

## **The EEA and the case-law of the CJEU: Incorporation without participation?**

Halvard Haukeland Fredriksen

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The authority of the Court of Justice of the European Union (CJEU) over the interpretation of the Agreement on the European Economic Area (EEA) is a politically sensitive as well as a legally difficult matter. In this chapter, an attempt is made not only to present the origins and the inherent tensions of the complex judicial architecture of the European Economic Area (EEA), but also to reveal how it works in practice. As the analysis will show that the authority on the interpretation of the substantive rules of the European Economic Area *de facto* rests firmly with the CJEU, it is further discussed to what extent the participating member states of the European Free Trade Association (EFTA) may influence the CJEU's development of the law. Towards the end follow some brief thoughts on how the judicial architecture of the EEA Agreement would cope with a scenario where either Switzerland or the UK (or both) were to join in on the EFTA side of the EEA.

### **The origins of the complex judicial architecture of the EEA**

During the EEA negotiations, both the EU side and the EFTA States were well aware that to achieve the objective of full integration of the latter into the EU internal market, it was not enough to make sure that the wording of the EEA Agreement and the relevant provisions of EU law were identical: A homogeneous European Economic Area with equal conditions of competition (Art. 1 EEA) could only be achieved if the relevant provisions of EU and EEA law were also interpreted and applied in a uniform manner.

Originally, the Contracting Parties agreed that a common EEA Court of Justice should be established. Among other things, this court was to have jurisdiction to settle disputes between the Contracting Parties. This would have guaranteed that the EEA rules *as such* were interpreted and applied in a uniform manner in the EU and in the participating EFTA States. Still, the existence of a common EEA Court could not in itself guarantee homogeneity between its interpretation of EEA law and the CJEU's authoritative interpretation of the corresponding provisions of EU law. Acknowledging this, the Contracting Parties agreed that provisions of the EEA Agreement which were taken over from EU law were to be interpreted 'in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement' (Art. 6 EEA Agreement). For reasons of sovereignty, however, it was impossible for the EFTA States to accept an extension of this obligation to encompass future CJEU case-law. Instead, a provision of the draft agreement obliged the EEA Court and the CJEU (as well as the highest courts of the EFTA States) to pay 'due account' to each other's decisions. However, the centrepiece in the attempt to secure homogeneity lay at the institutional level: the Contracting Parties agreed that the EEA Court should be integrated into the CJEU. It was to be composed of eight judges, of which only three were to come from the EFTA States and a majority of five from the CJEU. Furthermore, the draft agreement introduced a possibility for the national courts of the EFTA States to ask the CJEU 'to express itself' on the interpretation of a provision of the EEA Agreement. The EFTA States originally argued for this competence to be assigned to the EEA Court, but this was rejected by the EU side.

To the surprise of the Contracting Parties, the CJEU was not satisfied by the compromises found. In its (in)famous Opinion 1/91, the CJEU declared the whole system of judicial supervision in the draft agreement incompatible with the (then) EEC Treaty.<sup>1</sup> The CJEU

stressed that it, as an institution of one of the Contracting Parties, would be bound by the EEA Court's interpretation of EEA law and that this – via the objective of homogeneity – would determine the interpretation of the corresponding provisions of EU law. The obligation on the EEA Court to follow the CJEU's case-law did not alter this as it was limited to rulings given prior to the date of signature of the agreement. According to the CJEU, an agreement which in this way would condition the future interpretation of the EU rules on free movement and competition conflicted with 'the very foundations of the Community'. The fact that the majority of the members of the EEA Court were to come from the CJEU did not remedy this. Rather to the contrary, the CJEU was of the opinion that these 'organic links' made things even worse as it would 'be very difficult, if not impossible, for those judges, when sitting in the CJEU, to tackle questions with completely open minds where they have taken part in determining those questions as members of the EEA Court'. Further, the CJEU held it to be 'unacceptable' that answers given to questions on the interpretation of the EEA Agreement from the national courts of the EFTA States were to be advisory only. According to the CJEU, this would change the nature of its function as it was conceived by the (then) EEC Treaty, namely that of a court whose judgments were binding.

As noted at the time by leading commentators, the essence of the CJEU's objections to the draft EEA Agreement was that it saw the common EEA Court as a threat to its own position as the supreme authority on EU law (Hartley 1992: 847).

Acknowledging this, the Contracting Parties returned to the negotiating table and came up with a solution which left the position of the CJEU untouched. Instead of a common EEA Court, an EFTA Court without any functional or personal connections to the CJEU was set up by the Agreement between the EFTA States on the establishment of a Surveillance Authority

and a Court of Justice.<sup>2</sup> The EFTA Court's competences extend to the EFTA States alone – it has no jurisdiction over the EU or the EU member states.

Furthermore, the obligation on the CJEU to pay due account to the rulings of the courts on the EFTA side of the EEA was removed and it was agreed that the CJEU's answers to any questions put by the national courts of the EFTA States would be binding.

Without a common EEA Court, the Contracting Parties acknowledged that any disputes between one or more of the EFTA States on the one side and the EU and the EU member states on the other would have to be settled by diplomatic means in the EEA Joint Committee (Art. 111). However, the EFTA States accepted that in cases concerning the interpretation of EEA provisions taken over from EU law, the Contracting Parties to the dispute can agree to refer the matter to the CJEU. In addition, disputes concerning the scope or duration of safeguard measures, or the proportionality of any rebalancing measures taken can be referred to arbitration, but no questions of interpretation of EEA provisions taken over from EU law may be dealt with in such procedures.

The Contracting Parties were of course fully aware of the risk that a system with two courts at the international level, the CJEU and the EFTA Court, interpreting the same rules, poses to the objective of homogeneity. In order to reach 'the most uniform interpretation possible' of the provisions of the agreement and of the corresponding provisions of EU law, the Joint Committee was therefore vested with competence to keep the development of the case-law of the CJEU and of the EFTA Court under constant review (Art. 105 EEA Agreement). The Joint Committee is to act so as to preserve the homogeneous interpretation of the agreement.

However, the EFTA States had to accept that in no case may decisions taken by the Joint Committee affect rulings of the CJEU.<sup>3</sup>

In its Opinion 1/92, the CJEU approved the renegotiated agreement, stressing that the EFTA Court would exercise its jurisdiction only within EFTA and highlighting the abovementioned limitation on the competences of the EEA Joint Committee as ‘an essential safeguard which is indispensable for the autonomy of the Community legal order’.<sup>4</sup>

### **The core of the problem: Independence vs homogeneity**

The CJEU’s insistence on the autonomy of the EU legal order and its own untouchable position as the supreme authority on not only the EU rules as such, but also on the corresponding EEA rules as they are to be applied within the EU, left the EFTA States with only bad alternatives. As candidly stated by the Commission, the best solution from the perspective of homogeneity would have been for the EFTA States simply to accept future rulings of the CJEU.<sup>5</sup> However, reasons of sovereignty left this alternative untenable for the EFTA States. On the other hand, if the EFTA States reacted by stressing the complete independence of ‘their’ courts (the EFTA Court as well as their own national courts) from the future developments of CJEU case-law, the result could only be the gradual undermining of the objective to create a homogeneous European Economic Area with equal conditions of competition. Thus, as noted by one commentator at the time, the EFTA States acknowledged the need to accord a *de facto* pre-eminence in the judicial structure to the CJEU *without making this explicit* (Cremona 1994: 517 [author’s emphasis]).

An important element in this attempt to ‘square the circle’ is Art. 3(2) of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of

Justice. This provision, which was introduced unilaterally by the EFTA States, obliges the EFTA Court (and the EFTA Surveillance Authority) to pay ‘due account’ to the principles laid down by the ‘relevant rulings’ of the CJEU given *after* the date of signature of the EEA. Importantly, this obligation encompasses not only the CJEU’s interpretation of EU rules which are copied into the EEA Agreement, but also the CJEU’s interpretation of EEA law as such.

Equally important is the above mentioned role of the EEA Joint Committee under Art. 105 EEA. The agreement that no decision of the Joint Committee may effect the case-law of the CJEU (Protocol 48) essentially means that in the case of diverging case-law from the CJEU and the EFTA Court, the Joint Committee can only preserve homogeneity by letting the view of the CJEU prevail. The Joint Committee, then, ostensibly given the task of reconciling differences between the two judicial organs, is in fact, in the words of one commentator, ‘intended to preserve the case-law of the Court [the CJEU], and not to substitute its own political decision’ (Cremona 1994: 517). As candidly admitted by the Commission, Art. 105 EEA ‘provides for the “reception” of new rulings of the Court of Justice by means of measures taken by the Joint Committee’.<sup>6</sup>

Of course, from a legal point of view, Art. 105 and Protocol 48 EEA may not be interpreted as to impose the case-law of the CJEU upon the EFTA States. If a case of diverging case-law of the EFTA Court and the CJEU is to be raised by the EU in the EEA Joint Committee, the EFTA States remain free under Art. 105 to refuse to adopt the interpretation maintained by the CJEU. Similarly, the EFTA States may block any attempt by the EU to refer the disputed question to the CJEU in accordance with Art. 111 EEA. Still, refusal to accept the CJEU’s view will open up for safeguard measures from the EU or the suspension of the affected part

of the Agreement. Thus, as noted by one commentator, the EFTA States cannot enforce opposition to CJEU case-law except at the risk of pulling down part of the EEA structure (Cremona 1994: 524).

Perhaps the most important practical effect of Art. 105 and Protocol 48 is the message this arrangement sends to the EFTA Court: A case of judicial conflict between it and the CJEU is one which the EFTA Court cannot win. According to the president of the EFTA Court, this is a threat of which the EFTA Court has always been aware (Baudenbacher 2010: 5).

### **The EFTA Court's approach**

More than 20 years after the entry into force of the EEA Agreement, the track record of the EFTA Court reveals that it has consistently let the objective of a homogeneous EEA prevail over any temptation it may have had to pursue an independent interpretation of the EEA Agreement within the EFTA pillar of the EEA. In its very first case, the *Restamark* case from 1994 concerning the Finnish import monopoly for alcoholic beverages, the EFTA Court adopted the CJEU's method of interpretation and essentially decided that the objective of homogeneity had to prevail over any expectations the (Nordic) EFTA States might have had as to the possibility to keep their strict policy on the import of alcohol.<sup>7</sup> Since *Restamark*, the EFTA Court has continued to disprove the widespread fear that differences in context and purpose would inevitably undermine the objective of an interpretation of EEA rules in conformity with corresponding rules of EU law (Fredriksen 2010b: 740). In *Restamark*, the CJEU case-law relied on by the EFTA Court predated the signing of the EEA Agreement, but subsequent cases soon revealed that the temporal limitation of Art. 6 EEA had no impact on the EFTA Court's adherence to CJEU case-law. As the EFTA Court itself noted in the

*L'Oréal* case from 2008, it has 'consistently taken into account the relevant rulings of the CJEU given after the said date'.<sup>8</sup> In essence, as noted with satisfaction by the president of the CJEU on the occasion of the EFTA Court's twentieth anniversary, 'it does not appear that the EFTA Court has treated the CJEU case-law differently depending on when the pertinent judgments were rendered' (Skouris 2014: 35).

A prominent example illustrating this is the so-called *Reversion* case, concerning the legality of the almost century-old Norwegian regime for acquisition of hydropower resources under which private undertakings have to surrender all installations to the Norwegian State without compensation at the expiry of the concession period.<sup>9</sup> The EFTA Surveillance Authority argued that the regime violated both Art. 31 EEA on the freedom of establishment and Art. 40 on the free movement of capital because undertakings in which Norwegian public entities owned at least two-thirds of the shares were exempted from the system of reversion. In its defence, the Norwegian government argued, *inter alia*, that the rules at issue were a part of the basic ownership structure in the hydropower sector, and as such fell under Art. 125 EEA. According to Art. 125 EEA, the EEA Agreement 'shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership'. The provision is copied verbatim from what is now Art. 345 TFEU. At the date of the signing of the EEA Agreement, the CJEU had not clarified the reach of this exemption. Subsequent case-law, however, revealed that the CJEU was of the view that Art. 345 TFEU does not exempt the member states' systems of property ownership from the fundamental rules of the EU Treaties.<sup>10</sup> Supported by Iceland, and highlighting their common understanding of Art. 125 EEA at the time of the EEA negotiations, the Norwegian government argued that Art. 125 should not be interpreted in conformity with the CJEU's interpretation of Art. 345 TFEU. The EFTA Court was not persuaded, however, holding that there were no 'specific circumstances' in the case



which would warrant such a break with the homogeneity objective. In particular, the EFTA Court stressed that '[u]nilateral expressions of understanding of the kind claimed to have been made by Norway and Iceland cannot constitute such circumstances'.<sup>11</sup> Closely following CJEU case-law, the EFTA Court thereafter found the system of reversion to be incompatible with the EEA Agreement.<sup>12</sup>

Of course, a policy of adherence to CJEU case-law is only helpful in cases where guidance may be found in existing rulings from the CJEU. In cases where the EFTA Court has to tackle questions of internal market law not yet decided by the CJEU (so-called *going first* cases), the EFTA Court's judges are in reality asked to second-guess the CJEU: By applying the CJEU's method of interpretation, the EFTA Court will – to the best of its ability – try to identify how the CJEU would have decided the case at hand.

Experience after twenty years of the EEA reveals that the EFTA Court has won subsequent approbation of the CJEU in several of the cases where it had to go first (Fredriksen 2010b: 747–749). This is a considerable achievement for which the EFTA Court deserves praise. However, it is inevitable that the EFTA Court (like everyone else) sometimes fail to second-guess the CJEU.

The question of how to proceed in such situations was raised before the EFTA Court in the *L'Oreal* case from 2008. In a remarkable open and straight-forward manner, the EFTA Court conceded that the consequences for the internal market within the EEA 'call for an interpretation of EEA law in line with new case-law of the CJEU regardless of whether the EFTA Court has previously ruled on the question'.<sup>13</sup> Acknowledging that the CJEU's interpretation of the Trademark Directive (89/104/EEC) in the cases *Silhouette* and *Sebago*

was based on arguments which were equally valid in an EEA law context and an EU law context, the EFTA Court simply abandoned the interpretation of the Trade Mark Directive which it had previously favoured in the *Maglite* case.<sup>14</sup> Of particular interest is the fact that the EFTA Court at no point admitted that the interpretation preferred by the CJEU was any better, or the reasoning more convincing, than the one originally favoured by the EFTA Court. On the contrary, the EFTA Court expressly stated that both alternatives were supported by ‘weighty arguments’ and that the EFTA Court and the CJEU simply had ‘opted’ for different solutions.<sup>15</sup> Thus, it was merely the authority of the CJEU’s case-law which caused the EFTA Court to overrule *Maglite*. As a result, as noted by one commentator, the *L’Oreal* case suggests that the EFTA Court is of the opinion that its own decisions only have ‘provisional authority pending a decision of the CJEU’ (Van Stiphout 2009: 15).

In the wake of its U-turn in *L’Oreal*, the EFTA Court has been charged with having relegated itself to ‘junior partner’ in the EEA judicial system, a subordination which was ‘neither the intention of the Contracting Parties in general nor that of the EFTA States in particular’ (ibid.). There is some merit to this criticism from an institutional perspective, but from the perspective of homogeneity the EFTA Court’s open deference to the CJEU may only be applauded (Fredriksen 2010a: 496). As has been shown above, the EFTA Court may only exercise its institutional equality with the CJEU at the expense of the overall goal of uniform interpretation and application of the common EEA rules in all of the EEA States. In short, *L’Oreal* confirms and strengthens the impression left by the case-law of the EFTA Court ever since its establishment that the objective of a homogeneous EEA prevails over any pluralistic suggestions left by the judicial structure of the EEA. Even though not invoked as justification by the EFTA Court, the abovementioned acceptance from the EFTA States of the untouchable position of the CJEU (as most clearly evidenced in Protocol 48) suggests that the decision in

*L'Oreal* only made explicit an inconvenient truth which was deliberately hidden by the Contracting Parties in the complex judicial architecture of the EEA.

Unfortunately for the EFTA Court, the loyal deference to the CJEU has diminished the demand for its services considerably. The number of preliminary references to the Court from the national courts of the EFTA States is very low, with an annual average of only a little more than four cases altogether from Icelandic, Liechtenstein and Norwegian courts.<sup>16</sup> Most strikingly, it is now more than twelve (!) years since the last occasion on which the Supreme Court of Norway bothered to ask the EFTA Court for guidance on the proper interpretation of EEA law.<sup>17</sup> Even though there may be several different factors contributing to this result, the EFTA Court's deference to the CJEU certainly has to be recognised as one of them (Fredriksen 2012: 203–206). Once it is acknowledged that the authority on the interpretation of the substantive rules of the internal market essentially rests with the CJEU, the national judges may perhaps be excused if they ask themselves how much there really is to gain from a preliminary reference to the EFTA Court and if the advantages outweigh the delay, work and cost entailed. The acknowledgment of the authority of the CJEU may also explain why the parties appearing before Norwegian courts are not very keen on a reference to be made to the EFTA Court. Even though there are several cases in which a party has pleaded for a reference to be made, it is striking that this seems not to be the case in the majority of the EEA-related cases (ibid.: 205). It is tempting to speculate that parties with an interest in general clarification of the substantive rules of the internal market (such as consumer organisations, labour unions, business federations, public agencies etc.) would be keener on such references to be made if the recipient was the CJEU rather than the EFTA Court.

Further, in situations where similar questions of EEA law arise at the same time in the EFTA pillar and in the EU (which they often do), there seem to be a quiet understanding between the EFTA States and the EFTA Surveillance Authority to let the matter be decided by the CJEU (Baudenbacher 2010: 14). Rather than parallel proceedings before the EFTA Court, both the EFTA Surveillance Authority and the EFTA States concerned make use of their right to take part in EEA-related proceedings before the CJEU. As long as the EFTA States loyally adhere to the subsequent ruling of the CJEU, there is hardly any reason for the EU to object to this indirect seizure of the CJEU as a forum to decide such disputes. But there is no denial that the practice demonstrates that the EFTA Surveillance Authority and the EFTA States acknowledges that the authority on the interpretation of the common EU/EEA rules rests with the CJEU.

In an interesting attempt to increase the demand for its services, the EFTA Court has in the last couple of years highlighted the ‘EEA specific’ character of certain matters of EEA law – parts of EEA law where the Agreement is not merely a copy of EU law and where the quest for equal conditions for competition throughout the EEA allows for more creativity from the EFTA Court. This is particularly true for the thorny issue of the effect of EEA law in the legal orders of the EFTA States, where the EFTA Court recently warned that the principle of State liability for breaches of EEA law differs from the development, in the case law of the CJEU, of the principle of State liability under EU law and that the application of the principles therefore ‘may not necessarily be coextensive in all respects’.<sup>18</sup>

However, as far as the substantive rules of the internal market are concerned, the approach revealed in *L’Oréal* still prevails (even though the EFTA Court’s reluctance to quote the decision in subsequent cases perhaps suggests that it regrets how explicit it was in its

deference to the CJEU). Thus, based on twenty years of experience, the EFTA Court's approach to CJEU case-law may be summarized in the following statement by the president of the CJEU on the occasion of the EFTA Court's twentieth anniversary: There is general agreement that the EFTA Court 'strictly respects the obligations imposed upon it by the [EEA] Agreement and respects the precedence of the CJEU' (Skouris 2014: 36). As a telling result, twenty years on there are still no examples of the EU calling on the EEA Joint Committee to deal with a case of diverging case-law from the EFTA Court and the CJEU.

### **The approach of the national courts of the EFTA States**

As noted in the introduction, it was a *sine qua non* for the EFTA States during the EEA negotiations that they would not have to relinquish judicial sovereignty to the 'foreign judges' of the CJEU. From this background, one would perhaps expect a somewhat reluctant reception of CJEU case-law in the EFTA States, perhaps with the national courts sticking to 'their' EFTA Court or even pursuing a more independent interpretation of EEA law on their own. However, this is not how things have turned out. Rather on the contrary, CJEU precedents are cited and followed by Icelandic, Norwegian and Liechtenstein courts, including the supreme courts, in much the same manner as in the EU member states (Batliner 2004; Fredriksen 2012; Hannesson 2012)<sup>19</sup>.

In Norway, the Supreme Court played down the significance of the temporal limit of Art. 6 EEA at the first opportunity. In two important cases from 1997, *Eidesund* and *Løten*, concerning the interpretation of Directive 77/187/EEC on employees' rights in the event of transfers of undertakings, the Supreme Court held that CJEU judgments rendered after the date of signature of the Agreement still would have 'direct consequences' for the interpretation of the Norwegian legislation implementing the directive<sup>20</sup> and that the temporal

limit in Art. 6 EEA was ‘of little interest’.<sup>21</sup> A later statement to the same effect is found in the 2002 judgment in the *Jo-Bolaget* case, where the Supreme Court referred to *Eidesund* as authority for the opinion that it was clear that more recent case-law of the CJEU had to be taken into account.<sup>22</sup> After this, the Supreme Court simply stopped referring to Art. 6 EEA, clearly indicating that the temporal limit of that provision is without any practical significance (Graver 2005: 91).

Further, the jurisprudence of the Supreme Court shows that CJEU case-law is not only taken into account when interpreting EEA law – it is *de facto* followed as binding authority. Evidence suggests that the Supreme Court will disregard even clear assumptions in the *travaux préparatoires* and overrule both its own and the EFTA Court’s precedents if deemed necessary in order to comply with CJEU case-law.

Thus, in the *Norsk Dental Depot* case from 2004 the Supreme Court simply referred to CJEU’s interpretation of the Product Liability Directive (85/374/EEC) in *Sánchez*<sup>23</sup> to the effect that established Norwegian jurisprudence on strict liability for dangerous products could no longer be relied on in addition to the liability regime established by Art. 6 of the said directive.<sup>24</sup> The fact that the Norwegian legislator in the *travaux préparatoires* to the act implementing the Directive into the 1988 Act on Product Liability clearly assumed that there would still be room for the established Norwegian regime of strict liability was simply disregarded.

Similarly, in the *Vesta Forsikring* case from 2006, concerning bad faith of the applicant as a condition for refusal to register a trademark, the Supreme Court openly overruled an earlier decision on the interpretation of Art. 4(4) of the Trademark Directive (89/104/EEC).<sup>25</sup>

Nothing in the judgment indicates that the Supreme Court accorded its own previous judgment any authority in this respect – the court simply stated that subsequent clarification through decisions of the EU’s Office of Harmonization for the Internal Market (OHIM) called for an interpretation deviating from the one previously held.

Further, both the *Finanger (No 1)* case from 2000 and the *Edquist* case from 2010 clearly suggested that the Supreme Court would be prepared to deviate from the case-law of the EFTA Court if it deemed this to be necessary in order to follow the CJEU’s lead.<sup>26</sup> The Supreme Court confirmed this in its controversial judgment in the *STX* case from 2013.<sup>27</sup> In this judgment, the Supreme Court made it painfully clear that it disagreed with the EFTA Court’s interpretation of the Posted Workers Directive (96/71/EC).<sup>28</sup> In a way, the judgment may rightly be portrayed as the Norwegian Supreme Court demonstrating its sovereignty from the EFTA Court. However, it is important to add that the judgment is dotted with references to CJEU case-law and clearly based on the assumption that the directive in question is to be interpreted and applied in Norway in accordance with the (presumed) view of the CJEU. Thus, the Supreme Court only exercised its independence vis-à-vis the EFTA Court in order to adhere to what it believed to be ‘the ECJ version of EEA law’.

The loyal reception of CJEU case-law is equally striking in cases where no clear precedent may be found. Avoiding any temptation it may have had to pursue its own interpretation of EEA law, the Supreme Court’s approach in such cases is to analyse existing CJEU case-law and try to deduce whatever guidelines it can from the reasoning of the CJEU in cases involving more or less similar questions. In the two fairly recent judgments *Nye Kystlink* and *Bottolvs* concerning alleged age discrimination, the Supreme Court stated that Norwegian courts should interpret the ban against age discrimination in Directive 2000/78/EC as would

the CJEU if the case had been referred to it.<sup>29</sup> As directive 2000/78/EC is not part of the EEA Agreement, a reference to the EFTA Court was no alternative. Even though the court was careful to tie its adherence to CJEU case-law to the presumed intentions of the legislator when voluntarily implementing the Directive into Norwegian law, both judgments show that the reception of CJEU case-law is extended even beyond the scope of EEA law.

Striking is certainly too the decision to stay the proceedings before the Supreme Court in the age discrimination case *CHC Norway* in order to await the preliminary judgment of the CJEU in *Prigge*.<sup>30</sup> A better illustration of the Supreme Court's adherence to the 'foreign judges' of the CJEU than staying a pending case for more than a full year and against the will of one of the parties to the case, in order to make sure that Norwegian law is interpreted and applied in conformity with CJEU case-law, is hard to imagine.<sup>31</sup>

Of course, general acceptance of the authority of the CJEU does not guarantee that the national courts of the EFTA States always get it right in their interpretation of EEA law in concrete cases. Unsurprisingly, it is not difficult after twenty years of the EEA to find examples from Iceland, Liechtenstein and Norway where it may well be questioned whether the national judges succeeded in their attempts to follow CJEU case-law (Batliner 2004, Fredriksen 2012 and Hannesson 2012). A recent and much debated example is the Norwegian Supreme Court's reliance on CJEU case-law in the above-mentioned *STX* case from 2013. Subsequent developments suggest that the Supreme Court overestimated the reach of the CJEU case-law it relied on in order to justify several deviations from the EFTA Court's opinion.<sup>32</sup> This is of course unfortunate, not only to the parties to the case but also with a view to the damage mistakes like this can do to the credibility of the judicial mechanism in the EFTA pillar of the EEA. Still, a single judgment is hardly enough to charge the Supreme



Court with a strategy to establish a distinct (state-friendly) ‘Norwegian version of EEA law’.<sup>33</sup> As mentioned above, the judgment is dotted with references to CJEU case-law and clearly based on the view that the Posted Worker Directive was to be interpreted and applied in Norway in accordance with what the Supreme Court sincerely believed to be the view of the CJEU. Further, the Supreme Court was careful to claim support from the observations which the Commission and the EFTA Surveillance Authority submitted to the EFTA Court as the case was pending before it.

Furthermore, if subsequent rulings from the CJEU indeed should reveal that the Norwegian Supreme Court got it wrong in the *STX* case, Norwegian authorities will have no choice but to adjust their policies against social dumping accordingly. Failure to do so will certainly prompt the EFTA Surveillance Authority to take action, if need be by bringing an infringement action against Norway before the EFTA Court. This will give the EFTA Court the possibility to have the final say on the matter in the form of a binding judgment. And as above, the ruling of the EFTA Court may safely be expected to follow the CJEU’s lead. Thus, in one way or the other, the view of the CJEU will prevail in the end.

### **Influencing the CJEU’s development of the common rules for the internal market?**

Even though the authority of the interpretation of the common rules for the EEA internal market rests with the CJEU, if not *de jure* then certainly *de facto*, the judicial architecture of the EEA still leaves the EFTA side with some opportunities to influence the judicial development in the CJEU.

Firstly, the EEA Agreement provides the EFTA States (and the EFTA Surveillance Authority) with the right to appear before the CJEU in cases of relevance to the EEA.<sup>34</sup> This is an

opportunity which the Norwegian government has highlighted as an important way to ‘influence’ the development of EEA law and of which it makes use on a fairly regular basis (Parliament White Paper no. 5 [2012–2013]: 22–24). Submissions made by the EFTA States are considered by the CJEU on an equal footing with submissions made by EU member states – it is the quality of the submission and the strength of the arguments that determine whether the views put forward gain acceptance. As admitted by the Norwegian government, it is difficult to gauge the extent to which a submission has influenced the CJEU in its final decision, but there are several examples where it is apparent that the CJEU has based its decision directly on arguments put forward by Norway, including in cases where Norway’s views have differed from those of other actors (Parliament White Paper no. 5 ([2012–2013])). Still, the right to appear before the CJEU hardly compares to the existence of a common EEA Court which would have included members representing the legal traditions of the EFTA States. And furthermore, in 2010 the president of the CJEU changed his practice concerning the EFTA States’ right to intervene in EEA related cases between EU member states and EU institutions (for example infringement proceedings initiated by the Commission against an EU member state).<sup>35</sup> The EFTA States have reportedly raised the issue with the EU, both in the EEA Joint Committee and in the EEA Council, and the Norwegian government has vowed to ‘continue to work actively to gain acceptance for its view on this matter’ (Parliament White Paper no. 5 [2012–2013]: 22–24), but essentially all they can do is to hope for the president of the CJEU to change his mind.<sup>36</sup> For the time being, the EFTA States’ right to appear before the CJEU is thus limited to other categories of cases (of which preliminary references are by far the most important).

Secondly, and perhaps somewhat unexpectedly, the EFTA Court has managed to establish itself as a fairly regular dialogue partner of the CJEU. Over the past twenty years, the CJEU

and its Advocate Generals have referred to decisions from the EFTA Court in more than 200 cases.<sup>37</sup> This is a remarkable achievement for a small court from the equally small EFTA pillar of the EEA, not least in view of the importance the CJEU attached to its position as the supreme authority on the rules of the internal market in its above-mentioned Opinions on the EEA Agreement. Indeed, together with the powerful European Court of Human Rights in Strasbourg, the EFTA Court is the only court with which the CJEU engages in such a dialogue on a regular basis.<sup>38</sup>

Still, the extent to which decisions from the EFTA Court have influenced the CJEU is hard to gauge. While some commentators take the view that the CJEU only cite decisions from the EFTA Court as a source of inspiration, others believe the EFTA Court's influence to be substantial.<sup>39</sup> Interestingly, members of the CJEU tend to fall in the latter category when they – in an extra-judicial capacity – on various occasions over the last twenty years have paid salute to the EFTA Court. On the occasion of the EFTA Court's tenth anniversary in 2004, the president of the CJEU described the dialogue between the CJEU and the EFTA Court as 'a paradigm for international cooperation between judicial institutions' and stated that 'ignoring EFTA Court precedents would simply be incompatible with the overriding objective of the EEA Agreement which is homogeneity' (Skouris 2005: 123–129). Ten years later, he repeated the same words and even took the view that the CJEU in some cases had referred to decisions of the EFTA Court as 'leading authority' (Skouris 2014: 28). Still, cases where the CJEU departs from the case-law of the EFTA Court without even mentioning the latter's decisions certainly confirm that the CJEU may well allow itself to be inspired or even influenced by the case law of the EFTA Court, but that it decides by itself if, when and to what extent this will be the case. Indeed, that the dialogue is not one between equals has

explicitly been acknowledged by the president of the EFTA Court: The CJEU is ‘in the driver’s seat’ (Baudenbacher 2012: 12).

Even if the EFTA Court may be able to influence the CJEU, it is questionable how interested the EFTA states are in such a ‘judicial dialogue’. Experience reveals that is almost only in cases where the EFTA Court has taken the lead in the development towards further realisation of the fundamental freedoms of the internal market that the CJEU sees fit to quote its decisions (Fredriksen 2010b: 757). Arguably, this might be part of the reason why the EFTA States, Norway in particular, seem rather reluctant to take steps in order to increase the number of cases which reach the EFTA Court. Both the tendency to suggest that the EFTA Surveillance Authority ought to await the CJEU’s decision in a similar case or the mostly firm opposition to suggestions that national courts ought to refer a case to the EFTA Court, may be seen as part of a strategy to prevent the EFTA Court from taking the lead in the judicial evolution of EU/EEA law. In Norway, the government’s lawyers seem to fear that the EFTA Court will seize any such opportunity to make an impression on the CJEU and that it will do so through dynamic interpretation of EEA law against the interest of the state. The chilling response to the EFTA Court’s recent call for two additional judges and an Advocate General in order to reinforce its standing and credibility hints in the same direction.<sup>40</sup> The same applies to the governments’ disinterest in proposals for the jurisdiction of the EFTA Court to be broadened to encompass other agreements between the EU and the EFTA States.

Part of the problem for the EFTA States is that the homogeneity objective leaves no room for the legal traditions of the EFTA States as a relevant consideration in the interpretation of the substantive rules of the internal market. Seen from the CJEU’s perspective, it is plain that a distinction has to be drawn between the legal traditions of the member states and those of

third countries such as the EFTA States: The former are recognized as relevant sources of EU law, the latter are not. It follows that the use of legal traditions characteristic to the EFTA States as sources of EEA law would, in any situation where they differ from the traditions of the EU member states, *per se* conflict with the Agreement's overarching goal of homogeneity between EEA and EU law. Thus, it is hardly surprising that there are no cases where the EFTA Court has advocated the legal traditions of the EFTA States as a relevant source for the judicial development of EEA law: The only way the EFTA Court can gain and keep the position of a dialogue partner of the CJEU is by adopting the CJEU's method of interpretation and its selection of relevant sources. Thus, the judicial dialogue between the EFTA Court and the CJEU hardly compares to the existence of a common EEA Court in which judges from the EFTA States would have been participating on equal footing with colleagues from the CJEU.

### **What if Switzerland and the UK were to join to the EFTA pillar of the EEA?**

Given the current debate both in Switzerland and the UK, it is tempting to end by contemplating how the judicial architecture of the EEA Agreement would cope with a scenario where one or both of these countries were to join in on the EFTA side of the EEA. The immediate result would obviously be a strengthening of the EFTA Court with two new members and, presumably, a welcome increase in its caseload. This again could possibly reinforce the EFTA Court's standing and credibility, leading to more cases being referred to it both from the national courts of the existing members of the EFTA pillar and from the EFTA Surveillance Authority. Further, it may lead to an intensified and perhaps even more equal dialogue with the CJEU. Still, Swiss and/or UK accession to the EFTA side of the EEA may also reignite the inherent tensions in the judicial architecture of the EEA. It is hardly given that neither the courts nor the governments of Switzerland and the UK will adhere to the

decisions of the ‘foreign judges’ of the CJEU as readily as have the much smaller EFTA States of Iceland, Liechtenstein and Norway. Should the EFTA States, be it their governments or courts, become more self-assertive and demand a greater say in the judicial development of the common rules of the internal market, then the maintenance of equal conditions for competition throughout the EEA would depend on the EU being willing to accept this. Opinion 1/91 and 1/92 suggest that any such expectations from the EFTA side, even in the rather unlikely scenario that it was to be enforced by Switzerland or the UK (or both), will be frustrated by the CJEU.

## **Conclusion**

Despite the gradual development of a judicial dialogue between the CJEU and the EFTA Court, the reality of the EEA is that the EFTA States have to play by the rules of the internal market as they are interpreted by the ‘foreign judges’ of the CJEU. The fact that the EEA Agreement for over twenty years now has defied the discouraging predictions made by leading commentators at the time of its birth<sup>41</sup> is more than anything due to the fact that the remaining EFTA States have accepted the hegemony of the EU and its Court of Justice. From a political perspective, this may perhaps be explained by the increasingly unequal strength between the diminished EFTA pillar and the ever-growing EU pillar of the EEA; the perceived importance of the EEA Agreement to the economy of the remaining EFTA States and their lack of viable alternatives to the current association to the EU. Thus, the survival of the EEA Agreement is hardly due to its judicial architecture being so much better than perceived by those predicting its demise more twenty years ago, but rather to the fact that the remaining EFTA States have proven to be far more pragmatic than any commentator back in the early 1990’s could have expected them to be. In a way, the EFTA States have grown

accustomed to life under the hegemony of the CJEU, a fact which is now demonstrated by their adherence to CJEU case-law even outside the reach of the EEA Agreement.

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<sup>1</sup> Opinion 1/91 *EEA I*, ECLI:EU:C:1991:490.

<sup>2</sup> OJ [1994] L 344, 3.

<sup>3</sup> Originally, this followed from an Agreed Minute by the Contracting Parties, but its binding effect was later strengthened by moving it to a protocol (Protocol 48).

<sup>4</sup> Opinion 1/92, *EEA II*, ECLI:EU:C:1992:189.

<sup>5</sup> See the submission of the Commission before the CJEU in Opinion 1/92, above n 4 at p. 2833.

<sup>6</sup> The submissions of the Commission in Opinion 1/92, above n 5, at p. 2833.

<sup>7</sup> Case E-1/94 *Restamark* [1994–1995] EFTA Court Report 15. Cf. the telling question posed by Kronenberger: ‘Does the EFTA Court interpret the EEA Agreement as if it were the EC Treaty?’ (Kronenberger 1996).

<sup>8</sup> Joined cases E-9/07 and E-10/07 *L’Oréal* [2008] EFTA Court Report 258, par. 28.

<sup>9</sup> Case E-2/06 *EFTA Surveillance Authority v Norway* [2007] EFTA Court Report 167.

<sup>10</sup> See, e.g., Case C-302/97 *Klaus Konle v Australian Republic* [1999] ECLI:EU:C:1999: 271, par. 38.

<sup>11</sup> *Ibid.* par. 59.

<sup>12</sup> For the sake of completeness, it ought to be added that the Norwegian government reacted by eliminating completely the possibility for undertakings in which Norwegian public entities do not own at least two-thirds of the shares to obtain concessions for acquisition of hydro-power resources.

<sup>13</sup> Joined cases E-9/07 and E-10/07 *L’Oréal* [2008] EFTA Court Report 258, par. 29.

<sup>14</sup> In Case E-2/97 *Maglite* [1997] EFTA Court Report 129, the EFTA Court opted for an interpretation of Art. 7(1) of the Trademark Directive which allowed for so-called international

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exhaustion of trademarks. Shortly thereafter, however, the CJEU opted for mandatory EEA-wide exhaustion in Case C-355/96 *Silhouette*, ECLI:EU:C:1998:374 and then upheld that interpretation in Case C-173/98 *Sebago*, ECLI:EU:C:1999:347 (which concerned goods originating from outside the EEA).

<sup>15</sup> *L'Oréal*, par. s 24–25. Whereas the EFTA Court attached particular importance to considerations relating to free trade and competition in the interest of consumers, the CJEU emphasised the overall objective of facilitating the free movement of goods and services and in that regard the Directive's objective of ensuring the same protection for registered trademarks within the whole of the internal market.

<sup>16</sup> See the EFTA Court's annual report for 2013, pp. 1035 ff. The Report is available at [www.eftacourt.int](http://www.eftacourt.int), last accessed 18 December 2014.

<sup>17</sup> Case E-3/02 *Paranova* [2003] EFTA Court Report 101.

<sup>18</sup> Case E-2/12, *HOB-vín* [2012] EFTA Court Report 1092, par. 120 and Case E-7/12 *DB Schenker v EFTA Surveillance Authority* [2013] EFTA Court Report 356, par. 120.

<sup>19</sup> For Icelandic courts see Hannesson (2012), for Norwegian courts see Fredriksen (2012), for Liechtenstein courts see Batliner (2004).

<sup>20</sup> Rt. 1997 p. 1954 *Eidesund*, at 1960.

<sup>21</sup> Rt. 1997 p. 1965 *Løten*, at 1970.

<sup>22</sup> Rt. 2002 p. 391 *Jo-Bolaget* (often referred to in Norway as the '*God Morgon*'-case), at 395–396.

<sup>23</sup> Case C-183/00 *Sánchez*, ECLI:EU:C:2002:255.

<sup>24</sup> Rt. 2004 p. 122, par. 31.

<sup>25</sup> Rt. 2006 p. 1473 *Vesta Forsikring* (often referred to in Norway as the *lifebuoy* case), overruling Rt. 1998 p. 1809 *BUD*. In the earlier decision, the Supreme Court had held that mere knowledge of existing use of a similar mark by another meant that the trade mark could not be



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registered, whereas the Court in the 2006 case clarified that registration may only be refused if the applicant was acting in bad faith at the date of the application.

<sup>26</sup> Rt. 2000 p. 1811 *Finanger (No 1)*, at p. 1825 and Rt. 2010 p. 1500 *Edquist*, par. 113.

<sup>27</sup> Rt. 2013 p. 258 *STX*. For a recent comment in the English language, cf. Barnard (2014).

<sup>28</sup> Case E- 2/11, *STX Norway Offshore* [2012] EFTA Court Report 4.

<sup>29</sup> Rt. 2010 p. 202, par. 56 and Rt. 2011 p. 609, par. 72.

<sup>30</sup> Rt. 2010 p. 944, staying the proceedings in order to await the outcome of Case C-447/09 *Prigge*, ECLI:EU:C:2011:573.

<sup>31</sup> In its final judgment (Rt. 2012 p. 291), the Supreme Court closely followed the CJEU's findings in *Prigge*.

<sup>32</sup> See the Opinion of Advocate General Wahl in the pending Case C-396/13 *Sähköalojen ammattiliitto*, ECLI:EU:C:2014:2236.

<sup>33</sup> As the EFTA Court's president did in a remarkable onslaught in the wake of the Supreme Court's judgment in the *STX* case, see Baudenbacher (2013).

<sup>34</sup> See the Statute of the CJEU Art. 23 (3) (observations in preliminary reference cases) and Art. 40 (3) (right to intervene in certain other types of cases).

<sup>35</sup> See the orders of the CJEU's president in Case C-542/09 *Commission v Netherlands* and in Case C-493/09 *Commission v Portugal*.

<sup>36</sup> Of course, the EU Council can force a reversal of this practice upon the CJEU through an amendment of the CJEU's Statute, but it is to be doubted if the EU Member States will take such action just for the benefit of the three small EFTA States (in particular because the decision of the CJEU president is to be seen as part of the Court's efforts to handle its ever increasing workload).

<sup>37</sup> Source: The CJEU's InfoCuria database (<http://curia.europa.eu/juris/>).

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<sup>38</sup> It is thus hardly surprising that the ‘judicial dialogue’ with the CJEU (and its Advocate Generals) is a favourite topic for the EFTA Court’s president, see, eg, Baudenbacher (2008).

<sup>39</sup> Compare Bekkedal (2008) with Baudenbacher (2008).

<sup>40</sup> See Press Release 11/11 of 8 December 2011 *An Extended EFTA Court? The EFTA Court proposes amendments to the Surveillance and Court Agreement*. For unknown reasons, the proposal is no longer available at the EFTA Court’s homepage, but it may be obtained from the Court upon request to the Registrar. The response from the Norwegian government came in Parliament White Paper no. 5 (2012–2013: 22–24): ‘Thus far, the Government has not seen a need to make amendments to the institutional setup of the EFTA Court’.

<sup>41</sup> Cf. Cremona (1994: 524): ‘the compromises reached are unlikely to prove satisfactory’.

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