E-7/18-19

REPORT FOR THE HEARING

in Case E-7/18

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway, (*Norges Høyesterett*), in the case between

Fosen-Linjen AS, supported by **the Confederation of Norwegian Enterprise (*Næringslivets Hovedorganisasjon, NHO*)**

and

AtB AS

concerning the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and in particular Article 2(1)(c) thereof.

I Introduction

1. By a letter of 19 November 2018, registered at the Court as Case E-7/18 on 19 November 2018, the Supreme Court of Norway (*Norges Høyesterett*), requested an Advisory Opinion in the case pending before it between Fosen-Linjen AS ("Fosen-Linjen"), supported by the Confederation of Norwegian Enterprise (*Næringslivets Hovedorganisasjon, NHO*), and AtB AS ("AtB").

2. The case before the referring court concerns an appeal by the parties against a judgment of2 March 2018 of Frostating Court of Appeal (*Frostating lagmannsrett*), which dealt with a damages claim brought by Fosen-Linjen against AtB for errors made in a tender procedure. By that judgment, Frostating Court of Appeal did not uphold Fosen-Linjen's claim for damages for its positive contract interest, although the company was granted NOK 1.5 million in damages for its negative contract interest. By decision of 19 June 2018 of the Appeals Selection Committee of the Supreme Court of Norway (*Høyesteretts ankeutvalg*), leave to appeal was granted. The question posed by the referring

court concerns whether Article 2(1)(c) of the Remedies Directive requires that any breach of the public procurement rules is in itself sufficient for there to be a basis of liability for positive contract interest. The dispute in the present case has already been subject to a request for an advisory opinion to the Court in Case E-16/16 *Fosen-Linjen AS* v *AtB AS*[1]("*Fosen-Linjen I"*).

II Legal background

EEA law

3. Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) (the "Remedies Directive"), is referred to at point 5 of Annex XVI (Procurement) to the Agreement on the European Economic Area ("the EEA Agreement").

4. The Remedies Directive was amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31 and EEA Supplement 2015 No 76, p. 918) ("Directive 2007/66"). Directive 2007/66 was incorporated into the EEA Agreement by Joint Committee Decision No 83/2011 of 1 July 2011 (OJ 2011 L 262, p. 54, and EEA Supplement 2011 No 54, p. 68) and is also referred to at point 5 of Annex XVI (Procurement). Constitutional requirements were indicated and fulfilled in September 2012. Consequently, the decision entered into force on 1 November 2012, and the time limit for the EFTA States to implement the Directive expired on the same date.

5. The third recital of the Remedies Directive reads:

> *Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement, or national rules implementing that law;*

6. The sixth recital of the Remedies Directive reads:

> *Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;*

[1] Case E-16/16 *Fosen-Linjen* [2017] EFTA Ct. Rep. 617.

7. At the relevant time, Article 1(1) of the Remedies Directive read:

> *This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.*
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> *…*
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> *Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.*

8. Article 2(1)(c) of the Remedies Directive reads:

> *1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:*
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> *…*
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> *(c) award damages to persons harmed by an infringement.*

9. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and EEA Supplement 2009 No 34, p. 216) was inserted to point 2 of Annex XVI to the EEA Agreement by Joint Committee Decision No 68/2006 of 2 June 2006 (OJ 2006 L 245, p. 22, and EEA Supplement 2006 No 44, p. 18), which entered into force on 18 April 2007. Directive 2004/18/EC applied in the EEA at the relevant time. It has since been repealed and replaced by Directive 2014/24/EU (OJ 2014 L 94, p. 65 and EEA Supplement 2018 No 84, p. 556).

National law

10. At the time of the tender competition, Article 2(1)(c) of the Remedies Directive was implemented in Norwegian law by Section 11 of the Act of 16 July 1999 No 69 on Public Procurement.[2] Section 11 of that Act reads as follows:

[2] *Lov 16. juli 1999 nr. 69 om offentlige anskaffelser*, which has been replaced by *lov 17. juni 2016 nr. 73 om offentlige anskaffelser*.

> *In the event of a breach of this Act, or of any regulations issued pursuant to this Act, the claimant is entitled to damages for the loss suffered as a result of the breach.*[3]

11. Thus, while the provision specifies that the right to damages is connected to the loss suffered, the Act does not specify the type of damages or the conditions for damages to be awarded.

12. Under Norwegian law, damages for positive contract interest (lost profit or *lucrum cessans*) have traditionally not been considered protected during the pre-contractual phase.[4] A necessary condition for such a claim is that the person claiming damages can prove a legal right to contract.[5]

13. Norwegian law on positive contract interest in the context of public procurement was developed in the *Nucleus* judgment of 2001.[6] In that judgment, the Supreme Court concluded that an aggrieved tenderer in a public procurement procedure is entitled to damages if the following conditions are fulfilled. First, the contracting authority must have committed a serious error. Second, the tenderer must be able to show that there is a clear/qualified degree of probability that the contract should have been awarded to them had the error not been committed. Additionally, there must be a high degree of probability of a sufficient causal link between the error committed and the award of the contract. In the assessment of whether a breach is substantial, factors such as the nature and scope of the error and the degree to which the contracting authority is to blame should be taken into account.

14. A claimant bringing a claim for positive contract interest must bear the burden of proof, to be satisfied with a high degree of probability, that a sufficient causal link exists between the error(s) committed and the award of the contract.[7] The claimant must also prove the loss suffered.[8]

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[3] In Norwegian, the provision reads: "*Ved brudd på denne lov eller forskrifter gitt i medhold av loven, har saksøker krav på erstatning for det tap han har lidt som følge av bruddet.*" The Act was replaced by Act of 17 June 2016 No 73 on Public Procurement. What was governed by Section 11 is now governed by Section 10 of the new Act, which reads: *"The supplier has right to damages for loss suffered caused by a breach of the Act or a Regulation pursuant to the Act."* Unofficial translation.

[4] Reference is made to the judgment in *Fosen-Linjen I,* cited above, paragraph 14 and Judgment of the Norwegian Supreme Court, *Rt.* 2007 p. 425 , paragraph 32.

[5] *Rt.* 2007 p- 425, paragraph 32.

[6] Rt. 2001 p. 1062.

[7] Rt. 2001 p.1062, page 1080.

[8] Borgarting Court of Appeal, LB-2017-94201

15. Negative contract interest is not subject to the same conditions as positive interest. Here, the existence of a serious breach is not required and the standard of probability for an adequate causal link is less strict.[9]

III Facts and procedure

Background

16. The dispute in the main proceedings has, as stated above, already given rise to the judgment in *Fosen-Linjen I*, by which the Court, following a request for an Advisory Opinion made by Frostating Court of Appeal, *inter alia*, held:

> *1. The award of damages according to Article 2(1)(c) of Directive 89/665/EEC does not depend on whether the breach of a provision of public procurement law was due to culpability and conduct deviating markedly from a justifiable course of action, or whether it occurred on basis of a material error or whether it is attributable to the existence of a material, gross and obvious error. A simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of Directive 89/665/EEC, provided that the other conditions for the award of damages are met, including, in particular, the condition of a causal link.*

17. In paragraphs 16 to 36 of the Court's judgment in *Fosen-Linjen I*, the dispute in the main proceedings was summarised as follows:

> *"Background*
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> 16 According to the reference, Fosen-Linjen is a small, local undertaking, established in 1999. The company has operated two minor ferry services for approximately 15 years. There are a number of ferry operators active in Norway: some major, such as Norled AS ("Norled"), and some minor local operators besides Fosen-Linjen.
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> 17 The public transport services in Sør-Trøndelag county are administered through AtB, which is a company furnished with the tasks of planning (i.e. the overall coordination and planning of routes), promotion (including the sale of tickets) and procurement of public transport services. The overall responsibility for

[9] See the judgments of the Norwegian Supreme Court in Rt. 2008 page 982 (Catch) paragraph 47 "The sufficiently serious-criterion is in the case law primarily required with respect to claims for damages for positive contract interest". (Unofficial translation. The Norwegian original reads: *"Kravet til vesentlighet er i rettspraksis først og fremst stilt i forhold til krav om erstatning for den positive kontraktsinteressen"*). See also Rt. 2008 page 1705 (Rabatt) paragraph 50 and Rt. 1997 page 574 (Firesafe) on page 579.

public transport services in the county lies with Sør-Trøndelag County Authority (*Sør-Trøndelag fylkeskommune*).

18 AtB does not operate the actual services, but instead procures transport services from privately owned operators, and acts as their contracting authority. It receives significant subsidies from the county in order to finance the operation of the service network.

The tender procedure

19 In June 2012, Sør-Trøndelag County Council (*Fylkestinget i Sør-Trøndelag*) decided to assign to AtB the task of preparing tender specifications and carrying out a tender procedure for the procurement of ferry services.

20 The tender procedure notice was published on 5 June 2013. Tenders were invited for two lots, both for a contract period of ten years and with a unilateral option for AtB to extend the contract for up to two years. The tender procedure was carried out using the negotiated procedure in accordance with the rules laid down in Part II of the national procurement regulation. The deadline for submitting tenders was 14 October 2013.

21 The dispute at issue relates to the first lot concerning the service between Brekstad and Valset. Two ferries were requested for that lot.

22 Tenders were received from Fosen-Linjen, Norled and Boreal Transport Nord AS. After an extensive round of questions, responses and negotiations, Norled and Fosen-Linjen submitted revised tenders in November 2013.

23 AtB evaluated the tenders. The award criteria were “price” (50 per cent), “environment” (25 per cent) and “quality” (25 per cent). A score was awarded to each criterion on a scale from one to ten, and then weighted in accordance with the weight assigned to that criterion in the tender specifications. This process was in accordance with the rules on procurement procedure as set out in the tender specifications.

24 Under the criterion concerning quality, tenderers were required to submit, inter alia, a description of the tendered vessels.

25 The evaluation of the award criterion environment was based on the tenderers’ specification of fuel oil consumption for the two ferries for the Brekstad-Valset service. The tenderers were not required to demonstrate how the fuel oil consumption value was calculated or to state the assumptions upon which the calculations were based.

26 Further questions relating to the documentation requirement for the environment criterion were discussed at a tender conference in June 2013. AtB then introduced a new contractual penalty to apply during the contract period. According to the contractual term, deviations of more than 10 per cent from the fuel oil consumption specified in the tender during the performance of the contract would trigger a penalty charge of NOK 1 per litre. Although the question concerning the award criterion environment was raised a second time, no documentation requirements were introduced.

27 By letter of 17 December 2013, AtB informed the interested parties that Norled would be awarded the contract. Norled had been awarded a score of 9.39 points, Fosen-Linjen 9.06 points and the third tenderer 5.73 points. Fosen-Linjen was ranked first in terms of price, Fosen-Linjen and Norled were ranked equally in terms of quality, and Norled was considered best with regard to the criterion of environment.

28 Following a complaint made by Fosen-Linjen, the points awarded were re-evaluated and by letter of 15 January 2014, the parties were informed that 9.16 points were given to Norled, 9.06 to Fosen-Linjen and 5.52 to the third tenderer.

29 On 3 January 2014, Fosen-Linjen brought a case before Sør-Trøndelag District Court (*Sør-Trøndelag tingrett*) and requested that court to issue an interim measure to stop the signing of the contract between AtB and Norled. The District Court prohibited the contract's signature. AtB appealed the District Court's decision, but it was upheld by Frostating Court of Appeal in an order of 17 March 2014.

30 In its appeal, AtB had argued that, as regards the verification requirements, it had, "a good basis for ascertaining that Norled had stated a realistic fuel oil consumption". This assessment was based on "its own competence and experience". However, that argument is no longer maintained by AtB.

31 By a letter of 30 April 2014, AtB informed the tenderers that it had decided to cancel the tender procedure following the Court of Appeal's order. AtB referred to the Court of Appeal's finding that it had failed to establish a reasonable basis for evaluation and that it had committed an error by not verifying the reasonableness of Norled's stated fuel oil consumption. The letter finally set out that AtB lacked grounds on which to reject Norled's tender, as it had breached its obligation to provide guidance to Norled. Fosen-Linjen did not contest this decision before the courts. Subsequently, AtB signed a contract with Norled for the operation of the Brekstad-Valset ferry service for 2015 and 2016. A new invitation to tender for this service was announced at the beginning of 2016 and concerned the service's operation from 2019 to 2029. Fosen-Linjen did not submit a tender in this procedure.

> 32 In February 2014, Fosen-Linjen brought an action against AtB. In the subsequent proceedings, it claimed damages for positive contract interest (loss of profit – *lucrum cessans*) or, in the alternative, for negative contract interest (costs of bidding – *damnum emergens*).
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> 33 By a judgment of 2 October 2015, the District Court found in favour of AtB and rejected the claim for damages with regard to both the negative and the positive contract interest sought.
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> 34 The District Court held that there is a requirement under EEA law that award criteria should be linked to documentation. In the case at issue, the contracting authority had failed to require the necessary documentation. The District Court found that AtB, in the tender specifications, had not requested information about any of the parameters that were important for the calculation of fuel oil consumption, such as hull resistance, propulsive efficiency, transmission loss, hotel load and ship resistance. Furthermore, it held that none of the tenderers had understood the tender specifications to mean that they were required to document fuel oil consumption at the time of submitting the tender.
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> 35 On 30 October 2015, Fosen-Linjen brought an appeal against the District Court's judgment before Frostating Court of Appeal.
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> 36 By a letter of 24 October 2016, registered at the Court on 31 October 2016, the Court of Appeal referred […] questions to the Court."

18. In the order for reference, the referring court summarises the developments which have taken place since the delivery of the aforementioned judgment in *Fosen-Linjen I* as follows:

> "The hearing before the Court of Appeal was […] held in early 2018. By its judgment of 2 March 2018, Frostating Court of Appeal did not uphold Fosen-Linjen's claim for damages for its positive contract interest, although the company was granted NOK 1.5 million in damages for its negative contract interest.
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> The Court of Appeal construed the EFTA Court's judgment as meaning that any breach of the rules governing public procurement is in itself sufficient for there to be a basis of liability for positive contract interest. It nevertheless concluded that damages for positive contract interest are contingent on there being a sufficiently serious breach, as required by the Supreme Court's judgment reported in Rt-2001-1062 (*Nucleus*). The Court of Appeal summarised its reasons for not following the EFTA Court's advisory opinion as follows:
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> > *'The Court of Appeal concludes that the question of an individual State's right to regulate the contracting authority's liability by requiring that there*

> *be a serious breach has not been decided unambiguously by the EU Court of Justice, that there are diverging views on this issue in countries in the EEA, and that the EFTA Court's advisory opinion on this point does not appear to be clearly correct. The Court of Appeal further concludes that the Supreme Court's assessment of the issue in the judgment reported in Rt-2001-1062 (Nucleus) is consistent with Francovich and Others [C-6/90 and C-9/90, EU:C:1991:428] and Brasserie du pêcheur and Factortame [C-46/93 and C-48/93, EU:C:1996:79], to which the EU Court of Justice refers in Combinatie Spijker [C-568/08, EU:C:2010:751].'*
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> The Court of Appeal held that there had been errors in the invitation to tender, but that AtB had rightfully cancelled it on the basis of those errors. Given that the cancellation had been rightful, the Court of Appeal found that there was no causal link for the claim for damages for positive contract interest.
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> The parties each appealed against the Court of Appeal's judgment. Fosen-Linjen AS also filed an ancillary cross-appeal. By decision of 19 June 2018 of the Appeals Selection Committee of the Supreme Court, leave to appeal was granted to have the case heard by the Supreme Court. For the Supreme Court, an essential question will be which requirements must be satisfied in order to establish a basis of liability for damages for positive interest."

19. The referring court considers it necessary to ask the Court afresh for an advisory opinion.

20. In the order for reference, the referring court summarises the Court's judgment in *Fosen-Linjen I* and the background for the new request as follows:

> "It is unclear whether the EFTA Court's opinion must be read as setting out the criteria for a basis of liability for damages for positive contract interest. The Court's answer seemingly applies regardless of the type of claim for damages brought. As the review below will show, a number of sources suggest that the Directive does not harmonise the rules on the standard of liability. Part of the rationale behind the present reference is the need for clarification of how the EFTA Court's opinion is to be understood on this point.
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> As previously mentioned, the consideration of homogeneity (harmonisation) and the need for effective legal remedies was pivotal in order to arrive at the conclusions for the EFTA Court's reply to questions 1 and 2. Considering other relevant legal sources, they do not seem to accord these considerations the same significance or determinative weight:
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> In *Strabag* it was stated that Article 2(1) of the Remedies Directive does not harmonise the rules on basis of liability, see paragraph 33. The same position was

discussed and taken by the EU Court of Justice in *Combinatie Spijker*. Based on that premise, in *Combinatie Spijker* it was concluded that that provision gives a concrete expression to the general principle of State liability for breaches of EU/EEA law, see paragraphs 86-92. The EU Court of Justice thereby held that the Remedies Directive allows for liability for positive contract interest to be contingent on there being a sufficiently serious breach. This impression is reinforced by the Commission's *travaux préparatoires* for Directive 92/13/EEC (remedies directive for the supply sector).[10] The *travaux préparatoires* indicate that, when drawing up the proposal for the Remedies Directive, the Commission did not intend to regulate substantively the basis of liability for damages for positive contract interest, neither in the Remedies Directive, nor in Directive 92/13/EEC. Most recently, the EU Court of Justice stated in *Hochtief*, paragraph 35, that the Remedies Directive lays down only minimum harmonised conditions.[11]

Furthermore, there is strong support for the position that the principle of effectiveness cannot justify stricter liability for damages than that to which the EU institutions are held in their public procurement activities.[12] The rules are somewhat different from the Norwegian ones, but liability is contingent on there being a sufficiently serious breach, see reference in the judgment in *EUIPO*,[13] paragraph 91, to paragraph 52 of the judgment in *Nikolaou*[14] (see also paragraph 53).

This perspective is not specifically addressed by the EFTA Court in its judgment. It is accordingly unclear how the EFTA Court weighted these sources against homogeneity and the need for effective legal remedies, when the Court – as the opinion is read – concludes that the Remedies Directive must be interpreted as harmonising the standard for the basis of liability for damages claims for positive contract interest. As for the questions on causal link, the same considerations have had a limited impact, as mentioned above.

In the interests of dialogue between the EFTA Court and the national courts, clarification and amplification, or possibly a reconsideration, of the requirements imposed by Article 2(1)(c) of the Remedies Directive for the basis of liability in damages claims for positive contract interest, is sought. The fact that the Court of Appeal has already opted not to follow the earlier opinion in this case makes the need for such dialogue and further clarification all the more necessary.

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[10] Proposal for a Council Directive coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, COM (90) 297 final; see in particular paragraphs 16, 21 and 31.

[11] Reference is made to the judgment in *Hochtief AG*, C-300/17, EU:C:2018:635.

[12] Reference is made to the judgment in *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 42.

[13] Reference is made to the judgment in *EUIPO*, C-376/16, EU:C:2018:299.

[14] Reference is made to the judgment in *Nikolaou*, C-220/13, EU:C:2014:2057.

> It is mentioned that the approach taken recently by the supreme courts of the United Kingdom and Sweden postulates the same interpretation of the Remedies Directive as that applied by the EU Court of Justice in paragraphs 86-92 of its judgment in *Combinatie Spijker*, see the judgment of the Supreme Court of the United Kingdom of 11 April 2017 in *Nuclear Decommissioning Authority* v *EnergySolutions EU Ltd* (2017) UKSC 34, paragraphs 21-27, and the judgment of the Supreme Court of Sweden (Högsta domstolen) of 18 May 2016 in Case 3852-14 (NJA 2016 p. 358), paragraph 13. Neither of those courts referred the question to the EU Court of Justice."

21. In these circumstances, the referring court took the view that resolution of the dispute before it depended on the interpretation of EEA law. The referring court thus decided to stay proceedings and refer a single question to the Court for an advisory opinion.

22. The referring court has submitted the following question to the Court:

> **Does Article 2(1)(c) of the Remedies Directive require that any breach of the rules governing public procurement in itself is sufficient for there to be a basis of liability for positive contract interest?**

IV Written observations

23. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure ("RoP"), written observations have been received from:

— Fosen-Linjen, represented by Anders Thue, advokat;

— the Confederation of Norwegian Enterprise (NHO), represented by Morten Goller, advokat;

— AtB, represented by Goud Helge Homme Fjellheim, advokat;

— the Norwegian Government, represented by Pål Wennerås and Helge Røstum, advocates at the Attorney General (Civil Affairs), acting as Agents;

— the Finnish Government, represented by Henrikka Leppo, acting as Agent;

— the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Ewa Gromnicka and Erlend M. Leonhardsen, members of its Department of Legal & Executive Affairs, acting as Agents; and

— the European Commission (the "Commission"), represented by Luke Haasbeek and Petr Ondrůšek, members of its Legal Service, acting as Agents.

V Summary of the arguments submitted

Fosen-Linjen

24. At the outset, Fosen-Linjen submits that this case concerns the same question as *Fosen-Linjen I*,[15] and should be answered with an order simply referring to that previous judgment, in line with Article 97(3) RoP.

25. Fosen-Linjen argues that the principle of legal certainty, which is a general principle of EEA law and implies, inter alia, foreseeability and the protection of legitimate expectations, must entail that similar cases are decided in a similar way.[16] This must be even clearer when the same case has already been decided and no relevant sources are now available that were not available to the Court in *Fosen-Linjen I*. In that regard, Fosen-Linjen submits that the Court clearly dealt with issues related to positive contract interest in *Fosen-Linjen I*. A new composition of the Court affecting the outcome of this case would clearly violate the principle of legal certainty and it would also be questionable whether the party concerned had been able to secure a fair trial.

26. Fosen-Linjen refers to the findings of the Court in *Fosen-Linjen I*, and states that the judgment clarifies that a simple breach of public procurement law is in itself sufficient to trigger liability according to Article 2(1)(c) of the Remedies Directive. Further, it is clear from the judgment that rules on Member State liability do not apply in public procurement cases.[17] Therefore, the State liability doctrine is not applicable.

27. Further, Fosen-Linjen submits that the request for a new advisory opinion from the Supreme Court of Norway in effect supports the argument that the Court was wrong in *Fosen-Linjen I*. The new request also cites a number of sources in support of this contention. Fosen-Linjen submits that the arguments of the Supreme Court are unfounded. For example, the *travaux préparatoires* for Directive 92/13/EEC are in no way relevant to the case, in the light of later case law and the position of the Commission in *Fosen-Linjen I*. Furthermore, case law from the Court of Justice of the European Union ("ECJ") regarding jurisdictional issues has no bearing on the subject matter of the case at hand.[18] Moreover, case law regarding the public procurement activities of EU institutions provides for a similar result as regards EU institutions as *Fosen-Linjen I* does with regard to Member States.[19] In addition, law relating to the EU institutions does accept damages for the loss of chance, which is a far more effective system of remedies than under the Norwegian system.

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[15] Reference is made to *Fosen-Linjen I*, cited above.
[16] Reference is made inter alia to Carl Lebeck, *General Principles and Fundamental Rights in EEA Law*, The EEA and the EFTA Court - Decentred Integration (2014) p. 259-260 with further references.
[17] Reference is made inter alia to *Fosen-Linjen I*, cited above, paragraph 64 and the operative part.
[18] Reference is made to the judgment in *Hochtief*, cited above.
[19] Reference is made to the judgments in *EUIPO* v *European Dynamics Luxembourg and Others*, cited above, and *Nikolaou* v *Court of Auditors*, cited above.

28. Fosen-Linjen notes that the question from the Supreme Court of Norway is unclear and needs to be elaborated upon, as the Remedies Directive does not mention liability for the positive contract interest in particular. It is Norway which has chosen this form of liability to comply with the Remedies Directive's requirement for effective remedies. Thus the Supreme Court's question could correctly be answered both positively and negatively, depending on how it is understood, and should therefore be rephrased.

29. Fosen-Linjen submits that it is not necessary for it to show that the Remedies Directive contains an obligation to make it possible to recover the positive contract interest in a situation where the aggrieved supplier would have been awarded the contract were it not for the breach. However, if the system only makes available the recovery of bid costs, this would clearly not be sufficient to comply with the requirements of Article 1(1) and 2(1)(c) of the Remedies Directive. In the EU, it is considered necessary to allow access to claiming damages for the loss of opportunity and the result must be the same under the EEA Agreement, whether the result is based on the Remedies Directive or fundamental principles of effective judicial protection.[20]

30. In this regard, Fosen-Linjen states that as Norway has chosen a system where, in specific situations, only the positive contract interest can be recovered, it is clear that this system must be compliant with the Remedies Directive. From *Fosen-Linjen I* it is clear that a national system must allow for the recovery of any interest, including the positive contract interest.[21]

31. Further, Fosen-Linjen submits that if the Court wants to consider the substantive question of the case again, the conclusion must be the same as in *Fosen-Linjen I*. It is argued that the Court must examine the question referred in the light of the general context and aim of the judicial remedy of damages.[22] In the case at issue, the only possible remedy for Fosen-Linjen was to claim damages from AtB.

32. In this regard Fosen-Linjen notes that although at first glance, *Strabag* and *Combinatie* may be difficult to reconcile, it is not surprising that the ECJ did not carry out a review under the effectiveness angle in the latter case, as it simply had no reason to do so. Citing the views of academic authors to support its arguments, Fosen-Linjen submits that the State liability doctrine cannot be applied to damages claims in tender cases within the Remedies Directive.[23] Such an approach could even render the damages provisions in the Remedies Directive superfluous. Furthermore, neglecting the public procurement

[20] Reference is inter alia made to the judgment in *EUIPO* v *European Dynamics Luxembourg and Others*, cited above, paragraph 80.
[21] Reference is inter alia made to the judgment in *Fosen-Linjen I*, cited above, paragraphs 75, 76 and 90.
[22] Reference is made to the judgment in *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 34.
[23] Reference is made to Steen Treumer, "Basis and Conditions for a Damages Claim for Breach of the EU Public Procurement Rules", in Fairgrieve and Lichère (eds), *Public Procurement Law – Damages as an Effective Remedy* (2011), pp. 122 to 124; Carina Risvig Hamer, *Grundlæggende udbudsret* (2016), p. 829 and Jakobsen, Poulsen and Kalsmose-Hjelmborg, *EU udbudsretten* (3rd ed., 2016), p. 664.

context and applying the doctrine of State liability would in fact run contrary to the aim of the Remedies Directive, which is to strengthen existing mechanisms.[24] The conclusion is that the doctrine of State liability cannot apply alone, disregarding the principles set out in the Remedies Directive.[25] Accordingly, a "sufficiently serious breach" of law cannot be required as a condition for the award of damages.

33. However, Fosen-Linjen submits that, even if the notion of State liability were to apply under the Remedies Directive, it must be construed in line with the principle of effectiveness. The Court should follow the approach adopted by the ECJ in *Strabag*. This would be fully compliant with the ECJ's approach in *Combinatie* and the application of State liability. The ECJ expressly recognised in that case that the principle of effectiveness limits procedural autonomy.[26]

34. In this regard, Fosen-Linjen argues that any breach of EEA public procurement law already provides sufficient ground for damages. A requirement of national law, according to which the contracting authority's error causing the infringement of EEA law must be material, gross or obvious for damages to be awarded, is precluded by the Remedies Directive and the principle of effectiveness.

35. Furthermore, Fosen-Linjen contends that the contracting authority cannot exonerate itself from potential liability by referring to a discretionary margin if there is no or limited discretion at play.[27] This is also in line with *Strabag*.[28]

36. Consequently, Fosen-Linjen considers a breach of a national rule transposing EEA law in the field of public procurement, under which a contracting authority is not free to exercise any discretion, to constitute in itself a sufficiently serious breach that gives a right to damages under the Remedies Directive if the other conditions for claiming damages are also fulfilled.

37. Fosen-Linjen proposes to reformulate the question from the referring court as follows:

> *Is a national system for liability for breach of public procurement law compliant with Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC if it does not make it possible to recover loss resulting from the loss of chance and if it requires a breach*

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[24] Reference is made to the judgment in *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 74.
[25] Reference is, inter alia, made to the judgment in *Commission* v *Portugal*, C-275/03, EU:C:2004:632.
[26] Reference is made to the judgment in *Combinatie Spijker and Others*, C-568/08, EU:C:2010:751, paragraph 92.
[27] Reference is made to Case E-2/12 *HOB-vín ehf.* [2013] EFTA Ct. Rep. 816, paragraphs 129 and 130.
[28] Reference is made to the judgment in *Strabag*, cited above, paragraph 41. Reference is also made to Wolfgang Wurmnest and Christian Heinze, "General Principles of Tort Law in the Jurisprudence of the European Court of Justice", in Schulze (ed.), *Compensation of Private Losses – the Evolution of Torts in Business Law* (2011), p. 64.

of public procurement law to be sufficiently serious before it is possible to recover the loss of profits caused by the breach?

38. Fosen-Linjen proposes that the Court should answer the question referred, reformulated or not, as follows:

A national system for liability for breach of public procurement law is not compliant with Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC if it does not make it possible to recover loss resulting from the loss of chance and if it requires a breach of public procurement law to be substantial before it is possible to recover the loss of profits caused by the breach. In such a case any breach of the rules governing public procurement must in itself be sufficient for there to be a basis of liability for positive contract interest.

The Confederation of Norwegian Enterprise

39. At the outset, NHO refers to and supports the written observation of Fosen-Linjen. It argues that an order under Article 97(3) RoP, by reference to *Fosen-Linjen I*, should suffice in the case at hand or otherwise the Court should in any event uphold the aforementioned judgment.[29]

40. NHO submits that if the Court should choose to deviate from *Fosen-Linjen I*, it should alter its conclusions as little as possible. Firstly, it follows from ECJ case law that Article 2(1)(c) of the Remedies Directive precludes national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable.[30] Secondly, a contracting authority cannot rely on the excuse of legal error to avoid liability.[31]

41. Further, NHO argues that it should be clear that the principle of State liability as such is not directly applicable. Rather, the question is whether *Combinatie* must be understood as concluding that the liability of a contracting authority under Directive 2004/18/EC is assimilated to that of the State, and consequently that a test of "sufficiently serious" can be applied. In that regard, *Combinatie* should be treated with some caution as the observations on the conditions for liability are in *obiter dicta*, as opposed to the observations in *Strabag*. Further, it could be argued that the general condition for there to be a "sufficiently serious breach" of EEA law under the State liability doctrine, was relaxed by the Remedies Directive (as *lex specialis*) as this only mentions the need for an (unqualified) infringement as sufficient ground for a damages claim.

[29] Reference is made to the judgment in *Fosen-Linjen I*, cited above, paragraphs 61 to 82.
[30] Reference is made to the judgments in *Commission* v *Portugal*, cited above, paragraph 42, and *Strabag*, cited above, paragraph 45.
[31] Reference is made to the judgment in *Strabag*, cited above, paragraphs 41 and 42.

42. If the Court nevertheless concludes that the doctrine on State liability can be assimilated or applied by analogy to breaches of procurement law, NHO submits that it is crucial that the test of "sufficiently serious" must be applied in the context of its procurement law setting and taking into account the principle of effectiveness. This would entail that the criterion of sufficiently serious breach cannot be construed as setting out a high threshold to obtain damages for positive contract interest. That would also entail that any breach of procurements rules which by its nature might affect the outcome of the competition and where the contracting authority is not free to exercise any discretion, will in itself constitute a sufficiently serious breach.[32]

AtB

43. At the outset, AtB states that Article 2(1)(c) of the Remedies Directive is an expression of the general principle of State liability and that the Directive is an instrument of minimum harmonisation.[33] AtB submits that it is peculiar that in *Fosen-Linjen I*, no distinction was made between the basis of liability for the award of damages for loss of profit and for the award of damages for bid costs, as this distinction is quite fundamental in most European countries. Further, it is open to interpretation what the precise requirement is as regards direct causal link in the aforementioned judgment.

44. In that regard, AtB notes that Article 2(1)(c) of the Remedies Directive and Article 2(1)(d) of Directive 92/13/EEC, which sets out identical requirements for the utilities sector, do not determine the specific conditions for damages, separate from the ones existing in each Member State. The wording as such goes no further than to set out a mere constitutive requirement of damages. That is further strengthened in a contextual interpretation, as Article 2(7) of Directive 92/13/EEC, as opposed to Article 2(1)(c) of the Remedies Directive, sets out specific conditions for damages, including requiring a strict liability under certain circumstances, thus harmonising the conditions for damages for bid costs. Moreover, it may be inferred from preparatory documents, inter alia for Directive 92/13/EEC, that the Commission intended for the criteria for liability in Article 2(1)(c) of the Remedies Directive to be regulated by each Member State.[34] Even though the Remedies Directive was amended in 2007, the EU legislator did not find it desirable or necessary to adopt new provisions concerning the award of damages.

45. AtB argues that the Remedies Directive is clearly an example of minimum harmonisation, citing inter alia Recital 6 of the Directive and case law of the ECJ.[35] In that regard, Member States' practices should be taken into account when interpreting Article

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[32] Reference is made to the judgment in *HOB-vín ehf.*, cited above, paragraphs 129-130.
[33] Reference is made to the judgment in *Combinatie*, cited above.
[34] Reference is made inter alia to COM (90) 297 final, paragraphs 16, 20, 21, 31 and 32, COM (87) 134 final , Article 1(3), and SEC (2006) 557, paragraph 6.2. Reference is made to the judgments in *X*, C-360/15 and C-31/16, EU:C:2018:44, paragraph 108, and *Lafonta*, C-628/13, EU:C:2015:162, paragraph 37.
[35] Reference is made to the judgments in *Hochtief*, cited above, paragraph 35, and *Symvoulio Apochetefseon Lefkosias*, C-570/08, EU:C:2010:621, paragraph 37.

2(1)(c), as very few Member States operate with a strict liability of public procurement rules. Further, no Member State changed their regime of damages for positive contract interest when implementing the Remedies Directive.[36]

46. As regards the interpretation of Article 2(1)(c) of the Remedies Directive, AtB submits that of the case law[37] interpreting this provision the judgment in *Combinatie* encompasses the most thorough considerations. In that judgment, the ECJ found that Article 2(1)(c) of the Remedies Directive gives expression to the principle of State liability.[38] AtB submits that in *Fosen Linjen I*, the Court clearly departs from settled case law without justification or even deliberation as to why *Combinatie* is inapplicable. This undermines the principle of homogeneity and Article 6 EEA.

47. AtB understands *Strabag* as adding nothing to what had already been concluded in *Brasserie du Pêcheur*[39], namely that Member States cannot introduce a fixed requirement of fault as a condition of State liability. AtB submits that there are no contradictions between the rulings in *Strabag* and *Combinatie*. If the Court finds that the aforementioned judgments are incompatible, it is submitted that *Combinatie* should take precedence, both in the light of the substance of the ruling and the rule on *lex posterior*.[40]

48. Further, AtB submits that the facts of the case are important as the contract in the main proceeding is a contract for a non-priority service, and thus not subject to the detailed procedural rules of Directive 2004/18/EC. In matters where there is no clear and precise rule, the procuring authority clearly enjoys a margin of discretion and that discretion must be determined with reference to EEA law.[41] Thus, the principle of State liability is well suited to handle breaches of public procurement rules, in particular where such breaches rely on the infringement of general principles.

49. Moreover, AtB states that it follows from settled case law of the ECJ that the same conditions for liability for damages shall apply to Member States and EU institutions alike, unless there is specific justification for divergence.[42] The conditions for damages are quite restrictive for EU institutions and the threshold for establishing EU institutional liability is

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[36] Reference is made to "Enforcement of EU Public Procurement Rules", Steen Treumer & Francois Lichere (.ed), *Public Procurement Law: Damages as an Effective Remedy*, Duncan Fairgrieve & Francois Lichere (ed), special editions regarding remedies in Public Procurement Law Review (2006), *Damages in EU Public Procurement Law*, Hanna Schebesta, and The Spanish Approach to the Remedy of Damages in the Field of European Public Procurement, María Fuentes in European Procurement & Public Private Partnership Review 2016 no 1.

[37] Reference is made to the judgments in *Commission* v *Portugal*, cited above; *Strabag*, cited above; and *Combinatie*, cited above.

[38] Reference is made to the judgment in *Nuclear Decommissioning Authority* v *Eneregy Solutions EU Ltd* [2017] UKSC 34.

[39] Reference is made to the judgment in *Brasserie du Pêcheur*, cited above, paragraphs 78 to 80.

[40] Reference is made to the judgment in *Hochtief*, cited above, paragraphs 35-37.

[41] Reference is made, inter alia, to the judgments in *Haim*, C-424/97, EU:C:2000:357, paragraphs 38 and 40, and *Brasserie du Pêcheur*, cited above, paragraph 59.

[42] Reference is made to the judgment in *Brasserie du Pêcheur*, cited above, paragraph 42

high.[43] AtB submits that there are no justifications, for example the principle of effectiveness, which could explain a varying protection for aggrieved tenderers depending on whether it is a national authority or an EU institution who is responsible for the breach in question.

50. AtB states that to the extent that *Fosen Linjen I* might be interpreted as entailing that State liability does not apply when the State acts in a private capacity, the ECJ has never given grounds for such a distinction in its case law. On the contrary it has explicitly stated that State liability can be engaged where there is no exercise of public authority.[44] Further, it is not clear-cut that public procurement can be defined as an exercise of private autonomy. Moreover, establishing a stricter liability for the State does not level the playing field for market operators.

51. Finally, AtB submits that, contrary to *Fosen Linjen I*, when assessing the level of judicial protection and effectiveness of a remedy, the correct approach is to look at the national remedies system as a whole.[45]

52. AtB proposes that the Court should answer the question referred as follows:

> *Article 2 (1) (c) of Directive 89/665/EC does not give the slightest indication of any conditions or limits which may, as appropriate, be attached to the transposition and implementation of that provision, Member States remain free to determine the conditions under which the national rules transposing Article 2 (1) (c) must be applied in their legal order and the limits, exceptions or derogations that, as necessary, may be connected with that application. This entails that Article 2 (1) c) of the Remedies Directive does not require that any breach of public procurement rules is sufficient in itself for there to be a basis of liability for damages. Since Article 2 (1) (c) gives concrete expression to the principle of State liability, the pertinent test under the Remedies Directive is whether a sufficiently serious breach of public procurement rules have been committed.*

The Norwegian Government

53. As a preliminary remark, the Norwegian Government states that an affirmative answer to the question referred would flaunt the principle of homogeneity, and impede both legal certainty and the functioning of the internal market. Further, it argues that it is

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[43] Reference is made, inter alia, to the judgments in *Agriconsulting Europe* v *Commission*, T-570/13, EU:T:2016:40, paragraphs 32, 95 and 96, *AFCon Management Consultants and Others* v *Commission*, T-160/03, EU:T:2005:107, paragraphs 90 and 93, *EUIPO* v *European Dynamics Luxembourg and Others*, cited above, paragraph 91, and *Nikolaou* v *Court of Auditors*, cited above, paragraphs 52 and 53.

[44] Reference is made to the judgments in *AGM-COS.MET*, C-470/03, EU:C:2007:213, paragraphs 91 and 93, *Fuß*, C-429/09, EU:C:2010:717, and *EUIPO* v *European Dynamics Luxembourg and Others*, cited above.

[45] Reference is inter alia made to the judgments in *Peterbroeck, Van Campenhout & Cie* v *Belgian State*, C-312/93, EU:C:1995:437, paragraph 14, *Bulicke*, C-246/09, EU:C:2010:418, paragraph 35, and *Unibet*, C-432/05, EU:C:2007:163.

important that not only the result, but also the reasoning, be in line with the principle of homogeneity.

54. The Norwegian Government submits that the request for an advisory opinion is admissible, since the only substantive requirement imposed by Article 34 of the Surveillance and Court Agreement is that the question referred concerns the interpretation of EEA law, which is fulfilled in the present case. Further, neither part of the question is "manifestly identical".

55. Further, the Norwegian Government states that the Court must firstly answer the second part of the question – whether Article 2(1)(c) requires the EEA States to make loss of profits available as a head of damage. If not, the standard of liability falls outside the scope of EEA law.[46] This is particularly pertinent, since Fosen-Linjen claims that the answer is negative, as a right to compensation for loss of profit cannot be claimed under EEA law.[47]

56. In that regard, the Norwegian Government submits that the Remedies Directive does not harmonise the field of procedures and remedies, but only lays down minimum conditions to be met by the Member States.[48] Since these minimum conditions give specific expression to the right to an effective remedy, which is a general principle of EU law, they also apply to the EU institutions.[49]

57. Further, the Norwegian Government states that remedies for infringements of EEA law, in the absence of harmonisation, are within the procedural autonomy of the Member States, restricted by the principles of equivalence and effectiveness.[50] The Norwegian Government submits that the case law of the General Court concerning whether the EU institutions may be held responsible for loss of profit is applicable.[51] In this regard, the Norwegian Government states that the public procurement rules do not give a tenderer a right to enter into a contract. Since a tenderer does not have a valid claim to enter into contract, the requirement of direct causation is not fulfilled.[52] Thus, no right for

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[46] Reference is made inter alia to the judgments in *Kremzow*, C-299/95, EU:C:1997:254, paragraphs 18-19, *Bulthis-Griffioen*, C-453/93, EU:C:1995:265, and *Sherson Lehmann Hutton*, C-89/91, EU:C:1993:15.

[47] Reference is made to written submission by Fosen-Linjen to the Supreme Court 12 November 2018.

[48] Reference is made *inter alia* to judgments in *Strabag*, cited above, paragraph 33, *Combinatie Spijker*, cited above, paragraph 86, and *Hochtief*, cited above, paragraph 35; to COM (90) 297 final, cited above, paragraphs 16, 20, 21, 31. Reference is also made to Hanna Schebesta "Damages in EU Public Procurernent law" (2016), and Steen Treumer & Francois Lichere "Enforcement of the EU Public Procurement Rules" (2011).

[49] Reference is made to the order in *Vanbreda Risk & Benefits*, C-35/15 P (R), EU:C:2015:275, paragraph 28.

[50] Reference is made to the judgments in *Rewe*, 33-76, EU:C:1976:188, paragraph 5, and Case E-10/17 *Nye Kystlink AS* v *Color Group AS and Color Line AS*, judgment of 17 September 2018, not yet reported, paragraph 73.

[51] Reference is made to the judgment in Case E-28/15 *Jabbi* [2016], EFTA Ct. Rep. 575, paragraph 71.

[52] Reference is made inter alia to the judgments in *Embassy Limousines*, T-203/96, EU:T:1998:302 , paragraphs 54 and 96, *Citymo*, T-271/04, EU:T:2007:128, paragraphs 161-164, *Evropaiki*, T-461/O8, EU:T:2011:494, paragraphs 211-212, *Agriconsulting Europe*, T-570/13, EU:T:2016:40, paragraphs 95-96; and *EUIPO*, cited above, paragraph 91.

compensation for the loss of profit is available. Likewise, the Court in *Fosen-Linjen I* held that a tenderer does not have a right to enter into contract.[53]

58. The Norwegian Government further argues that such conclusion does not contradict the principle of effectiveness. Firstly, the ECJ did not intend to prohibit exclusion of loss of profit for infringements of all EU rules. Secondly, the principle of effectiveness applies after three basic conditions are met, including a "direct causal link".[54] Thirdly, ECJ case law does not consider that excluding loss of profit contradicts the principle of effectiveness. As such, the same must hold true for the Member States. Fourthly, compensation for loss of profits in public procurement is not required since other types of harm are eligible for compensation.[55] Finally, reading the judgment in *Combinatie* together with opinion of the Advocate General proves that public procurement law does not furnish such requirements.[56] Consequently, neither Article 2(1)(c) nor the principle of effectiveness requires a Member State to make claims for loss of profit available.

59. The Norwegian Government notes that the Member States must also respect the principle of equivalence. It follows that, insofar as national law makes available compensation for loss of profit under domestic public procurement rules, the Member State must provide the same remedy for infringements of EEA rules. The interpretation of national law and practice is nevertheless a matter for the national court to determine.[57]

60. As a preliminary remark concerning the first part of the question, the Norwegian Government states that it is possible to read *Fosen-Linjen I* in a manner compatible with *Combinatie*, in particular where the answers given are read in the light of the questions referred. An affirmative answer to the first question does not contradict *Combinatie* if the answer is intended to convey that national law must not impose criteria for liability going beyond that of a sufficiently serious breach. The answer to the second question in *Fosen-Linjen I* is compatible with *Combinatie*, if the Court meant that a mere infringement may constitute a sufficiently serious breach in the event that the rule in question confers no discretion on the Contracting Authority. But in order to render a final ruling on whether such an infringement constitutes a sufficiently serious breach, as will be recalled from settled case law, it is also necessary to consider other factors as well, such as the clarity and precision of the rule infringed, whether the infringement and the damage caused, was intentional or involuntary, and whether any error of law was excusable or inexcusable.

61. Further, the Norwegian Government states that *Combinatie* and *Strabag* are compatible. Firstly, the two judgments answer different questions. *Strabag* reaffirms that

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[53] Reference is made to the judgment in *Fosen-Linjen I*, cited above, paragraphs 90-91 and 105.
[54] Reference is made to the judgments in *Brasserie du pêcheur*, cited above, paragraphs 65-67; and *EUIPO*, cited above, paragraph 91.
[55] Reference is made to the judgment in *Agriconsulting Europe*, cited above, paragraph 99.
[56] Reference is made to the Opinion of Advocate General Cruz Villalón in *Combinatie*, C-568/08, EU:C:2010:515, paragraph 110, and the judgment in *Combinatie Spijker*, cited above, paragraphs 88-89.
[57] Reference is made to the judgment in Case E-14/15, *Holship*, [2016] EFTA Ct. Rep. 240, paragraph 37.

culpa is not the determining factor for liability[58] while *Combinatie* states that the principle of State liability applies.[59] Secondly, both judgments, as well as *Fosen-Linjen I*, conclude that Article 2(1)(c) does not harmonise the conditions for liability.[60] Thirdly, *Combinatie* was rendered after *Strabag*, and the ECJ was well aware of the latter, which was discussed by the Advocate General and cited by the ECJ.

62. The Norwegian Government further submits that *Combinatie* answers the first part of the referred question. Following the principle of precedent, *acte éclairé*,[61] and homogeneity,[62] Article 2(1)(c) of the Remedies Directive must be interpreted in conformity with the latest case law of the ECJ – namely *Combinatie*. Thus, Article 2(1)(c) gives concrete expression to the principle of State liability, and individuals have a right to reparation where three conditions are met, particularly that the breach is sufficiently serious.[63]

63. In this regard, to determine whether a breach is "sufficiently serious" a number of factors should be taken into account by the national court: the clarity and precision of the rule infringed; the measure of discretion left by that rule to the national authorities;[64] whether the infringement, and the damage caused, was intentional or involuntary; and whether any error of law was excusable.[65] The decisive test is whether the authority has manifestly and gravely disregarded the limits of its discretion.[66]

64. The Norwegian Government proposes that the Court should answer the question referred as follows:

> *Neither Article 2(1)(c) of Directive 89/665 nor the principle of effectiveness requires a Member State to make available loss of profit as a head of damage. However, the principle of equivalence requires this where such a head of damage is available for infringements of national public procurement rules.*
>
> *Article 2(1)(c) of Directive 89/665 gives concrete expression to the principle of State liability for loss and damage caused to individuals as result of breaches of EEA law for which the State can be held responsible. Therefore, State liability requires that a breach of a EEA public procurement rule is sufficiently serious, in addition to the*

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[58] Reference is made to the judgment in *Strabag*, cited above, paragraphs 44-45.
[59] Reference is made to the judgment in *Combinatie Spiiker*, cited above, paragraphs 87 and 92.
[60] Reference is made to the judgments in *Strabag*, cited above, paragraph 33, and *Combinatie Spiiker*, cited above, paragraph 86.
[61] Reference is made to the judgments in *CILFIT*, 283/81, EU:C:1982:335, paragraph 14, and *Pedro IV Servicios*, C-260/07, EU:C:2009:215, paragraph 36.
[62] Reference is made to the EEA, Article 1(1), Recitals 4, 15 of the Preamble.
[63] Reference is made to the judgment in *Combinatie Spijker*, cited above, paragraphs 85-87.
[64] Reference is made to the judgment in Case E-2/12 *HOB vin*, cited above, paragraph 131.
[65] Reference is made to the judgment in Case E-8/07 *Nguyen*, [2008] EFTA Ct. Rep. 224, paragraph 33 and case law cited.
[66] Reference is made to the judgments in Case E-9/97, *Sveinbjörnsdottir*, [1998] EFTA Ct. Rep. 95, paragraph 68, *Bergaderm*, C-352/98 P, EU:C:2000:361, paragraph 43, and *Specht*, C-501/12, EU:C:2014:2005, paragraph 102.

requirements that that rule is intended to confer rights on individuals and that there is a direct causal link between the breach and the damage sustained by the individuals.

The Finnish Government

65. At the outset, the Finnish Government submits that the question referred should be answered in the negative. Firstly, the Remedies Directive harmonises neither the rules on liability for breaches of EEA law nor the criteria for determining a contracting authority's responsibility for its conduct.[67] Secondly, observing the principles of equivalence and effectiveness in no way requires that any breach of the rules governing public procurement must in itself be sufficient for there to be a basis of liability for positive contract interest.[68]

66. In that regard, the Finnish Government states that the examination in the case at hand should focus on the principle of effectiveness, i.e. would it be practically impossible or excessively difficult to obtain damages based on Article 2(1)(c) of the Remedies Directive, if any breach of public procurement rules were not to automatically and unconditionally trigger liability for positive contract interest. The Government submits that this is not the case under Norwegian law.

67. Further, the Finnish Government submits that the aforementioned interpretation is not precluded by ECJ case law, such as *Strabag*, as that case dealt with a national legislation very different from the one under review in the current case.[69] In particular, in the current case, the tenderer does not face the risk of being deprived of his right to damages or of obtaining damages only belatedly.

68. The Finnish Government argues that the case at hand presents an opportunity for the Court to clarify and refine its case law regarding claims for positive interest.[70] An EEA State should have discretion to define the content of the strict liability, in relation to the Remedies Directive, and to limit it to only certain types of damages, such as negative contract interest.[71]

69. The Finnish Government proposes that the Court should answer the question referred as follows:

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[67] Reference is made to the judgments in *Fosen-Linjen I*, cited above, paragraph 70, and *Combinatie*, cited above, paragraph 90.
[68] Reference is made to the judgment in *Combinatie*, cited above, paragraph 91.
[69] Reference is made to the judgment in *Strabag*, cited above, paragraphs 7, 25, 30, 41 to 42 and 45.
[70] Reference is made to the judgment in *Fosen-Linjen I*, cited above, paragraph 70.
[71] Reference is made to the judgment in *Fosen-Linjen I*, cited above, paragraph 90.

Article 2(1)(c) of the Remedies Directive does not require that any breach of the rules governing public procurement in itself is sufficient for there to be a basis of liability for positive contract interest.

ESA

70. As a preliminary remark, ESA states that there are number of grounds for nuancing or, if the Court should wish to do so, overturning *Fosen Linjen I*, or certain aspects of it in view of the homogeneity principle.

71. In that regard, ESA submits that Article 2(1)(c) of the Remedies Directive only prescribes that the power to award damages to persons harmed by an infringement must be available. No guidance is provided by the Directive and its recitals regarding the concept of damage, specific types of damages and the liability standard.[72]

72. ESA argues that the wording of Article 2(1)(c) of the Remedies Directive, read in isolation, cannot be taken to suggest that any breach of the rules governing public procurement in itself is sufficient for there to be a basis of liability for positive contract interest. Further, an exploration of the specific purpose of the Remedies Directive leads to the same understanding. Article 2(1)(c) only requires that it should be possible to award damages, which is in line with the nature of the Directive as a minimum harmonisation instrument.[73] ESA submits that the ECJ has stated clearly that the Remedies Directive does not harmonise the rules on damages, which are for Member States to determine.[74]

73. Further, ESA refers to the context of the adoption of the Remedies Directive and its subsequent amendments, which support the interpretation that the Directive and EEA law leave significant parts of the implementation of the power to award damages to the procedural autonomy of Member States.[75]

74. ESA states that the principal limits upon the procedural autonomy of Member States flow from the principle of equivalence and the principle of effectiveness.[76] These principles entail that rules governing liability under Article 2(1)(c) of the Remedies Directive must not be less favourable than those governing similar domestic liability, and that national

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[72] Reference is made to the judgment in *Combinatie*, cited above, paragraph 86 and the Opinion of Advocate General Cruz Villalón in *Combinatie*, cited above, paragraph 106.

[73] Reference is inter alia made to the judgments in *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 42, and *Hochtief*, cited above, paragraph 36.

[74] Reference is made to the judgment in *Combinatie*, cited above, paragraph 90.

[75] Reference is made, inter alia, to Directive 89/665/EEC, cited above, first and second recitals of the preamble, and Directive 2007/66/EC, cited above. Reference is also made to the judgments in *Alcatel Austria AG and Others*, *Siemens AG Österreich and Sag-Schrack Anlagentechnik AG* v *Bundesministerium für Wissenschaft und Verkehr*, C-81/98, EU:C:1999:534, paragraphs 33 and 34, and *Ministero dell'Interno* v *Fastweb SpA*, C-19/13, EU:C:2014:2194, paragraph 59.

[76] Reference is made to the judgment in *Combinatie*, cited above, paragraph 92, the Opinion of Advocate General Cruz Villalón in *Combinatie*, cited above, paragraph 99, and the judgment in *Stefan Rudigier*, C-518/17, EU:C:2018:757, paragraph 61.

procedural rules must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law.[77] However, neither principle requires, of itself, that the Court answers the referred question in the affirmative.

75. ESA notes that whilst the Court held in *Fosen Linjen I*, in general terms, that a simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, provided that other conditions for the award of damages are met, the Court did not address the question of whether any breach of the rules governing public procurement in itself is sufficient for there to be a basis of liability for positive contract interest. ESA submits that it is primarily ECJ case law which is relevant in order to elucidate the correct interpretation of Article 2(1)(c).

76. Further, ESA cites two judgments of the ECJ regarding liability for damages under Article 2(1)(c), i.e. *Strabag* and *Combinatie*. With regard to the former judgment, ESA submits that ECJ limited its conclusions to national rules regarding *culpa* and did not expressly take a position on the general standard of liability under Article 2(1)(c). In the latter judgment, the ECJ held that the general principle of State liability applied with regard to Article 2(1)(c).[78] In the light of that, ESA submits that the right to damages according to Article 2(1)(c) is subject to procedural autonomy of Member States, provided that the principles of equivalence and effectiveness are complied with.[79] An answer in the affirmative to the referred question would be incompatible with this case law from the ECJ.

77. ESA submits that it follows from Article 1(1) of the EEA Agreement, its recitals and case law of the EFTA Court that one of the main objectives of the Agreement is to create a homogenous European Economic Area.[80] That principle, in essence, requires the Court and ESA to pay due account to the rulings of the ECJ.[81] Homogeneity establishes a presumption that provisions framed in the same way in the EEA Agreement and under EU law are to be construed in the same way. Where there are divergence, there must be compelling grounds for differing interpretations of the Court and the ECJ.[82] ESA submits that to the extent that the Court in *Fosen-Linjen I* may be seen to diverge from the ECJ regarding the application of principles of State liability in procurement cases in *Combinatie*

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[77] Reference is made to Case E-10/17 *Nye Kystlink AS* v *Color Group AS and Color Line AS*, cited above, paragraphs 73, 110 and 111.

[78] Reference is made to the judgments in *Strabag*, cited above, paragraphs 33, 35, 39, 40 and the operative part, and *Combinatie*, cited above, paragraphs 85-92. Reference is also made to Case E-04/01 *Karl K. Karlsson* v *Iceland* [2002] EFTA Ct. Rep. 240, paragraph 33.

[79] Reference is inter alia made to the judgment in *Norbrook Laboratories Ltd* v *Ministry of Agriculture, Fisheries and Food*, C-127/95 EU:C:1998:151, paragraph 111.

[80] Reference is made inter alia to recitals 4, 8 and 15 of the EEA Agreement. Reference is also made to Cases E-9/97 *Sveinbjörnsdóttir*, [1998] EFTA Ct. Rep. 95, paragraphs 49 and 57, E-15/10 *Posten Norge* [2012] EFTA Ct. Rep. 246, paragraph 110, E-18/11 *Irish Bank Resolution Corporation* v *Kaupthing Bank* [2012] EFTA Ct. Rep. 592, paragraph 122, and E-14/11 *DB Schenker* v *EFTA Surveillance Authority* [2013] EFTA Ct. Rep. 356, paragraph 118.

[81] Reference is made to Case E-3/98 *Herbert Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 20.

[82] Reference is made to Case E-9/07 and 10/07 *L'Oréal Norge AS* v *Aarskog Per AS and Others and Smart Club Norge* [2008] EFTA Ct. Rep. 259, paragraphs 27, 31 and 37.

and instead rely on the judgment in *Strabag* and the principle of effectiveness, the Court did not provide grounds for such divergence.

78. Moreover, ESA argues that the relevant procurement rules are identical in the EEA and the EU. In order to ensure a homogeneous internal market, ESA submits that Article 2(1)(c) of the Remedies Directive should be interpreted and applied in the same way by the Court and the ECJ. The Court should thus answer the referred question in the negative. For further support to this conclusion, ESA also refers to ECJ case law regarding liability of EU institutions for breaches of rules governing procurement by these institutions.[83]In this regard, ESA holds that if the effectiveness of the procurement rules applicable to the tenders of the EU institutions is ensured by a liability limited to sufficiently serious breaches, the effectiveness of EEA public procurement rules in Member States is also presumably ensured by State liability for sufficiently serious breaches of EEA law only.

79. ESA proposes that the Court should answer the question referred as follows:

> *Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts must be interpreted as not requiring that any breach of the rules governing public procurement in itself is sufficient for there to be a basis of liability for positive contract interest.*

The Commission

80. At the outset, the Commission states that its observations pertain to the factual and legal framework of the case, to the referred question itself, particularly in the light of the facts of the case. It argues that the referred question should be reformulated by Court.

81. The Commission submits that, according to the description of the facts in *Fosen-Linjen I*, it is not entirely clear which act represented the basis of the claim for damages: (i) an error by the contracting authority, (ii) the termination of the tendering procedure, or (iii) the award of the contract for 2015-2016 services to Norled.[84] It appears from the request that the claim originates from February 2014[85] and, therefore, pre-dates the termination of the procurement procedure.[86]

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[83] Reference is made to the judgments in *Brasserie du Pêcheur and Factortame*, cited above, paragraph 42, and *Vakakis kai Synergates — Symvouloi gia Agrotiki Anaptixi AE Meleton* v *European Commission*, T-292/15, EU:T:2018:103, paragraphs 62-64.

[84] Reference is made to the judgment in *Fosen-Linjen I*, cited above, paragraph 31.

[85] Reference is made to the Request for an advisory opinion of the EFTA Court made by the Norwegian Supreme Court on 19 November 2018 and registered as Case E-7/18, paragraph 21 and the judgment in *Fosen-Linjen I*, cited above, paragraph 32.

[86] Reference is made to the judgment in *Fosen-Linjen I*, cited above, paragraph 31.

82. Further, in February 2014, Fosen-Linjen claimed damages in the form of "net profits it would have earned if it had performed the ferry operations contract in the years 2016-2026" even though it did not take part in the later tendering procedure concerning the ferry services for the 2019-29 period.[87] The Norwegian Court of Appeals considered that there was no causal link for the claim for damages for positive contract interest.[88] Consequently, the Commission submits that, either: in the light of the assessment of the Norwegian Court of Appeals the referred question could be considered as hypothetical; or the Supreme Court of Norway considers that there is at least some chance that a causal link exists. The Commission therefore bases its observations on the latter assumption.

83. The Commission contends that the single question referred to the Court raises two distinct issues that must be considered separately. The first concerns the level of seriousness of breach necessary to trigger liability (with no distinction between heads of damage). The second is whether the damages awarded to persons harmed by an infringement may be limited to a negative contract interest or whether they include a positive contract interest (regardless of the seriousness of the breach).

84. For the Commission, it is clear that the first question was resolved by the Court in *Fosen-Linjen I*, where is was concluded that the gravity of a breach is irrelevant for the award of damages.[89] It further submits that there are no specific factual or legal elements in the request which would put this conclusion of the Court into question.

85. Regarding the second question, the Commission argues that the judgment in *Fosen-Linjen I* requires clarification, particularly with regard to the form of wording used by the Court: "trigger the liability of the contracting authority to compensate the person harmed for the damage incurred".[90] This wording departs from the text of Article 2(1)(c) of the Remedies Directive which refers to the requirement to: "award damages to persons harmed by an infringement", and may be interpreted as the Remedies Directive harmonising the issue of the heads of damage available in the event of infringements. Consequently, the question is whether Article 2(1)(c) does indeed have such an effect, and, hence, whether the "damages" must always include a positive contract interest where there is a causal link.

86. In this regard, the Commission states that Article 2(1)(c) does not exclude any head of damage.[91] Moreover, the Article refers to "damages", not "damage". The Commission contends that while "damage" refers to loss actually suffered, "damages" is a legal concept denoting compensation awarded by the court, not heads of damage. Furthermore, reading Article 2(1)(c) together with its *chapeau*, and recital 6 of the Remedies Directive, makes it clear that the Article enshrines the need for procedures to ensure that damages can be

[87] Reference is made to the Request, paragraph 21, and the judgment in *Fosen-Linjen I*, cited above, paragraph 31.
[88] Reference is made to the Request, paragraph 26.
[89] Reference is made to the judgment in *Fosen-Linjen I*, cited above, paragraph 80.
[90] Reference is made to the judgment in *Fosen-Linjen I*, cited above, paragraph 82 and point 1 of the operative part.
[91] Reference is made to the Opinion of Advocate General Cruz Villalón in *Combinatie*, cited above, paragraph 112.

awarded, but does not cover complex issues relating to the heads of damage and the causal link.

87. The Commission submits that given the similarity of the regulatory framework provided by the Remedies Directive and by Directive 92/13/EEC,[92] the latter should also be considered by the Court.[93] In this regard, the Commission argues that the legislator did not intend to harmonise any aspect regarding damages other than the provisions regarding bidding costs laid down in Article 2(7) thereof and that, therefore, all other aspects of the award of damages are left to the national law of the Member States.[94] It is argued that this conclusion would be *a fortiori* valid for the Remedies Directive.

88. The Commission further submits that despite the fact that the Directive is intended to provide for "effective remedies",[95] the question of effectiveness should not be confused with the issue of whether the Directive actually harmonises heads of damage. The Commission submits that the recitals of the Remedies Directive and of Directive 2007/66/EC emphasise pre-emptive remedies, *i.e.* remedies invoked before any damage occurs.[96] Thus, it seems inconceivable to the Commission that the legislator intended to provide through Article 2(1)(c) of the Remedies Directive, for the harmonisation of such complex matters as the heads of damage, the causal link and the quantification of damage whilst not providing for any explanations or justifications regarding these issues.

89. The Commission further refers to the findings of the ECJ in the *Strabag,*[97] *Combinatie,*[98] and *Hochtief*[99] cases, and states that the case law of the ECJ confirms the considerations listed above. Consequently, the Commission submits that Article 2(1)(c) of the Remedies Directive requires that national law include powers for the award of damages. However, the heads of damage, their extent and requirements of the causal link are not regulated by that provision and remain within the procedural autonomy of the Member States.[100]

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[92] Reference is made to Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

[93] Reference is made to Article 2(1)(d) of Directive 92/13/EEC, cited above, which requires the Member States to ensure that there is a possibility to "award damages to persons injured by the infringement".

[94] Reference is made to Directive 92/13/EEC, cited above, recital 10.

[95] Reference is made to the Remedies Directive, cited above, recital 4.

[96] Reference is made to the Remedies Directive, cited above, recital 5; Directive 2007/66/EC, cited above, recitals 3-12 and 21.

[97] Reference is made to the judgment in *Strabag*, cited above, paragraph 33.

[98] Reference is made to the judgment in *Combinatie*, cited above, paragraph 90.

[99] Reference is made to the judgment in *Hochtief*, cited above, paragraph 35.

[100] Reference is made, inter alia, to the judgment in *Combinatie*, cited above, paragraph 90; the Opinion of Advocate General Cruz Villalón in *Combinatie*, cited above, paragraph 89; the judgement in *Stefan Rudigier*, cited above, paragraph 61.

90. The Commission contends that the breach at issue is not considered to be sufficiently serious,[101] there is (or at least could be) a causal link recognised by national law, the tendering procedure at issue was cancelled,[102] the tenderer chose not to participate in a later procurement procedure,[103] and in such situations the national law grants reimbursement of the bidding costs.[104] Consequently, the Commission argues that the scope of the referred question goes far beyond the circumstances of the present case and should be reformulated by the Court to prevent answering hypothetical questions.

91. The Commission submits that the question at hand is whether the limitation of the damages, in these specific circumstances, solely to the bidding costs is compatible with Article 2(1)(c) or whether broader compensation is required by that Article.

92. The Commission proposes to reformulate the question from the referring court as follows:

> *Does Article 2(1)(c) of the Remedies Directive preclude national law pursuant to which, as in the present case, a breach of public procurement law, which is not sufficiently serious, results in the award of damages in the form of compensation of bidding costs only, where there is a casual link despite the cancellation of the procurement procedure, and where the tenderer chose not to participate in a later procurement procedure before the same contracting authority concerning the same services and largely the same period as that for which the damages are sought?*

93. The Commission proposes that the Court should answer the reformulated question as follows:

> *Article 2(1)(c) of the Remedies Directive does not preclude national law pursuant to which, as in the present case, a breach of public procurement law, which is not sufficiently serious, results in the award of damages in the form of compensation of bidding costs only, where there is a casual link despite the cancellation of the procurement procedure, and where the tenderer chose not to participate in a later procurement procedure before the same contracting authority concerning the same services and largely the same period as that for which damages are sought, provided that a broader compensation is not required in those circumstances in accordance with the principle of equivalence.*

Páll Hreinsson
Judge-Rapporteur

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[101] Reference is made to the Request, cited above, paragraph 25.
[102] Reference is made to the Request, cited above, paragraph 26.
[103] Reference is made to the Request, cited above, paragraph 21, and the judgment in *Fosen-Linjen I*, cited above, paragraph 31.
[104] Reference is made to the Request, cited above, paragraph 24.