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## The Genesis of EEA Law and the Principles of Primacy and Direct Effect

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# The Genesis of EEA Law and the Principles of Primacy and Direct Effect

Walter van Gerven

## **Abstract**

The subject of this comment is the Genesis of the European Economic Area Agreement. The author reflects on the question of whether two basic principles, the principles of primacy and direct effect, which have played an important role in the making of European Community law, are also present in the EEA law.

## ARTICLES

# THE GENESIS OF EEA LAW AND THE PRINCIPLES OF PRIMACY AND DIRECT EFFECT

*by Walter van Gerven\**

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### *INTRODUCTION*

The Genesis of the European Economic Area ("EEA") Agreement (the "Agreement") was the subject assigned to me for this introductory lecture. I changed the title into "The Genesis of EEA Law and the Principles of Primacy and Direct Effect." Indeed, instead of reporting on what happened in the past, why and how the Agreement was concluded,<sup>1</sup> I would rather reflect on the question of whether two basic principles, the principles of primacy and direct effect, which have played an important role in the making of European Community ("EC") law, are also present in EEA law. If that is the case, they may play a similar role in the development of EEA law. Before examining this question, I will, however, first recall the scope and nature of the Agreement and the legislative and judicial mechanisms put into place to preserve the homogeneity of EEA and EC law.

Let me make one preliminary remark. EEA law may be (or may have become) less important in itself, partly because of the Swiss refusal to ratify the Agreement at the end of 1992, but even more so because it was known, from the outset, that many European Free Trade Area ("EFTA") countries wished to become full members of the European Community as soon as possible. Nevertheless, it remains worthwhile to analyze EEA law, and examine the role that the principles of primacy and direct effect may fulfil in its development. In particular, the EEA legal system may operate as a model for the Community in later negotiations with other countries, especially with Eastern European countries, which will not be in a position for many years to come, to adhere to the Community as full members, but may like to be associated with the European Community within a multilateral and institutionalized framework.

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1. See Mathias-Charles Krafft, *Le système institutionnel de l'EEE*, 3 *EUR. J. INT'L L.* 285 (1992) (setting forth why and how Agreement was concluded).

## I. SCOPE, CONTENT AND NATURE OF THE EEA AGREEMENT

It is difficult to formulate more accurately the significance, the substantive scope and the structure and content of the EEA Agreement than Sven Norberg, director of Legal Affairs of the EFTA Secretariat, has done in articles published in the *European Business Law Review* of July 1992<sup>2</sup> and in the *Common Market Law Review* of December 1992.<sup>3</sup> Therefore, I am taking the liberty of starting my contribution with three extracts from the latter article (the footnotes are my own):

On 2 May 1992 in Oporto, Ministers from the nineteen EC and EFTA Member States and the EC Commission signed the Agreement on a European Economic Area (EEA).<sup>4</sup> On the same day the Ministers from the seven EFTA States also signed the two agreements on the Establishment of a Surveillance Authority and a Court of Justice (the ESA-EFTA Court Agreement) and on a Standing Committee of the EFTA States, through which the EFTA States create among themselves the necessary institutions and structures required by the EEA. Thereby a successful end was put to three years of hard work, consisting of one year of preparatory work and almost two years of formal negotiations. These negotiations, which have been the largest carried out by any of the twenty-one Contracting Parties, have involved directly and indirectly several thousand people. The signed copy of the EEA Agreement contains in its thirteen languages some 15,000 pages and has a weight of about 100 kgs.<sup>5</sup>

As to the substantive scope of the Agreement, this may, in

2. Sven Norberg, *The European Economic Area: The Legal Answers to a Dynamic and Homogeneous EEA*, 3 *EUR. BUS. L. REV.* 195-200 (1992).

3. Sven Norberg, *The Agreement on a European Economic Area*, 29 *COMMON MKT. L. REV.* 1171-98 (1992).

4. See European Economic Area Agreement, [1992] 1 *C.M.L.R.* 921 (hereinafter EEA Agreement). Apart from the 12 EC States and the 7 EFTA States, also the European Economic Community and the European Coal and Steel Community have signed the Agreement. *Id.* As to the meaning of the term "Contracting Parties" as far as the Community and the EC Member States are concerned, see Article 2(c): "the meaning attributed to this expression in each case is to be deduced from the relevant provisions of this Agreement and from the respective competences of the Community and the EC Member States as they follow from the (EEC and ECSC) [Treaties]. . . ." EEA Agreement, *supra*, [1992] 1 *C.M.L.R.* at 929, art. 2(c).

5. Norberg, *supra* note 3, at 1171.

general terms, be described as covering all EEA-relevant primary and secondary EC rules regarding the four freedoms of the EC internal market and, in addition a wide range of accompanying horizontal and flanking policies, i.e. fields such as environment, research and development, social policy, consumer protection, education, statistics where the EC has or is developing common rules, policies or programmes. The main substantive difference between the scope of the EEA and that of membership in the EC refers to the absence in the EEA of four common EC policies. Thus, the EEA has no common external trade policy; it is a fundamentally improved free trade area but not a customs union, which means that border controls, although simplified, will not be abolished. Further, although there is improved liberalisation of trade in agriculture and fish there are no common policies in those two fields. Finally, there is no policy as to taxation.<sup>6</sup>

As to structure and content, the main part of the EEA Agreement, 129 Articles, is very close to corresponding provisions in the Treaty of Rome . . . . [It] is followed by 49 protocols and 22 annexes to the Agreement. While the protocols contain rules on more particular questions, such as the origin of goods, customs matters, fish or transitional periods, the annexes provide for the integration into the Agreement of around 1,600 acts of secondary EC legislation, which have been identified as relevant so-called '*acquis communautaire*' [legislation that EFTA States must take as they find]. This is done through the technique of referring to the publication of these legal acts in the OFFICIAL JOURNAL OF THE COMMUNITIES, which is published in the nine EC languages . . . .<sup>7</sup>

The EEA Agreement is the successor to the free trade agreements, which the EFTA countries had concluded on a bilateral basis with the European Communities.<sup>8</sup> Such agreements provided basically for the elimination of custom duties and equivalent taxes; the elimination of quantitative restrictions on imports and exports of goods, and of all discriminating measures having an equivalent effect (with derogations

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6. *Id.*

7. *Id.* The Final Act of the Agreement contains moreover joint and unilateral declarations. EEA Agreement, *supra* note 4 [1992] 1 C.M.L.R. 921.

8. See J. Steenbergen, *EG/EFTA en de Europese economische ruimte*, 1 SOCIAL ECONOMISCHE WETGEVING 16-17 (Jan. 1991).

similar to those contained in Article 36 EEC);<sup>9</sup> the prohibition of discriminating internal taxes; the free movement of payments; the institution of a system of competition by means of rules for undertakings similar to Articles 85(1) and 86 and of rules relating to “distorting” state aid; finally, a reference to dumping rules incorporated in the General Agreement on Tariffs and Trade (“GATT”). Such agreements read in conjunction with the Treaty Establishing the European Economic Community (the “EEC Treaty”) and EFTA treaty thus provided for a free trade area for goods (except agricultural products and food) between the EC and EFTA countries. These agreements did not contain provisions concerning free movement of persons, services, capital. Moreover, the agreements related only to goods of origin from the association country, but failed to provide for a *Dassonville*<sup>10</sup> or *Cassis de Dijon*<sup>11</sup> “type” of ruling (according to which non-discriminatory free trade restrictions cannot, except for imperative reasons, be opposed to goods that have been legally manufactured in the other country). Finally, it was not at all clear to what extent the provisions of these agreements were meant to have direct effect in favour of individuals.<sup>12</sup>

The multilateral EEA Agreement<sup>13</sup> goes far beyond the existing bilateral Association agreements, both in scope and

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9. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958), amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter EEC Treaty]. Article 36 of the EEC Treaty contains derogations from the article 30 prohibition of “restrictions on imports, exports or goods in transit” if “justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.” EEC Treaty, *supra*, art. 36, 298 U.N.T.S. at 29.

10. *Procureur du Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 833, [1975] 2 C.M.L.R. 436.

11. *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case 120/1978, [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494.

12. The EC Court of Justice has made clear in caselaw that Association agreements can have direct effect within the EC. See *Office National de L'emploi v. Kziber*, Case C-18/90, [1991] E.C.R. I-199, [1993] C.M.L.R. —; see also N. March Hunnings, *Enforceability of the EEC-EFTA Free Trade Agreements*, 2 EUR. L. REV. 163 (1977); M. Waelbroeck, *Enforceability of the EEC-EFTA Free Trade Agreements: A Reply*, 3 EUR. L. REV. 27 (1978).

13. See EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. 921.

objective.<sup>14</sup> As already indicated, its substantive scope covers all primary and secondary EC-rules regarding the four freedoms of the EC internal market, but only with regards to those goods originating from one of the EC or EFTA Member States. Therefore, goods from third countries that have been put in free circulation in an EC or EFTA State are not covered. The scope of the EEA Agreement encompasses the *Dassonville* or *Cassis de Dijon* ruling for the free movement of goods and similar rulings for the freedoms of persons and services.<sup>15</sup> It contains provisions identical to Articles 85, (1) and (3), 86, 90, 92-93 of the EEC Treaty in respect of competition and State aid.<sup>16</sup> The objective of the Agreement is characterized in the Preamble as that of establishing a dynamic and homogeneous European Economic Area. In other words the EEA Agreement should, as opposed to the bilateral association agreements, be interpreted in a way that allows a dynamic development of the Agreement. Furthermore, it should be interpreted and applied in such a way that it should be homogeneous to the corresponding EC rules and their application, not only when the Agreement becomes effective but also, through the application of special devices discussed below, during the period to come.

Notwithstanding these basic differences between the former association agreements and the EEA, the latter obviously falls short of full membership of the EC. The most conspicuous "missing link" is the absence in the EEA of four common EC policies: no common external trade policy or common customs tariff vis-à-vis third countries; no customs union without border controls; no common policy (but only improved trade liberalisation) in agriculture and fish and no harmonisation of direct or indirect taxes.<sup>17</sup> Moreover, in the fields of environ-

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14. See Pierre Pescatore, *Synthèse et note documentaire*, 2 L'AVENIR DU LIBRE-ÉCHANGE EN EUROPE: VERS UN ESPACE ECONOMIQUE EUROPÉEN? COLLECTION DE DROIT EUROPÉEN 482-84 (1990) (concerning former bilateral Association agreements and more particularly, limited legal effect that has been attached to them in internal legal order of certain EFTA countries).

15. See e.g., *Dassonville*, [1974] E.C.R. 883, [1975] 2 C.M.L.R. 436; *Cassis de Dijon*, [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494.

16. See P. Lippens de Cerf and T. Aractingi, *Présentation générale de l'Accord sur l'Espace Economique Européen (EEE)*, 4 REVUE DES AFFAIRES EUROPÉENNES 23, 26-32 (1992).

17. The EFTA countries do not adhere to the Maastricht objectives, such as the creation of a common currency, the economic and monetary union or the mechanism regarding foreign policy and common defense, either. See The Treaty on European



ment, research and development, social policy, consumer protection and education, there are only so-called horizontal and flanking policies, whereas the EC strives for common rules, policies or programmes in these fields.<sup>18</sup>

Apart from these differences in scope, there are also, according to the Court of Justice, in its Opinion 1/91 of December 14, 1991,<sup>19</sup> important differences between the objectives of the provisions of the Agreement and those of Community law. In the words of the Court:

- 15 With regard to the comparison of the objectives of the provisions of the agreement and those of Community law, it must be observed that the agreement is concerned with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties.
- 16 In contrast, as far as the Community is concerned, the rules on free trade and competition, which the agreement seeks to extend to the whole territory of the Contracting Parties, have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement.
- 17 It follows *inter alia* from Articles 2, 8a and 102a of the EEC Treaty that that treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union. Article 1 of the Single European Act makes it clear moreover that the objective of all the Community treaties is to contribute together to making concrete progress towards European unity.
- 18 It follows from the foregoing that the provisions of the EEC Treaty on free movement and competition, far from being an end in themselves, are only means for attaining those objectives.<sup>20</sup>

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Union [hereinafter TEU], in [1992] 1 C.M.L.R. 719, art. G, reprinted in [1992] 1 C.M.L.R. 573.

18. See Lippens de Cerf & Aractingi, *supra* note 16, at 25.

19. Court of Justice, Opinion 1/91, O.J. C 110/1 (1992) [hereinafter Opinion 1/91].

20. Opinion 1/91, O.J. C 110/1, at 10-11. (1992).

## II. LEGISLATIVE AND JUDICIAL MECHANISMS TO PRESERVE HOMOGENEITY BETWEEN EC AND (QUASI-)IDENTICAL EEA RULES

In order to guarantee individuals and economic operators in all countries of the EEA that they can operate under legal rules that are sufficiently uniform, and to preserve homogeneity between EC and EEA laws, complicated devices had to be put into place to coordinate legislative and judicial decision making processes between the Contracting Parties.<sup>21</sup> In the past, this was achieved through the "Agreement" itself,<sup>22</sup> which contains, in substance, identical rules to the corresponding provisions of the EEC and European Coal and Steel Community (the "ECSC") Treaties and of certain important acts of secondary EC law. In respect of these provisions, Article 6 EEA provides that the EEA rules "shall, in their implementation and application, 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."<sup>23</sup> In the future, however, the EFTA countries did not wish to subject themselves either to a legislative process in which they did not participate or to the future case law of the EC Court of Justice, which they would not be able to co-determine. Therefore, in order to preserve homogeneity and to respect new provisions and their subsequent interpretation, legislative and judicial techniques had to be invented, which I will summarize below.

### A. Legislative Homogeneity

At the legislative level, homogeneity is achieved, on the one hand, by involving experts from the EFTA-countries in the preparatory work within the EC on new EC rules and applications, and, on the other hand, by letting the legislative process within the EEA organs (in particular the EEA Joint Commit-

21. See G.J. Frisch and C.A. Meyer, *Le Traité sur l'Espace économique européen: cadre juridique d'une "Europe du deuxième cercle"*, 360 REV. MARCHÉ COMMUN. 601-02 (1992) (presenting overview of how this process will function).

22. See EEA Agreement, *supra* note 4, art. 2(a), [1992] 1 C.M.L.R. at 929. "The term "Agreement" means the main Agreement, its Protocols and Annexes as well as the acts referred to therein." *Id.*

23. *Id.* art. 6. [1992] 1 C.M.L.R. at 930. The EEA Agreement was signed on May 2, 1992.

tee)<sup>24</sup> coincide as much as possible with the legislative process within the EC-organs.

To that effect, Article 99 of the EEA Agreement provides that "as soon as new legislation is being drawn up by the EC Commission in a field which is governed by this Agreement, the EC Commission shall (not only as said above) informally seek advice from experts of the EFTA States . . . ." <sup>25</sup> but shall also "when transmitting its proposal to the Council of the European Communities . . . transmit copies thereof to the EFTA States. At the request of one of the Contracting Parties, a preliminary exchange of views takes place in the EEA Joint Committee."<sup>26</sup> All this as well as a "continuous information and consultation process"<sup>27</sup> should facilitate, "at the end of the process, the decision-taking in the EEA Joint Committee."<sup>28</sup>

Article 102 of the Agreement then deals, as provided for in Article 98, with the main legislative power of the EEA Joint Committee, which is to approve amendments of an Annex to the Agreement "as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement."<sup>29</sup> If the Committee is unable to reach the consensus needed to take a decision, the relevant part of the Annex to be amended will eventually be provisionally suspended, a situation which the Joint Committee will try to terminate as soon as possible.<sup>30</sup>

According to Article 97, "the Agreement does not prejudice the right for each Contracting Party [i.e. each EFTA-State but also, depending on the distribution of legislative powers within the EC, the Community and/or each EC-State] to amend, without prejudice to the principle of non-discrimi-

24. *See id.* art. 92, ¶ 1, [1992] 1 C.M.L.R. at 954-55. This Committee shall ensure the effective implementation and operation of the Agreement. Decisions are taken by the Joint Committee "by agreement between the Community, on the one hand, and the EFTA States speaking with one voice, on the other". *Id.*, [1992] 1 C.M.L.R. at 954-55, art. 93 ¶ 2.

25. *Id.*, [1992] 1 C.M.L.R. at 957, art. 99 ¶ 1.

26. *Id.*, [1992] 1 C.M.L.R. at 957, art. 99 ¶ 2.

27. *Id.*, [1992] 1 C.M.L.R. at 957, art. 99 ¶ 3.

28. *Id.*, [1992] 1 C.M.L.R. at 957, art. 99 ¶ 4.

29. *Id.*, [1992] 1 C.M.L.R. at 958, art. 102 ¶ 1.

30. *Id.*, [1992] 1 C.M.L.R. at 958, art. 102 ¶ 4.

nation and after having informed the other Contracting Parties, its internal legislation in the areas covered by this Agreement."<sup>31</sup> However, the same Article goes on to say, that such right is subject to either a conclusion of the EEA Joint Committee that the legislation as amended does not affect the proper functioning of this Agreement; or to the completion of the procedures referred to in Article 98.<sup>32</sup>

As indicated above Article 98 gives the right to the Joint Committee to amend the Annexes to the Agreement, which include approximately 1,600 acts of secondary EC legislation, and a large part of the Protocols, in accordance with the aforementioned Articles 99 and 102, amongst other articles, of the Agreement.<sup>33</sup> Decisions thus taken by the Joint Committee within its sphere of competence shall bind the Contracting Parties upon their entry into force,<sup>34</sup> unless otherwise provided in the decision and subject to the provisions of Article 103 where an Agreement of the Committee can only be binding "after the fulfilment of constitutional requirements."<sup>35</sup>

It appears from the foregoing that the Joint Committee has important, albeit limited powers, namely to amend the Annexes of the Agreement that contain the bulk of secondary EC legislation relating to the subjects covered by the Agreement.

### B. *Judicial Homogeneity*

Apart from the legislative mechanism described above, to preserve the future homogeneity between EC and EEA rules, the EEA Agreement also contains a judicial mechanism to assure the homogeneity in the future interpretation of (old and new) identical EC and EEA rules. This mechanism has been the object of the Court of Justice Opinions 1/91 of December 14, 1991<sup>36</sup> and 1/92 of April 10, 1992,<sup>37</sup> rendered pursuant to

31. *Id.*, [1992] 1 C.M.L.R. at 956-57, art. 97.

32. *Id.*

33. *Id.*, [1992] 1 C.M.L.R. at 957, art. 98; *see id.*, [1992] 1 C.M.L.R. at 954, art. 89 ¶ 1 (denoting limited and for main part purely "political" powers of EEA Council, "[i]t shall, in particular, be responsible for giving the political impetus in the implementation of the EEA Agreement and laying down the general guidelines for the EEA Joint Committee.").

34. *Id.*, [1992] 1 C.M.L.R. at 959, art. 104.

35. *Id.*, [1992] 1 C.M.L.R. at 957, art. 98.

36. Opinion 1/91, O.J. C 110/1 (1992).

37. Court of Justice, Opinion 1/92, O.J. C 136/1 (1992).

Article 228, section 1, second paragraph, of the EEC Treaty.<sup>38</sup>

At first, it was envisaged to set up an independent EEA Court of Justice composed of judges from the EC Court and judges from the EFTA States, functionally integrated with the EC Court of Justice. In its Opinion of December 14, 1991, the EC Court considered this structure to be incompatible with the Community legal order, since the Court of Justice would, in accordance with its own case law, be bound by future decisions of the EEA Court rendered in respect of a vast number of rules that are identical to EC law.<sup>39</sup> The EC Court would therefore no longer be completely independent in interpreting these EC rules.<sup>40</sup> The fact that the majority of EEA Court judges would be Community judges would not, according to the Court of Justice, reduce the risk of dependency.<sup>41</sup> On the contrary, one may wonder if these judges would not become slightly "schizophrenic" trying to decide questions of interpretation of identical rules that, considering the different objectives of the Community treaties and of the EEA, might have different meanings.<sup>42</sup>

In its second Opinion 1/92, of April 10, 1992, the Court of Justice examined the changes that resulted from the EC and EFTA negotiations pursuant to the first Opinion of the Court of Justice and were subsequently proposed for insertion in the draft EEA Agreement.<sup>43</sup> In these changes, the idea of an independent EEA Court has been abandoned. Instead, an EFTA Court is established<sup>44</sup> that will have competence to decide dis-

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38. EEC Treaty, *supra* note 9, art. 228 § 1 ¶ 2, 298 U.N.T.S. at 90. As requested by the EC Commission, the Court's legality control has been limited to the provisions of the proposed EEA which concern the judicial mechanism. Jean Boulouis, *Les avis de la Cour de justice des Communautés sur la compatibilité avec le Traité CEE du projet d'accord créant l'Espace économique européen*, 3 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 458, 462 (1992). In addition to those provisions the Court also examined, in its second Opinion, whether the articles on competition were compatible with Community law. Opinion 1/92, O.J. C 136/1, at 11, ¶¶ 38-41 (1992). Other articles were not examined at all. *Id.* at 8, ¶ 1.

39. Opinion 1/91, O.J. C 110/1 at 11-13, ¶¶ 30-46 (1992).

40. *Id.*

41. *Id.* at 13, ¶¶ 47-53.

42. *Id.*

43. Opinion 1/92, O.J. C 136/1 (1992).

44. See "Declaration by the Governments of the EFTA States Concerning a Court of First Instance," reprinted in 15 COMMERCIAL LAWS OF EUROPE pt. 10, at 292 (1992). In the Declaration, which is annexed to the Final Act adopting the EEA

putes between the EFTA Surveillance Authority<sup>45</sup> and an EFTA State as well as between EFTA States, and to review the legality of decisions taken by that Authority in the field of competition, including State aid.<sup>46</sup> According to Article 34 of the EFTA Surveillance Agreement, the EFTA Court shall moreover have jurisdiction to give, at the request of a national court in an EFTA State, advisory opinions on the interpretation of the EEA Agreement.<sup>47</sup>

In order to prevent that the interpretation by the EFTA Court of an EEA rule (which is identical in substance to an EC rule) differs from the interpretation given by the EC Court to the identical EC rule, Article 105 paragraph 2 of the EEA Agreement now provides that the EEA Joint Committee shall keep under constant review the development of the case law of both Courts.<sup>48</sup> If a difference comes to the attention of, or is brought before, the EEA Joint Committee, the Committee will try to resolve it within two months.<sup>49</sup> If the EEA Joint Committee does not succeed within that period to preserve the homogeneous interpretation of the EEA Agreement, the procedure of Article 111 EEA may be applied.<sup>50</sup> In the course of that pro-

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Agreement, it is said that "[t]he EFTA States will establish a court of first instance for cases in the field of competition, should the need arise." *Id.*

45. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 961, art. 108 ¶ 1. The EFTA Surveillance Authority (which is the counterpart for EFTA of the EC Commission) will be an independent organ with the specific task of ensuring that the provisions concerning public procurement, competition and state aids are respected in the EFTA Member States. *See also* A. Toledano Laredo, *The EEA Agreement: An overall view*, 92 COMMON MKT. L. REV. 1199, 1212 (1992).

46. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 961, art. 108 ¶ 2. In Articles 31 et seq. of the EFTA Surveillance Agreement the jurisdiction of the EFTA Court is further specified. EFTA Surveillance Agreement, *reprinted in* 15 COMMERCIAL LAWS OF EUROPE pt. 10, at 300, art. 31 (1992) [hereinafter EFTA Surv. Agreement]. Of particular interest here are Article 32 of that Agreement, that gives the Court jurisdiction concerning "disputes between two or more EFTA States regarding the interpretation or application of the EEA Agreement, the Agreement on a Standing Committee of the EFTA States or the present Agreement", and Article 34 as referred to in the text. *Id.*, *reprinted in* 15 COMMERCIAL LAWS OF EUROPE pt. 10, at 300, arts. 32 & 34 (1992).

47. EFTA Surv. Agreement, *reprinted in* 15 COMMERCIAL LAWS OF EUROPE pt. 10, at 300, art. 34 (1992). *See* Leif Sevón, *The EEA Judicial System and the Supreme Courts of the EFTA States*, 3 EUR. J. INT'L L. 329 (1992) (discussing judicial competences following EEA Agreement and EFTA Surveillance Agreement).

48. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 960, art. 105 ¶ 2.

49. *Id.*, [1992] 1 C.M.L.R. at 960, art. 105.

50. *Id.*, [1992] 1 C.M.L.R. at 963, art. 105 ¶ 3.

cedure, if no solution is found, the Contracting Parties to the dispute may agree to request the EC Court of Justice to give a ruling on the interpretation of the relevant rules.<sup>51</sup> In the absence of such an agreement, a Contracting Party may take appropriate measures to remedy possible imbalances.<sup>52</sup> In addition to all the preceding, Article 107 of the EEA Agreement now provides, and Protocol 34 further specifies, that EFTA countries may allow their national courts to ask the EC Court to decide by way of a binding preliminary ruling on the interpretation of an EEA rule that is identical in substance to a Community law rule.<sup>53</sup>

In its second Opinion the Court of Justice found the newly agreed judicial mechanism to be compatible with Community law.<sup>54</sup> In order to come to that conclusion it took into account Protocol 48 by virtue of which decisions taken by the EEA Joint Committee under Articles 105 and 111 of the EEA Agreement may in no event affect the case law of the EC Court of Justice.<sup>55</sup> Also, the possibility that the Court of Justice may be requested by an EFTA national court to give a preliminary ruling on the interpretation of an EEA rule was held to be acceptable.<sup>56</sup>

### III. THE EC COURT'S HOLDING AS TO PRIMACY AND DIRECT EFFECT OF EEA RULES

In its Opinion of December 14, 1991,<sup>57</sup> the Court of Justice, after having described the difference in objectives between the EEA and the EEC Treaty,<sup>58</sup> went on to say:

19 The context in which the objective of the agreement is

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51. *Id.*, [1992] 1 C.M.L.R. at 963, art. 111 ¶ 3.

52. *Id.*, [1992] 1 C.M.L.R. at 963.

53. *Id.*, [1992] 1 C.M.L.R. at 961, art. 107; EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. 921, Protocol 34, reprinted in 15 COMMERCIAL LAWS OF EUROPE pt. 10, at 290 (1992). It is unlikely that any of the EFTA States could avail itself of this possibility, since such possibility would require constitutional amendments, even in those EFTA States where seeking a merely advisory opinion would not require such an amendment. Sevón, *supra* note 47, at 337.

54. Opinion 1/92, O.J. C 136/1, at 10, ¶ 35 (1992).

55. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. 921, Protocol 48 (on file with the *Fordham International Law Journal*).

56. Opinion 1/92, O.J. C 136/1, at 11, ¶ 37 (1992).

57. Opinion 1/91, O.J. C 110/1 (1992).

58. Opinion 1/91, O.J. C 110/1, at 10-11, ¶¶ 13-18 (1992).

situated also differs from that in which the Community aims are pursued.

- 20 The EEA is to be established on the basis of an international treaty which, essentially, merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up.
- 21 In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (see, in particular, the Judgment in case 26/62 *Van Gend en Loos* [1963] ECR 1). The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.<sup>59</sup>

In this statement the EC Court indicates that the EEA Agreement does not effect any transfer of sovereign rights to the EEA institutions (which it qualifies as "inter-governmental" institutions) established under it, and assumes that the EEA, in contrast to the EEC Treaty, does not attach direct effect to any of its provisions (or of those included in its Annexes) and does not entail primacy over the law of the States. This statement should, indeed, be seen in conjunction with the Court's finding in paragraphs 27 and 28 of its Opinion 1/91, which read:

- 27 Secondly, although Article 6 of the agreement does not clearly specify whether it refers to the Court's case law as a whole, and in particular the case law on the direct effect and primacy of Community law, it appears from Protocol 35 to the agreement that, without recognizing the principles of direct effect and primacy which that case law necessarily entails, the Contracting Parties undertake merely to introduce into their respective legal

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59. Opinion 1/91, O.J. C 110/1, at 11 (1992).



orders a statutory provision to the effect that EEA rules are to prevail over contrary legislative provisions.

28 It follows that compliance with the case law of the Court of Justice, as laid down by Article 6 of the agreement, does not extend to essential elements of that case law which are irreconcilable with the characteristics of the agreement.<sup>60</sup>

Protocol 35 to which the EC Court of Justice refers in the above-cited paragraph 27, states in its preamble that

Whereas this Agreement aims at achieving a homogeneous European Economic Area, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the European Economic Area; and Whereas this consequently will have to be achieved through national procedures

and provides in its sole Article that

For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.<sup>61</sup>

I do not wish to doubt the correctness of the Court's conclusion as to the effect of Article 6 EEA in respect of primacy and direct effect of rules of EEA law, which are identical in substance to EC law, i.e. rules of EEA law as they exist at the time of signature of the Agreement (hereinafter "existing" EEA law).<sup>62</sup> As far as I know, all Contracting Parties, as it appears from Protocol 35, were of the opinion, and those present in the Court proceedings defended the opinion before the

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60. *Id.*

61. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. 921, Protocol 35, pmb1. (on file with the *Fordham International Law Journal*).

62. *But see* August Reinisch, *Zur unmittelbaren Anwendbarkeit von EWR-Recht*, 34 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG, INT. PRIVATRECHT UND EUROPARECHT, 11-30 (1993). Reinisch argues forcefully that all EEA law referred to in Article 2 (a) EEA, i.e. provisions of the main Agreement, its Protocols and Annexes as well as the acts referred to therein which are identical in substance to corresponding EEC and ECSC provisions may have direct effect (namely when the corresponding EC rule has such effect). *Id.* In contrast therewith, Reinisch can see no direct effect in what he calls secondary EEA law, by which he refers to legal rules which are newly created by the EEA-organs (i.e. the EEA Joint Committee) in accordance with the legislative mechanism described above in this article, i.e. of "existing" EEA rules. *Id.* In the present contribution I am only dealing with the primacy and direct effect of the first category of EEA rules, i.e. of "existing" EEA rules.

Court, that in the absence of a transfer of legislative powers to EEA institutions, the EEA was to be considered as an improved free trade agreement and, accordingly, that the principles of primacy and direct effect were not to be considered as an integral part of EEA law.<sup>63</sup> For the Court to contradict that *opinio communis* would have meant that it ignored the will and intentions of the Contracting Parties and would have put the negotiators in such an awkward position that the Court's Opinion might have jeopardized the signing of the Agreement.

The legal arguments behind the Court's reasoning are, as appears from the foregoing, essentially based on Protocol 35 from which the Court inferred that EEA law, contrary to the EEC Treaty to which no similar Protocol was annexed, cannot be understood to have primacy, on its own, over the internal legal orders of the Contracting Parties and likewise cannot be regarded to have direct effect in some of its provisions. The fact that the preliminary rulings procedure, through which national courts from EFTA countries may interrogate the EC Court, was at the time of Opinion 1/91, not conceived as a full-fledged Article 177 procedure resulting in a binding opinion, has certainly contributed to the Court's understanding that primacy and direct effect are not to be regarded as essential characteristics of the EEA legal order since it was left to the national courts of the EFTA countries to decide these issues, at their own discretion, without being bound by binding opinions of the EC Court.

Be that as it may, the Court's conclusion in respect of primacy and direct effect of "existing" identical EEA law<sup>64</sup> must not be extended beyond the limits of Protocol 35. This means, in other words, that the EC Court's narrow reading of Article 6 EEA, which does not extend to the characteristics of direct effect and primacy of Community law as these characteristics are "irreconcilable with the characteristics" of the EEA Agreement, should not be regarded as final but only as provisionally

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63. *But see* Reinisch, *supra* note 62, at n.163 & 169 (referring to opposing views emanating from EFTA negotiators).

64. In the present article I am only dealing with "existing," not "future," EEA rules. *See supra* note 62. As it appears from the reference in paragraphs 27 and 28 of the Court's Opinion 1/91 to Article 6 of the EEA Agreement, the Court's reasoning does not refer to future EEA rules either, although it would seem to apply, *a fortiori*, to such rules. Opinion 1/91, O.J. C 110/1, at 11 (1992), ¶¶ 27 & 28.

correct for the period of time that the EFTA States need to comply with the obligation they have assumed under Protocol 35.

To sustain this proposition, I would like to argue, first, that the scope of Article 6 EEA is broad enough to encompass case law relating to general principles, including primacy and direct effect, unless otherwise provided for, such as in Protocol 35, and then only to the extent, and for the period, following from such proviso. Second, the differences in objectives between EC and EEA law are not permitted and, if they were, are not of a nature to contradict the broad meaning of Article 6 EEA. Third, the legal reasoning that led the EC Court to recognize primacy and direct effect of Community law almost thirty years ago, is not contradicting, but on the contrary supporting, the broad meaning of Article 6 EEA.

Let me try to clarify each of these arguments.

#### *A. The Wording of Article 6 EEA Includes General Principles*

There is nothing in the wording of Article 6 of the EEA Agreement itself that excludes the interpretation that general principles, including the doctrines of direct effect and primacy as developed by the EC Court, are an integral part of EEA law. Article 6 provides that "provisions of this Agreement, in so far as they are identical in substance to corresponding [EC] rules . . . shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice. . . ." <sup>65</sup> To the extent that the past case law of the EC Court has recognized the direct effect and primacy of specific EC provisions (including directive provisions), such recognition is an inseparable part of the Court's interpretation of those provisions. If that is so, it cannot be reasonably argued that said principles do not apply in the case of other specific provisions that present the same characteristics but concerning which there is no case law, yet, of the EC Court.

Article 7 of the EEA Agreement, which provides that EEA acts corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties whereas acts corresponding to an EEC directive shall leave to

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65. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 930, art. 6.

the authorities of the Contracting Parties the choice of form and method of implementation, does not stand in the way of that conclusion.<sup>66</sup> In so far as Article 7 refers to the situation in countries in which the dualistic view of international law prevails, it should not prevent the recognition of primacy and direct effect once the EEA Agreement has been incorporated, as a whole body of law, in the internal legal order of such countries.<sup>67</sup> As of that moment, the EC Court's case law recognizing primacy and direct effect of Community law must apply unhampered with respect to all identical EEA rules, existing when the EEA is signed.

If Article 6 of the EEA Agreement were to be interpreted as not referring to the doctrine of primacy and direct effect, the same interpretation should then prevail in respect of other general principles of EC law. Let me quote, in this connection, an article by Leif Sevón, Judge in the Supreme Court of Finland:

The duty of national courts - and the Contracting Parties - to adopt the general principles of Community law is less clear. These principles emerge frequently from cases on matters outside the scope of the EEA Agreement. In the light of the different objectives of the Treaty of Rome and the EEA Agreement so eloquently elaborated by ECJ, one could therefore conclude that these principles are not incorporated in the EEA Agreement. But such a view cannot be reconciled with the objective of homogeneity so strongly stressed in the EEA Agreement. In fact, the rejection of the general principles for the purpose of the EEA Agreement implies a questioning of the viability of the Agreement as a whole: why adopt over 13,000 pages of Community legislation if one does not have the ambition to ensure a uniform interpretation and application of the EEA Agreement and the corresponding parts of Community Law?<sup>68</sup>

### Stripping Community law of its general principles

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66. *Id.*, [1992] 1 C.M.L.R. at 930-31, art. 7; *see also* Reinisch, *supra* note 62, at 20-21 (analyzing EEA art. 7 in relation with existing EEA legal rules).

67. *See* P.J.G. KAPTEYN AND P. VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 40 (L.W. Gormley ed. 1988) (discussing significance of monistic and dualistic views under general international *vis-à-vis* Community law). *See also* M. Waelbroeck, *supra* note 12 (setting forth observations indicating relativity of distinction between monistic and dualistic views.)

68. *See* Sevón, *supra* note 47, at 338-39.

amounts to taking its heart. An EEA legal system that would not encompass such general principles, would therefore be a legal system that is not at all homogeneous with Community law. This is undoubtedly true for those general principles that have been developed by the EC Court with respect to articles of the EEC Treaty and implementing regulations and directives that confer rights upon individuals in relation with the four freedoms of Community law, which are also the heart of EEA law. Direct effect and primacy are amongst those general principles and have initiated other general principles (e.g., interpretation of national law in conformity with Community law and state liability for violations of Community law), which ensure individuals full judicial protection of the rights derived from fundamental rules of Community law. That such full judicial protection on behalf of individuals is also part of EEA law is confirmed by paragraph 8 of the preamble to the EEA Agreement, which refers to "the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights."<sup>69</sup> This is an unmistakable reference to direct effect and primacy as well.

It is thus only to the limited extent that Protocol 35 deviates from the normal scope of application of Article 6 EEA,<sup>70</sup> that the principle of primacy may be held to be no part of EEA law and consequently, in so far as it goes hand in hand with the first, that the principle of direct effect may not be used to put aside conflicting national legislation. Accordingly, these principles will enter into operation by virtue of Article 6 of the EEA Agreement and thus as a matter of EEA law, as soon as the EFTA States have taken the steps required by Protocol 35 to make EEA law prevail or, if they (or some of them) have not taken these steps, at the expiration of a reasonable period, after the entry into force of the EEA Agreement, that would have permitted them to do so. Indeed, the failure of the EFTA States to take the appropriate measures in order to make EEA

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69. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 927-29, pmb1.

70. Protocols shall form, according to Article 119 of the EEA Agreement, an integral part of the Agreement. *See id.* [1992] 1 C.M.L.R. at 965, art. 119. Article 235 EEC Treaty contains the same provision. *See* EEC Treaty, *supra* note 9, art. 235, 298 U.N.T.S. at 91 (1958); *see also* Vienna Convention on the Law of Treaties, May 23, 1969, art. 2 ¶ 1(a), 1155 U.N.T.S. at 333 (1980), *reprinted in* 8 I.L.M. at 680-81 (1969).

rules prevail over their internal law, should give rise to an action brought by the EFTA Surveillance Authority before the EFTA Court for failure "to fulfill an obligation under the EEA Agreement or of this Agreement."<sup>71</sup> Such failure is also a violation of Article 3 of the EEA Agreement, which requires the Contracting Parties to "take all appropriate measures . . . to ensure fulfilment [sic] of the obligations arising out of this Agreement."<sup>72</sup> By virtue of Article 6 EEA, Article 3 EEA must be interpreted in conformity with the case law of the EC Court concerning Article 5 EEC according to which national courts also are required to take such appropriate measures, within their sphere of competence.<sup>73</sup> Therefore, after the expiration of a reasonable period of time allowing EFTA states to comply with the requirement of Protocol 35, national courts will, at the request of an individual, have to put aside national legislation that is contrary to a rule of EEA law that is identical to an EC rule having direct effect.<sup>74</sup> Failure to do so may then give rise to state liability, as against individuals, under the conditions provided for in the *Francovich* Judgment of the EC Court.<sup>75</sup>

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71. EFTA Surv. Agreement, *reprinted in* 15 COMMERCIAL LAWS OF EUROPE pt. 10, at 299-300, art. 31 (1992).

72. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 930, art. 3. Article 3 of the EEA Agreement corresponds to Article 5 of the EEC Treaty. *See* EEC Treaty, *supra* note 9, art. 5, 298 U.N.T.S. at 17. The obligations arising out of the EEA Agreement include, according to Article 2(a) of the Agreement, obligations arising out of Protocols annexed to the Agreement. *See* EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 929, art. 2(a).

73. *Id.*, [1992] 1 C.M.L.R. at 930, art. 6; *see also* Sevón, *supra* note 47, at 338.

74. This is even so, according to EC law made applicable by virtue of Article 6 EEA, when a constitutional rule would prohibit a court of law to examine the compatibility of statutory provisions with EEA law. *But see* Olivier Jacot-Guillarmod, *Préambule, objectifs et principes (art. 1<sup>re</sup>-7 EEE)*, ACCORD EEE, COMMENTAIRES ET RÉFLEXIONS 60 (Jacot-Guillarmod ed. 1991).

75. *Francovich v. Italy*, Cases C-6, 9/90, [1991] E.C.R. I-5357, [1993] C.M.L.R. —. Some may challenge the view that the *Francovich* Judgment of 19 November 1991 is part of EEA law by virtue of Article 6 EEA, since it does not relate to a specific provision of EC law which has its counterpart in EEA law. *Id.*, [1991] E.C.R. I-5357, [1993] C.M.L.R. —, ¶¶ 31-37. I do not believe this to be correct. The *Francovich* liability is based on the requirement of judicial protection of rights which individuals derive from provisions of Community law and in particular from provisions regarding the four freedoms which are at the heart of EEA law. What is true, however, is that the *Francovich* Judgment is only specific, as to the conditions of application of such liability, in respect of violations of Community law consisting in the non-implementation of a directive. As to the liability of States for other violations of Community law, only the principle of liability, but not the conditions of ap-

B. *The Importance of Objectives and Essential Characteristics in the EC Court's Reasoning*

It follows from the preceding arguments that primacy and direct effect are, as a matter of principle, to be regarded as an integral part of EEA law by virtue of Article 6 EEA, and that, as soon as the Contracting Parties have undertaken measures to comply with the requirement of Protocol 35 or, if not, after the expiration of a reasonable period of compliance, such principles will become fully operational. Whatever the strength of these arguments, they seem not to have convinced the EC Court altogether. In its Opinion 1/91 the Court held in a rather hesitating manner that "Article 6 of the agreement does not clearly specify whether it refers to the Court's case-law as a whole, and in particular the case-law on the direct effect and primacy of Community law . . . ." <sup>76</sup> From the motivation of the Court's Opinion beginning in paragraph 15, it becomes clear that the Court finds reasons to support this view in the differences it sees between the objectives of EC and EEA law <sup>77</sup> and, more importantly, in the differences between the "constitutional" structure of Community law and the merely intergovernmental set-up of EEA law. <sup>78</sup>

I would like to argue that these differences in objectives and set-up should not be over-estimated, and that they cannot be used as arguments to contradict the normal scope of application of Article 6 of the EEA Agreement.

1. Preliminary Remarks

I would first like to point out that the holding of the EC Court in its Opinion 1/91 on direct effect and primacy has not been given in reply to specific questions that the Commission had submitted to the Court pursuant to Article 228 EEC. Indeed, the questions related only to the compatibility of Community law with (i) the presence of Judges of the EC Court on the then envisaged EEA Court; (ii) extending the right to inter-

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plication thereof, are, as yet, to be found in the case law of the EC Court. *See also* M. Ross, *Beyond Francovich*, 56 MOD. L. REV. no. 1 (1993).

76. Opinion 1/91, O.J. C 110/1, at 11, ¶ 27 (1992).

77. *See supra* notes 19-20 and accompanying text (discussing differences between objectives of EEA Agreement and EEC Treaty).

78. *See supra* notes 57-59 and accompanying text (quoting from Court's Opinion 1/91 on difference between Community legal structure and EEA legal structure).

vene before the EC Court to the EFTA countries; (iii) allowing courts from EFTA countries to submit preliminary questions to the EC Court; and (iv) the whole system of courts as laid down in the Agreement.<sup>79</sup> Before dealing with these precise questions in, respectively, Parts V, VI, VII and VIII of its Opinion, the Court first compares, in Part III, the aims and context of the EEA Agreement with those of Community law and examines then, in Part IV, whether, in light of the divergences between aims and context of EEA and Community law, the proposed system of courts may undermine the autonomy of the Community legal order.<sup>80</sup> At the end of Part IV the Court answers the latter question in the affirmative.<sup>81</sup> Its answer is based on two reasons: first the necessity for the EC Court to accept the interpretation that the envisaged EEA Court would give to the term "Contracting Parties," which implies a decision in respect of the distribution of powers within the Community.<sup>82</sup> Second the fact that, since the EEA Court's decisions would be (according to the EC Court's own case law) binding on the EC Court, the former would be able to impose upon the latter its future interpretation of a large body of legal rules, identical to EC rules, which constitute, for the most part, fundamental provisions of the Community legal order as well.<sup>83</sup>

Within the Court's reasoning, its statement concerning direct effect and primacy, read in connection with Protocol 35, appears only as part of the general description of Part III of Opinion 1/91. Part III of the Opinion concerns divergences between the aims and context of EEA law and Community law, a description that in itself constitutes only a general and, strictly speaking, not indispensable introduction to the Court's reply to the precise questions submitted to it. In that context, the Court's statement with respect to direct effect and primacy appears merely as an illustration of the risk that the EC Court sees in the case that it may be bound by important decisions of the then envisaged EEA Court on issues as important as primacy or direct effect of EEA legal rules which are identical in substance to EC law.

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79. Opinion 1/91, O.J. C 110/1 (1992).

80. Opinion 1/91, O.J. C 110/1, at 10-11, 13-14, ¶¶ 13-29, 47-72 (1992).

81. Opinion 1/91, O.J. C 110/1, at 13, ¶ 44-46 (1992).

82. Opinion 1/91, O.J. C 110/1, at 12, ¶¶ 32-36 (1992).

83. Opinion 1/91, O.J. C 110/1, at 12-13, ¶¶ 37-46 (1992).



Still another preliminary remark deserves to be made. I do not believe it to be in line with the rationale of Article 6 to examine the question concerning the scope of Article 6 with regard to the incorporation into EEA law of the general principles of Community law (relating to the fundamental freedoms) and the judicial protection of rights individuals can derive from them, from the angle of the differences in objectives and essential characteristics of the two legal orders. The real purpose of Article 6 is, on the contrary, to prevent divergences between the two legal orders and to secure the homogeneous application of EEA law and EC law. The means chosen thereto is to impose a duty to interpret the EEA rules that are substantially identical to corresponding EC rules in conformity with the EC Court's case law, and without regard for the considerations and underlying objectives that may have inspired or initiated such case law.

Let me now, after having thus indicated their limited significance, examine the divergences, first between the objectives, and then between the essential characteristics of Community law compared to EEA law.

## 2. Differences in Objectives Between EC and EEA Law

The differences in objectives that have been highlighted in the Court's Opinion 1/91 and their impact on primacy and direct effect as well as on other general principles of law, must not, leaving Protocol 35 aside, be over-emphasized. Indeed, in comparing these differences, one should keep in mind that direct effect and primacy, as general principles of Community law, have been primarily developed in connection with the judicial protection of rights that individuals can derive from the fundamental freedoms of Community law. Having been developed in that specific field of Community law, which aims at so-called negative integration, i.e. integration brought about by lifting obstacles to intra-Community trade, such principles cannot be held to be absent from EEA law (which pursues the same negative integration in a wider geographic area), on the basis of references to objectives of Community law that relate to measures of positive integration, i.e. integration brought about through common policies.

Therefore, the references in paragraph 17 of the EC Court's Opinion 1/91 to Articles 2, 8a and 102a of the EEC Treaty in so far as they aim "to achieve economic integration leading to the . . . economic and monetary union"<sup>84</sup> and to Article 1 of the Single European Act making it clear that "the objective of all the Community treaties is to contribute together to making concrete progress towards European unity,"<sup>85</sup> cannot be invoked to point out differences with EEA objectives, as these references go beyond the objectives, pursued both in EC and EEA law, in connection with which principles such as direct effect, primacy and the like have been developed in Community law.

But also the differences deduced from the fact, as the Court states in its Opinion at paragraphs 16 and 18, that the rules on free trade and competition are, in the case of the EEA, "ends in themselves" whereas, in the case of the EC, they are "only means" for attaining wider objectives, should be seen in their right perspective.<sup>86</sup> It is true that the EEC Treaty preamble sees "an even closer union among the peoples of Europe" and the necessity to pool "resources to preserve and strengthen peace and liberty" as such wider objectives.<sup>87</sup> It cannot be denied, however, that the ways to achieve these wider objectives are, also in the European Economic Community, economic by nature and aimed primarily at the removal of existing obstacles to the freedoms of trade and competition. All this, it would seem, is not so different from the similarly wide objective cited in the EEA preamble to contribute "to the construction of a Europe based on peace, democracy and human rights," based on "proximity, long-standing common values and European identity."<sup>88</sup> The fact that these wider objectives in the EEA (like in the original EC) are achieved through economic measures, consisting mainly in the lifting of obstacles to inter-State commerce, i.e. by "negative" integration, makes the EEA order similar, not dissimilar, to the EC order.

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84. Opinion 1/91, O.J. C 110/1, at 11, ¶ 17 (1992).

85. *Id.*

86. Opinion 1/91, O.J. C 110/1, at 11, ¶¶ 16 & 18 (1992).

87. EEC Treaty, *supra* note 9, pmbl., 298 U.N.T.S. at 14-15 (1958).

88. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 927-29, pmbl.

### 3. Differences in Essential Characteristics of EC and EEA Law

Also, differences in the essential characteristics (such as, in the words of the EC Court, primacy and direct effect in respect of Community law) between the EC and EEA legal orders<sup>89</sup> are unable to contradict the broad meaning of Article 6 of the EEA Agreement. Indeed, the legal reasoning that the EC Court has applied, during the first years of the existence of the EC, to conclude that the EEC Treaty can have direct effect and that it does take precedence over the national laws of the Member States, does in my opinion apply just as well to the EEA legal system (always with the proviso that Protocol 35 does temporarily suspend the application of Article 6 EEA in respect of primacy and direct effect). To show this I will first recall the EC Court's legal reasoning in respect of (early) European Community law and then examine its application to EEA law.

#### a. The EC Court's Legal Reasoning in Respect of EC Law

##### i. Preliminary Rulings

The legal reasoning developed by the EC Court in respect of direct effect and primacy of Community law has taken place in preliminary rulings that the Court has rendered on the basis of Article 177 EEC at the request of national courts. The questions raised by the national courts concerned the compatibility of national measures, including national legislation, with EC law. The resolution of such questions presupposes that individuals claiming the incompatibility of such measures with Community law, and therefore their non-application by the national court, may rely upon the relevant provisions of Community law before that court (direct effect) and that such provisions do have precedence over national law (primacy). It is well recognized that the EC Court has used the preliminary ruling procedure in such a way that, although it is not up to the Court to decide the question of incompatibility, the answers given to the national judge are so concrete that the latter can

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89. *But see* W. Kälin, *The EEA Agreement and the European Convention for the Protection of Human Rights*, 3 *EUR. J. INT'L L.* 341 (1992) (discussing third essential characteristic of Community based on respect for Human Rights as embodied in the European Convention on Human Rights).

resolve the compatibility question without much additional effort.

Direct effect of Community law, in that case of Article 12 EEC Treaty, was acknowledged by the Court for the first time in its Judgment of 5 May 1963 in case 26/62, *Van Gend en Loos*,<sup>90</sup> rendered on a preliminary question from a Dutch court. Primacy of Community law was first accepted by the Court in its Judgment of 15 July 1964 in case 6/64, *Costa v. Enel*,<sup>91</sup> rendered on a preliminary question from an Italian judge.

## ii. Direct Effect

In *Van Gend en Loos*, the Court of Justice started its examination of "whether Article 12 of the Treaty has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect" by saying that "[t]o ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions."<sup>92</sup>

Especially the reasoning of the Court in respect of "the spirit" is enlightening and I am quoting it in full:

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

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90. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, [1963] 1 C.M.L.R. 105.

91. *Costa v. Ente Nazionale Per L'Energia Elettrica (ENEL)*, Case 6/64, [1964] E.C.R. 585, [1964] 1 C.M.L.R. 425.

92. *Van Gend en Loos*, [1963] E.C.R. at 11-12, [1963] 1 C.M.L.R. at 128.

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the States have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.<sup>93</sup>

The EC Court thus used four interrelated arguments to come to the conclusion in 1963 that the Community constitutes a "new legal order of international law."<sup>94</sup> Those arguments are: the preamble of the EEC Treaty which refers not only to governments but to peoples;<sup>95</sup> the establishment of institutions endowed with sovereign rights, the exercise of which affects also the citizens of the Member States;<sup>96</sup> the cooperation of those citizens in the functioning of the Community through the intermediary of the European Parliament and the Economic and Social Committee;<sup>97</sup> and the fact that through the preliminary ruling procedure the Member States have acknowledged that their nationals can invoke the authority of Community law before the national courts.<sup>98</sup> As part of the conclusion that Community law thus constitutes a new legal order, the Court emphasized that the States have limited their

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93. *Id.*, [1963] E.C.R. at 12, [1963] 1 C.M.L.R. at 129.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

sovereign rights, albeit within limited fields.<sup>99</sup> I will try to show hereinafter that all these arguments can also be invoked, when it comes to assess the eventual direct effect of provisions of EEA law.

### iii. Primacy

Let me now recall the arguments that the EC Court used in *Costa v. Enel*, in respect of primacy of Community law, in order to come to the conclusion that "the law stemming from the [EEC] Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."<sup>100</sup> I cite again, in full, the relevant part of the Judgment:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty on a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives

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99. *Id.*

100. *Costa v. Enel*, [1964] E.C.R. at 594, [1964] 1 C.M.L.R. at 456.

of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.

The obligation undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they would be called in question by subsequent legislative acts of the signatories . . . .

The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, could be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.<sup>101</sup>

There are in this statement some arguments that are derived from the Court's own reasoning in *Van Gend en Loos*, namely those relating to the creation of a Community legal system of its own and thereby a limitation of sovereignty or a transfer of powers from the States to the Community.<sup>102</sup> New arguments are also used, including the (legal) fact that the Community is of unlimited duration and has its own institutions, personality, legal capacity and capacity of international representation;<sup>103</sup> the integration into the laws of the States of provisions that derive from the Community and, as a result, the impossibility for the States to give precedence to unilateral and subsequent measures of their own which would moreover lead to a varying executive force of Community law from one State to another;<sup>104</sup> and the binding character and direct application in the Member States of regulations.<sup>105</sup> Again, I will try to show hereinafter that these arguments are also valid in the context of EEA law.

## b. The EC Court's Findings Applied to EEA Law

### i. Preliminary Rulings

As indicated above, it is up to each of the EFTA States to authorize their courts or tribunals to ask the EC Court of Justice "to decide on" the interpretation of an EEA rule.<sup>106</sup> Arti-

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101. *Id.*, [1964] E.C.R. at 593-94, [1964] 1 C.M.L.R. at 455-56.

102. *Id.*, [1964] E.C.R. at 593, [1964] 1 C.M.L.R. at 455.

103. *Id.*

104. *Id.*

105. *Id.*, [1964] E.C.R. at 594, [1964] 1 C.M.L.R. at 455.

106. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 961, art. 107.

cle 1 of Protocol 34 makes it clear that (i) if there is a "question of interpretation of provisions of the Agreement, which are identical in substance to the provisions of the Treaties establishing the European Communities, as amended or supplemented, or of acts adopted in pursuance thereof,"<sup>107</sup> (ii) the national court or tribunal of an EFTA State that has received authorization, may put a question of interpretation, which arises in a case pending before it, if it considers this necessary,<sup>108</sup> and (iii) the EC Court shall then "decide on such a question."<sup>109</sup> In its Opinion 1/92 the EC Court has taken the view that the expression "decide on" guarantees the binding effect of the answers given by it.<sup>110</sup> This was, in that Court's view, essential since, it stated in Opinion 1/91, "it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the EFTA States are to be purely advisory and without any binding effects."<sup>111</sup> It appears further from Article 2 of Protocol 34, that an EFTA State which intends to make use of the possibility to interrogate the EC Court may then specify the scope and modalities thereof.<sup>112</sup>

It has also been indicated above that, according to Article 34 of the EFTA Surveillance Agreement, "the EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement," be it that an EFTA State "may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law."<sup>113</sup>

The overall picture is somewhat confusing. The EC Court may be given jurisdiction by an EFTA State, to the extent and in accordance with modalities that may vary from one State to another, to give a binding preliminary ruling on the interpreta-

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107. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. 921, Protocol 34, art. 1, *reprinted in* 15 COMMERCIAL LAWS OF EUROPE pt. 10, at 290 (1992).

108. *Id.*, [1992] 1 C.M.L.R. 921, Protocol 34, art. 1, *reprinted in* 15 COMMERCIAL LAWS OF EUROPE pt. 10, at 290 (1992).

109. *Id.*, [1992] 1 C.M.L.R. 921, Protocol 34, art. 1, *reprinted in* 15 COMMERCIAL LAWS OF EUROPE pt. 10, at 290 (1992).

110. Opinion 1/92, O.J. C. 136/1, at 10, ¶ 34 (1992).

111. Opinion 1/91, O.J. C. 110/1, at 14, ¶ 61 (1992).

112. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. 921, Protocol 34, art. 2., *reprinted in* 15 COMMERCIAL LAWS OF EUROPE at 290, pt. 10 (1992).

113. EFTA Surv. Agreement, *reprinted in* 15 COMMERCIAL LAWS OF EUROPE pt. 10, at 300, art. 34 (1992).



tion of "identical provisions" of the EEA Agreement and of acts of secondary legislation adopted in pursuance thereof. The EFTA Court shall have jurisdiction, eventually only when interrogated by courts of last resort, to give an advisory opinion on the interpretation of provisions (whether identical or not) of the EEA Agreement. Nonetheless, it is clear that the EC and/or the EFTA Court will be in a position to use the preliminary ruling procedure, in the same way as the EC Court has done in respect of the interpretation of EC law, to point out possible conflicts between EEA rules and national legislation of an EFTA State and to raise, on that occasion, the problems of direct effect and of primacy. It is also clear that the national court of the EFTA States will be in a position to use such rulings to strike down national measures that are incompatible with basic EEA rules. The fact that, in the case of the EFTA Court, the preliminary rulings are only advisory opinions is not, in my view, of decisive importance. If preliminary rulings of the EC Court are held to be binding, this is the result of the EC Court's own case law and of the acceptance thereof by the national courts of the Member States. In other words, it is due to the loyal cooperation of the national courts, and in particular of courts of last resort, that the preliminary rulings mechanism is fully operational. In the same vein, it will depend on the cooperation of the national courts of the EFTA countries whether advisory opinions of the EFTA Courts will, as a matter of fact, be as operational in substance as binding rulings.<sup>114</sup>

## ii. Direct Effect and Primacy

Let me now examine whether and, if so, to what extent the arguments invoked in *Van Gend en Loos* and *Costa v. Enel* to recognize, respectively, direct effect and primacy of EC (Treaty) provisions, could also be applied in respect of EEA (Agreement) provisions. The most important of these arguments re-

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114. See Henry Schermers, 29 COMMON MKT. L. REV. 991-1009 (1992). By insisting on the necessity of a binding ruling, the EC Court may have missed a chance to promote a system of preliminary rulings, as an instrument of judicial cooperation with courts outside the Community. *Id.* Schermers suggests that in the future, and thus *de lege ferenda*, any court (e.g. the European Court of Human Rights or a U.S. court) may ask EC Court, and vice versa, to give an authoritative, if not binding interpretation of the provisions that fall within the interrogated Court's jurisdiction. *Id.*

late to the transfer of sovereign rights to newly established institutions, by which legislative rights are meant in particular. I will examine that argument later and deal first with the other arguments.

The preamble to the EEA Agreement is in my view, just like (or even more clearly than) the preamble to the EEC Treaty, addressed not only to the governments but also to the peoples. Thus, as already pointed out, it alludes explicitly on the possibility of direct effect and primacy by saying that the States are "convinced of the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights."<sup>115</sup> Furthermore it refers to equal treatment of men and women, the interests of the consumers, and equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition.<sup>116</sup>

The cooperation of the individuals in the functioning of the EEA through the intermediary of a Parliament and an Economic and Social Committee is also, be it indirectly (but that was also the case of the EC Parliament before its members were chosen by general election), assured through the EEA Joint Parliamentary Committee and, in respect of economic and social matters, through the EEA Consultative Committee.<sup>117</sup> As indicated above, the nationals of the EFTA States may, like those of the EC States, invoke the authority of EEA law before their courts through procedures of preliminary rulings or opinions.<sup>118</sup>

The EEA Agreement also establishes institutions that are endowed with rights, albeit, like in the case of the Community, within limited fields, the exercise of which directly affects the individuals of the EFTA States, particularly in the field of competition, including State aid.<sup>119</sup> These institutions have been

115. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 927-29, pmbl.

116. *Id.*, [1992] 1 C.M.L.R. at 927-29, pmbl.

117. *See id.*, [1992] 1 C.M.L.R. at 955-56, art. 95 (regarding cooperation through EEA Joint Parliamentary Committee) and art. 96 (regarding cooperation through EEA Consultative Committee).

118. *See supra* notes 107-12 and accompanying text (discussing procedure by which EFTA states may seek preliminary rulings from Court of Justice).

119. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 942-47, arts. 53-64.

established for an unlimited duration and do have legal personality, also on the international level (be it that in the absence of a common commercial policy the last characteristic may have a lesser impact) just like the institutions established under the Community Treaties.

### iii. Transfer of Sovereign Legislative Powers?

According to Protocol 35, no transfer of legislative powers to EEA institutions is required from the Contracting Parties.<sup>120</sup> I doubt whether this legal assessment is entirely correct. As explained above the EEA Joint Committee has the right to amend the Annexes to the Agreement, which contain a significant quantity of secondary EC legislation, existing at the time of the signing of the EEA Agreement, regarding the subjects covered by the Agreement, in order to make them homogeneous with EC future amendments. Moreover, decisions of the Committee are in principle binding upon the Contracting Parties, be it subject to important limitations.<sup>121</sup> It would seem to me that such a right to legislate by amending existing rules is a sovereign legislative power, even although it is limited in various respects.

First, it is limited in that decisions of the Committee must be taken by agreement between the Community and the EFTA States, the latter speaking "with one voice."<sup>122</sup> Second, it is limited as to the circumstances under which it may be exercised, namely only when an amendment has been made previously in the corresponding EC rule, as well as to the scope of the legislative intervention, namely to adopt an amendment that comes as close as possible to the corresponding new Community rule.<sup>123</sup> Thirdly, it is limited because of the eventuality that, when no consensus can be reached by the EEA Joint Committee, and no other decision can be taken to maintain the good functioning of the Agreement, the relevant part of the act that was to be amended will in principle be "regarded as provi-

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120. *Id.*, [1992] 1 C.M.L.R. 921, Protocol 35 (on file with the *Fordham International Law Journal*).

121. See Reinisch, *supra* note 62, at 14. Reinisch describes these limitations, and in particular those resulting from the complicated "veto"-right embodied in Article 103, paragraphs 1 and 2 of the EEA Agreement. *Id.*

122. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 956, art. 93 ¶ 2.

123. *Id.*, [1992] 1 C.M.L.R. at 958, art. 102 ¶ 1.

sionally suspended," after the expiration of a further six months period and until a mutually acceptable solution has been found to terminate the suspension as soon as possible.<sup>124</sup>

Whether these limitations are apt to support the view that the transfer of legislative powers is not sufficient to make the EEA legal system a distinct legal order, is dubious. As to the first restriction, no argument has ever been drawn from the fact that competences at the EC level must be exercised by unanimity, to deny the existence of legislative powers on behalf of Community institutions within a certain field. As to the second restriction, the fact that the exercise of legislative power of the EEA Joint Committee is tied to, and made dependent on, the exercise of legislative power within the Community, does not eliminate the transfer of legislative power from the EFTA States to the Joint Committee. Surely in terms of real power, such transfer goes rather from the EFTA States to the Community, a view that the EFTA States will certainly not wish to endorse. That there is a transfer of power seems to me undeniable.<sup>125</sup> As to the third restriction, it is not dissimilar to restrictions resulting from the escape clauses set forth in Article 226 EEC and in Article 100A, paragraph 5. However that may be, the discussion in respect of transfer of sovereign legislative powers remains limited to the creation of new EEA law. It does not relate to "existing" identical EEA rules and, therefore, cannot bear on the characteristics of the EEA legal order as it stands at the date of signature of the EEA.<sup>126</sup>

Actually, the clearest evidence that the "sovereign legislative powers" of the Contracting Parties are restricted by the EEA Agreement, at least insofar as "existing" EEA rules are concerned, is to be found in Article 97 EEA which, in substance, allows a Contracting Party to amend its internal legislation in the areas covered by the Agreement only if the amend-

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124. *Id.*, [1992] 1 C.M.L.R. at 958-59, art. 102 ¶¶ 4-6. The same is true in the event that a State has not been able to overcome a constitutional obstacle to the entering into force of a decision taken by the Joint Committee. *See id.*, [1992] 1 C.M.L.R. at 959, art. 103 ¶ 2.

125. *See* Madeleine Hösli, *Decision Making in the EEA and EFTA States' Sovereignty*, 45 *AUSSENWIRTSCHAFT* 463-94 (1990) (showing that even in such situation of partial "opting-out" EFTA States have indirectly abandoned sovereign legislative rights).

126. *See* Reinisch, *supra* note 62 (arguing to deny direct effect of future EEA-rules by noting relative lack of sovereign legislative power of EEA-organs to enact future legislation, but accepting direct effect of "existing" EEA law).

ment has been found by the EEA Joint Committee not to “affect the good functioning of [the] Agreement,” or if the procedures referred to in Article 98 EEA, asking for a decision of the EEA Joint Committee, have been completed.<sup>127</sup>

### CONCLUSION

The principles of primacy and direct effect of, at the date of the signature of the EEA Agreement, existing identical rules are, by virtue of Article 6 EEA, an integral part of EEA law. Only to the extent that Protocol 35 deviates from the principle of primacy, and thus only for a period of time during which a Contracting Party has not (and should, reasonably, not yet have) complied with the obligation assumed under that Protocol, can it be accepted that the principle of primacy, and in so far as it is linked thereto, the principle of direct effect, of EEA law is temporarily inoperative. This conclusion is not contradicted by the differences in objectives and essential characteristics between EC and EEA law. Such differences are, indeed, not to be over-emphasized. This is particularly true for the so-called absence of sovereign legislative powers, a legal assessment made in the preamble of Protocol 35, which in our view is not fully supported by a correct reading of the EEA Agreement.

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127. EEA Agreement, *supra* note 4, [1992] 1 C.M.L.R. at 956-57, art. 97.