

Fordham International Law Journal

Volume 28, Issue 2

2004

Article 4

The EFTA Court: An Actor in the European Judicial Dialogue

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Carl Baudenbacher

Abstract

The vertical dialogue with the national courts of the EEA/EFTA States, in particular the Supreme Courts, has assisted the EFTA Court in developing its case law concerning effect and State liability. Through this jurisprudence, EEA homogeneity in the field of effect and State liability has been maintained. The EEA Main Agreement has been implemented in the domestic legal orders of the EFTA States. EEA secondary law is being implemented in an ongoing process. The same holds true for the rulings of the EFTA Court. There has, to this writer's knowledge, never been a case in which a national court refused to set aside a conflicting rule of domestic law, at least not in a vertical context. That fact is also important from a reciprocity perspective. With respect to the horizontal dialogue with the Community Courts, one must remember that in its Opinion 1/91 on the first version of the EEA Agreement the ECJ struck down a provision according to which the Community courts would have been under an obligation to take into account the case law of the EEA courts. In practice, the Community courts have shown openness in cases in which they agree with the outcome as well as with the reasoning of an EFTA Court decision.

ARTICLES

THE EFTA COURT: AN ACTOR IN THE EUROPEAN JUDICIAL DIALOGUE

*Carl Baudenbacher**

INTRODUCTION

The New York University Project on International Courts and Tribunals lists forty-three different institutions worldwide, sixteen of which are currently active.¹ International courts and tribunals are defined as permanent institutions that are composed of independent judges which adjudicate disputes between two or more entities, work on the basis of predetermined rules of procedure, and render decisions that are binding.² One of these entities is the Court of Justice of the European Free Trade Association (“EFTA Court”), the third European court after the Court of Justice of the European Communities (“ECJ”)³ and the European Court of Human Rights. The EFTA Court was set up under the Agreement on the European Economic Area (“EEA”) and the Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“Surveillance and Court Agreement”) of 1992.⁴ It assumed its functions on January 4, 1994, in Geneva, with five judges from the EFTA States participating in the EEA Agreement: Austria, Finland, Ice-

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1. See Project on International Courts and Tribunals, *The International Judiciary in Context*, available at <http://www.pict-cti.org> www.pict-cti.org/publications/synoptic_chart/synoptic_chart2.pdf (last visited Feb. 21, 2005).

2. See *id.*; see also *The EFTA Court: Legal Framework, Case Law and Composition*, available at <http://www.eftacourt.lu/sitemap.asp> (last visited Feb. 21, 2005).

3. The term “Court of Justice of the European Communities” has been understood as including the Court of First Instance. See *Scottish Salmon Growers Ass’n Ltd. v. EFTA Surveillance Auth.*, Case E-2/94, [1994-1995] Rep. EFTA Ct. 60, 64, ¶ 13; *Technologien Bau- & Wirtschaftsberatung GmbH & Bellona Found. v. EFTA Surveillance Auth.*, Case E-2/02, [2003] Rep. EFTA Ct. 52, ¶ 40.

4. See Agreement on the European Economic Area, art. 108, O.J. L 1/3 (1994) [hereinafter “EEA Agreement”]; see also Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, art. 34, O.J. L 344/1, at 5 (1994), modified by an agreement of December 29, 1994 [hereinafter “Surveillance and Court Agreement”].

land, Norway, and Sweden. After eighteen months of existence, the EFTA Court was reduced from five judges to three due to the accession of Austria, Finland, and Sweden to the European Community ("EC"). Since mid-1995, the Court has consisted of three judges from Iceland, Liechtenstein, and Norway. Moreover, there is a list of six *ad hoc* judges.

The establishment of the EFTA Court is an example of what in legal theory is referred to as judicialization of international law, or to use a rather problematic term, the proliferation of international courts.⁵ Historically, this step is to be viewed against the background of the 1972-1973 bilateral Free Trade Agreements ("FTAs")⁶, concluded between the European Economic Community ("EEC")⁷ and the European Coal and Steel Community ("ECSC")⁸ on the one hand, and the EFTA States on the other, which were characterized by an imbalance with regard to the role of courts. With the ECJ, there was a common court of the EC Member States, which was competent to apply the provisions of the FTAs and which ruled in the *Hauptzollamt Mainz v. C.A. Kupferberg & Cie K.G. a.A.* case that provisions of the FTAs

5. See Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. INT'L L. & POL. 709, 710 (1999); see also Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. INT'L L. & POL. 697, 697-98 (1999); Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 405-06 (2003); Carl Baudenbacher, *The EFTA Court: An Example of the Judicialization of International Economic Law*, 28 EUR. L. REV. 880, 883 (2003) (regarding the EFTA Court in particular).

6. See Council Regulation No. 2840/72, O.J. L 300, at 188 (1972) (concluding an Agreement between the European Economic Community ("EEC") and the Swiss Confederation, and adopting provisions for its implementation and concluding an additional Agreement concerning the validity, for the Principality of Liechtenstein, of the Agreement between the EEC and the Swiss Confederation of 22 July 1972); see also Council Regulation No. 2842/72, O.J. L 301, at 2-85 (1972) (concluding an Agreement between the EEC and the Republic of Iceland and adopting provisions for its implementation); Council Regulation No. 1691/73, O.J. L 171, at 1 (1973) (concluding an agreement between the EEC and the Kingdom of Norway and adopting provisions for its implementation). Agreements were also reached with States that have since left EFTA to join the European Community. See Council Regulation No. 2836/72, O.J. L 300, at 2 (1972) (concluding an agreement between the EEC and the Republic of Austria); see also Council Regulation No. 2838/72, O.J. L 300, at 97 (1972) (concluding an agreement between the EEC and the Kingdom of Sweden); Council Regulation No. 2844/72, O.J. L 301, at 165 (1972) (concluding an Agreement between the EEC and the Portuguese Republic).

7. Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

8. Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

could have direct effect.⁹ On the EFTA side, a common court was lacking, and the Supreme Courts of Austria and Switzerland, the two EFTA countries following the monist tradition of integrating international and internal legal orders, ruled in the cases *Adams v. Staatsanwaltschaft des Kantons Basel-Stadt*, *Bosshard Partners Intertrading AG v. Sunlight A.G. (Berufung)*, and *Austro-Mechana v. Gramola Winter & Co.* that the provisions of the FTAs on the free movement of goods and on competition could not produce direct effect.¹⁰ In the dualistic Nordic EFTA countries of Finland, Iceland, Norway, and Sweden, such effect was excluded due to the lack of implementation of these agreements into the respective domestic legal orders.¹¹

EEA law is essentially identical in substance to EC law. It is being adopted from EC law on a continual basis.¹² Therefore, at the very heart of the EEA Agreement are homogeneity rules, which essentially oblige the EFTA Court to follow or take into account the relevant case law of the ECJ.¹³ The EFTA Court has, as a matter of principle, always followed ECJ case law on the interpretation of EC law that is identical in substance to EEA law. At the same time, the EFTA Court has, from the very beginning, been called upon to answer legal questions that have not yet been decided by the ECJ.¹⁴ In such cases, the ECJ and the Court of First Instance ("CFI") have indicated their readiness to enter into a judicial dialogue with the EFTA Court.

The EFTA Court is competent to hear cases originating from the three EEA/EFTA States. Its rules of procedure are

9. See *Hauptzollamt Mainz v. C.A. Kupferberg & Cie K.G. a.A.*, Case C-104/81, [1982] E.C.R. I-3641, ¶ 3.

10. See *Adams v. Staatsanwaltschaft des Kantons Basel-Stadt*, BGE 104 IV 175 (1978) (Switz.); see also *Bosshard Partners Intertrading AG v. Sunlight A.G. (Berufung)*, BGE 105 II 49 (1979) (Switz.); *Austro-Mechana v. Gramola Winter & Co.*, 104 Rev. Int'l. du Droit d'Auteur 138, 148-49 (1953) (Aus.).

11. See Ulf Bernitz, *The E.E.C.-E.F.T.A. Free Trade Agreements*, 23 COMMON MKT. L. REV. 567, 578-81 (1986); see also John Forman, *The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and Its Implementation by the Two EEA Courts*, 36 COMMON MKT. L. REV. 751, 753 (1999).

12. The EFTA countries have certain rights in the enactment of EC law. See EEA Agreement, *supra* note 4, art. 102, O.J. L 1/3.

13. See Surveillance and Court Agreement, *supra* note 4, art. 105; see also EEA Agreement, *supra* note 4, art. 6, O.J. L 1/3.

14. See, e.g., Carl Baudenbacher, *Homogenität — Parallelität — Going First — Betrachtungen zur Rechtsstellung des EFTA-Gerichtshofs am Beispiel der Rechtsprechung zur Betriebsübergangsrichtlinie*, Festschrift für Bernhard Grossfeld zum 65. Geburtstag, Heidelberg 1999, 55.

largely identical to those of the ECJ. The most important types of cases concern preliminary references by national courts of the EEA/EFTA States, actions for violation of the EEA Agreement by the EFTA Surveillance Authority, and actions for the annulment of decisions of the EFTA Surveillance Authority by private plaintiffs or by governments of EEA/EFTA States.

I. *THE NOTION OF JUDICIAL DIALOGUE*

In recent years, Canadian and U.S. authors have postulated a systematic dialogue between high court judges all over the world.¹⁵ It is argued that in times of globalization, a global dialogue among supreme courts and international courts is inevitable due to the homogenization of legal problems around the globe, the fact that human rights are by their very nature international, advances in technology that make dialogue possible, and increased personal contact between the judges. This dialogue should not be subject to any constraints with regard to the origin of an argument. That would mean, for instance, that judgments rendered by African Supreme Courts should be taken into account by U.S. courts including the U.S. Supreme Court, even when interpreting the U.S. Constitution. One is reminded of Jürgen Habermas' concept of *herrschaftsfreier Diskurs*.¹⁶ The respective proposals have, however, prompted harsh criticism in the United States. Whether American judges should look abroad in carrying out their tasks is particularly controversial when it comes to the interpretation of the U.S. Constitution. The respective questions are discussed under the heading of "Comparative Constitutionalism."¹⁷ Those who are in favor of such comparison argue that a functionalist approach is needed "in which the relevant unit of analysis is not a geographic entity, such as a country or a region, but is rather the problem and its legal solution."¹⁸ Some of them tend to emphasize, that in re-

15. See Justice Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 *TULSA L.J.* 15, 15-16 (1998); see also Anne-Marie Slaughter, *Judicial Globalization*, 40 *VA. J. INT'L L.* 1103, 1103-04 (2000).

16. See generally JÜRGEN HABERMAS, 2 *THEORY OF COMMUNICATIVE ACTION* (1981).

17. See NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 3 (1st ed. 2003).

18. See Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 *HARV. L. REV.* 2570, 2574 (2004) (referring to the famous German comparatist Rudolf von Ihering's statement that "[T]he reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has

cent times, the U.S. Supreme Court has been increasingly open to referencing non-U.S. sources when interpreting the U.S. Constitution.¹⁹ Compared to other High Courts, however, the U.S. Supreme Court has referred to non-U.S. views in a relatively small number of cases, in many instances in a rather unspecific way.²⁰ The most prominent example is the judgment in *Lawrence v. Texas*, in which the U.S. Supreme Court found a Texas sodomy statute to be unconstitutional.²¹ In *Lawrence*, the Supreme Court referred to the judgment of the European Court of Human Rights in *Dudgeon v. United Kingdom*.²² Opponents of such dialogue have argued that using non-U.S. opinions in constitutional interpretation undermines U.S. sovereignty as well as the domestic majoritarian impulse (in particular with regard to capital punishment); that it is incompatible with the supremacy of the U.S. Constitution over international law; that judges are ill-suited to carry out comprehensive research so that there is a danger of them acting as “bricoleurs;” and that international and foreign materials may be used selectively.²³ The American attitude stands in stark contrast to the Canadian one. It appears that Canadian courts, including the Canadian Supreme Court, are very open-minded when it comes to taking into account non-Canadian experience.²⁴

For high courts in European countries, looking to foreign jurisdictions is not at all revolutionary. In particular, the supreme courts of small countries such as Austria and Switzerland have always borrowed from their counterparts in other countries, including the United States.²⁵ In addition, the German Su-

one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden"); see also KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 17 (Tony Weir trans., 3d ed. 1998).

19. See Teitel, *supra* note 18, at 2589.

20. See Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 417 (2003); see also Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 51 (2004).

21. See *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

22. See *id.* at 573 (citing *Dudgeon v. United Kingdom*, [1982] 4 Eur. H.R. Rep. 149).

23. See Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 57-58 (2004).

24. See Gérard La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 212 (1994); see also L'Heureux-Dubé, *supra* note 15, at 17; Harding, *supra* note 20, at 413.

25. See Carl Baudenbacher, *Judicial Globalization: New Development or Old Wine in New Bottles?*, 38 TEX. INT'L L.J. 505, 507 (2003).

preme Court and the House of Lords have, in high-profile cases, used a comparative approach.²⁶ In other European countries, comparative thoughts may have entered the minds of judges in many cases. But the respective judicial styles may have prevented the judges from making such lines of thought public. In any case, the traditional inter-court dialogue in Europe was, and still is, largely unstructured. It depends on factors such as the willingness of the individual judge to look abroad, and whether a judge has been trained in a foreign country. A structured dialogue has emerged within the European Union (“EU”) between the ECJ and the Supreme and Constitutional Courts of the Member States. This dialogue is taking place within the framework of the preliminary ruling procedure and is therefore vertical in nature, i.e., national courts are obliged to follow the judgments of the ECJ.²⁷ It is this European dialogue which has inspired some of the most outspoken U.S. writers on the subject.²⁸

II. *THE VERTICAL DIALOGUE BETWEEN THE EFTA COURT AND THE NATIONAL COURTS OF THE EEA/EFTA COUNTRIES*

The EFTA Court is cooperating with the national courts of the EEA/EFTA countries under the Article 34²⁹ of the Surveillance and Court Agreement preliminary reference procedure which has been modeled on Article 234³⁰ of the EC. In order to

26. See *Fairchild v. Glenhaven Funeral Services Ltd. & Others*, 1 A.C. 32, ¶¶ 23-32 (H.L. 2003) (presenting case law cited by the House of Lords); see also Judge Joachim Bornkamm, *The German Supreme Court: An Actor in the Global Conversation of High Courts*, 39 *TEX. INT’L L.J.* 415, 417-18 (2004) (discussing case law cited by German Supreme Court).

27. Strictly speaking this obligation extends only to the Court which has made the reference to the European Court of Justice (“ECJ”). In factual terms, the latter’s preliminary rulings have, however, *erga omnes* effect. See Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 *AM. J. COMP. L.* 421, 434-44 (discussing *erga omnes* effect of ECJ rulings).

28. See Slaughter, *supra* note 16, at 1115; see also Jenny S. Martinez, *Towards an International Judicial System*, 56 *STAN. L. REV.* 429, 459 (2003).

29. See Surveillance and Court Agreement, *supra* note 4, art. 34, O.J. L 1/3 at 5.

30. Treaty Establishing the European Community, Feb. 7, 1992, O.J. 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], incorporating changes made by Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union (“TEU”) amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]. The Treaty establishing the European Community (“EC Treaty”)

avoid constitutional problems in certain EEA/EFTA States, the drafters of the Surveillance and Court Agreement have deviated from EC law, particularly in two respects: (1) unlike national courts of last resort in the EC with respect to the ECJ, national supreme courts of the EEA/EFTA States are not legally obliged to refer European law questions to the EFTA Court;³¹ (2) unlike preliminary rulings of the ECJ under the Article 234 EC procedure, decisions rendered by the EFTA Court in response to a question by a national court are, strictly speaking, not legally binding on the referring national court.³² In Article 34 of the Surveillance and Court Agreement,³³ EFTA Court decisions are referred to as "Advisory Opinions."³⁴ In practice, the differences between EEA law and Community law are, however, hardly visible. The EFTA Court has received requests under the Article 34 of the Surveillance and Court Agreement procedure by the Supreme Courts of Iceland, Norway, and Sweden as well as by the Supreme Administrative Court of Liechtenstein in the fields of public procurement,³⁵ the obligation of a foreign plaintiff to provide security for costs of court proceedings,³⁶ motor vehicle insurance law,³⁷ the law of parallel trade and repackaging,³⁸ and freedom of establishment of managers, doctors, dentists, and

was amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam]. These amendments were incorporated into the EC Treaty, and the articles of the EC Treaty were renumbered in the Consolidated version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79 [hereinafter Consolidated EC Treaty], *incorporating changes made by Treaty of Amsterdam, supra*.

31. See Surveillance and Court Agreement, *supra* note 4, art. 34, O.J. L 1/3.

32. See *id.*

33. See *id.*

34. See *id.*

35. See *Fagtún ehf. v. Byggingarnefnd Borgarholtsskóla*, Case E-5/98, [1999] Rep. EFTA Ct. 51 (request by the Supreme Court of Iceland).

36. See *European Navigation Inc. v. StarForsikring AS under offentlig administrasjon (under public administration)*, Case E-5/97, [1998] Rep. EFTA Ct. 59 (request by the Supreme Court of Norway); *Data Delecta Aktiebolag & Ronnie Forsverg v. MSL Dynamics Ltd.*, Case E-7/94, [1994-1995] Rep. EFTA Ct. 109 (request by the Supreme Court of Sweden). After Sweden's accession to the European Community, the latter case was withdrawn and subsequently referred to and decided by the ECJ in *Data Delecta Aktiebolag v. MSL Dynamics Ltd*, Case C-43/95, [1996] E.C.R. I-4461.

37. See *Storebrand Skadeforsikring AS v. Veronika Finanger*, Case E-1/99, [1999] Rep. EFTA Ct. 119 (request by the Supreme Court of Norway).

38. See *Merck & Co, Inc. & Others v. Paranova AS*, Case E-3/02, [2003] Rep. EFTA Ct. 101 (request by the Supreme Court of Norway).

trustees.³⁹ Opinions of the EFTA Court have, as a matter of principle, always been followed by the national courts. If a national court were to refuse to follow those Opinions, it would bring its country into breach of the EEA Agreement.⁴⁰ Therefore, Opinions of the EFTA Court are, from a sociological standpoint, not weaker than preliminary rulings of its big sister court, the ECJ.⁴¹ The EFTA Court refers to them as “judgments.”

In substance, the dialogue between the EFTA Court and the national supreme courts has been particularly fruitful in the fields of effect and State liability. From early on, the question has been discussed of whether the so-called Community law constitutional principles of direct effect, primacy, and State liability, which the ECJ recognized in 1963, 1964, and 1991, respectively, also form part of EEA law. Through this case law, the ECJ has established a monist system in EC law. Monism does thereby not follow from a decision of Member States’ law, but from Community law. The EEA Agreement contains regulations that at first sight seem to speak in favor of a dualist approach. Article 7 of the EEA Agreement states that acts corresponding to an EEC regulation are not directly applicable, but shall be made part of the internal legal order of the EFTA States.⁴² Furthermore, Protocol 35 stipulates that the aim of achieving a homogeneous EEA, based on common rules, does not require the contracting parties to transfer legislative powers to any institution of the EEA.⁴³ On the other hand, the EEA Agreement emphasizes that the protection of individual rights is of paramount importance,⁴⁴ that the overriding goal of the EEA Agreement is to create a

39. See Herbert Rainford-Towning, Case E-3/98, [1998] Rep. EFTA Ct. 205; Dr. Johann Brändle, Case E-4/00, [2000-2001] Rep. EFTA Ct. 125; Dr. Josef Mangold, Case E-5/00, [2000-2001] Rep. EFTA Ct. 165; Dr. Jürgen Tschannett, Case E-6/00, [2000-2001] Rep. EFTA Ct. 205; Dr. Franz Martin Pucher, Case E-2/01, [2002] Rep. EFTA Ct. 44 (request by the Supreme Administrative Court of Liechtenstein).

40. See Henrik Bull, *The EEA Agreement and Norwegian Law*, 5 EUR. BUS. L. REV. 291, 296 (1994).

41. See Hans Petter Graver, *Die Ausdehnung des Europäischen Gemeinschaftsrechts auf Nichtmitglieder der Union — das Beispiel Norwegens*, ARENA Working Papers WP01/21 (2001), available at http://www.arena.uio.no/wp01_21.htm (last visited Feb. 21, 2005).

42. See EEA Agreement, *supra* note 4, art. 7, O.J. L 1/3.

43. See Protocol 35 on the Implementation of EEA Rules, available at <http://secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/EEAAgreement/protocols> (last visited Feb. 21, 2005) [hereinafter Protocol 35].

44. See EEA Agreement, *supra* note 4, pmbl, O.J. L 1/3.

dynamic and homogeneous EEA,⁴⁵ that the EEA Agreement as well as the Surveillance and Court Agreement contain specific homogeneity rules addressing the EFTA Court in particular,⁴⁶ and that the Contracting Parties are under a duty to loyally cooperate within the framework of the EEA Agreement.⁴⁷ Protocol 35 to the EEA Agreement states that the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in cases of possible conflicts between implemented EEA rules and other statutory provisions.⁴⁸ The governments of the Nordic States, focusing on Article 7 of the EEA Agreement and on Protocol 35, opined that the EEA Agreement had recognized traditional Nordic dualism, and therefore direct effect and State liability were unthinkable in EEA law.⁴⁹ These governments seemed to find comfort in the ECJ's Opinion 1/91, in which that Court declared the originally planned establishment of an EEA judiciary consisting of ECJ and EFTA judges incompatible with Community law.⁵⁰ The Opinion further assumed that the EEA Agreement was a simple public international law treaty conferring rights only on the participating EFTA States and the Community.⁵¹ The principles of direct effect and primacy were found to be "irreconcilable with the characteristics of the agreement."⁵² But influential authors, including two former judges of the EFTA Court and an Advocate-General ("AG") of the ECJ, stated that constitutional principles of EC law were at least on balance part of EEA law.⁵³ The EFTA

45. *See id.*

46. *See id.* arts. 105-07.

47. *See id.* art. 3.

48. *See* Protocol 35, *supra* note 43.

49. *See* Report for the Hearing and Oral Submissions of the Swedish Government, Ravintoloitsijain Liiton Kustannus Oy Restamark, Case E-1/94, [1994-1995] Rep. EFTA Ct. 35, 54, ¶¶ 89-91; Report for the Hearing, Sveinbjörnsdóttir v. Government of Iceland, Case E-9/97, [1998] Rep. EFTA Ct. 115, 125-29, ¶¶ 52, 66, 76; Report for the Hearing, Karlsson v. Icelandic State, Case E-4/01, [2002] Rep. EFTA Ct. 255, 267, ¶ 51.

50. *See* Opinion 1/91 of the Court of Justice on the EEA Agreement, [1991] E.C.R. I-6097, ¶ 6.

51. *See id.* ¶ 1.

52. *See id.*

53. *See* Leif Sevón, *Primacy and Direct Effect in the EEA Some Reflections*, in LIBER AMICORUM OLE DUE 34 (1994); *see also* Walter van Gerven, *The Genesis of EEA Law and the Principles of Primacy and Direct Effect*, 16 FORDHAM INT'L L.J. 955, 989 (1993); Thomas Bruha, *Is the EEA an Internal Market?*, in EEA-EU RELATIONS 97, 108 (Müller-Graff & Selvig eds., 1999); Leif Sevón & Martin Johansson, *The Protection of the Rights of Individuals under the EEA Agreement*, 24 EUR. L. REV. 373, 385 (1999); Sven Norberg, *Perspectives*

Court went for what may be called “quasi-direct effect,” “quasi-primacy,” and “full State liability.” The Court held in its very first case, *Ravintoloitsijain Liiton Kustannus Oy Restamark*, on December 14, 1994, that it follows from Protocol 35 that individuals and economic operators must be entitled to invoke and claim at the national level any rights that could be derived from the provisions of the EEA Agreement (having been made part of the respective national legal order), as long as they are unconditional and sufficiently precise.⁵⁴ In its 2002 *Einarsson v. Icelandic State* judgment, the Court found that, according to Protocol 35, such provisions take precedence over conflicting provisions of national law.⁵⁵ National courts must be entitled to ask the EFTA Court for an Opinion on these matters under Surveillance and Court Agreement Article 34. In its 1998 *Sveinbjörnsdóttir v. Government of Iceland* ruling, the EFTA Court held that the principle of State liability for breaches of EEA law must be assumed to be part of that law.⁵⁶ After having confirmed its State liability jurisprudence in the 2002 *Karlsson v. Icelandic State* judgment, the EFTA Court held, in *dicta*, that EEA law does not require that individuals and economic operators be able to rely directly on non-implemented EEA rules before national courts.⁵⁷ At the same time, it was considered inherent in the general objective of the EEA Agreement of establishing a dynamic and homogeneous market, in the ensuing emphasis on the judicial defense and enforcement of the rights of individuals, as well as in the public international law principle of effectiveness, that national courts will consider any relevant element of EEA law, whether implemented or not, when interpreting international law.⁵⁸

National Supreme Courts made important contributions to this outcome. With regard to the legal nature of Advisory Opinions, the Norwegian Supreme Court declared that although opinions of the EFTA Court are advisory, they must be accorded preeminent weight due to: (1) the task of the EFTA Court to guarantee homogeneous interpretation; (2) the specialized

on the Future Development of the EEA Agreement, AFMÆLISRIT THÓR VILHJÁLMSOON 367 (2002).

54. [1994-1995] Rep. EFTA Ct. 15, 37, ¶ 77.

55. Case E-1/01, [2002] Rep. EFTA Ct. 2, 5, ¶ 4.

56. Case E-9/97, [1998] Rep. EFTA Ct. at 97, 112-13, ¶¶ 62-69.

57. Case E-4/01, [2002] Rep. EFTA Ct. 240, 249 ¶ 28.

58. *See id.*

knowledge of the EFTA Court; and (3) the fact that Member States and institutions of EFTA and EC have the right to submit observations.⁵⁹ In another case, the Supreme Court stated that it would take a great deal for the Court to depart from the EFTA Court's interpretation of rules of EEA law.⁶⁰ The Supreme Court of Iceland similarly stated that Icelandic courts must follow the rulings of the EFTA Court save in exceptional cases.⁶¹ The Chairman of the Liechtenstein Administrative Court has recently stated that his court has adopted a policy of strictly following the EFTA Court's opinions.⁶²

Regarding effect and State liability, the Liechtenstein State Court ("Constitutional Court"), in an expert opinion of December 11, 1995, found that provisions of EEA law are effective in domestic law as they enter into force as public international law insofar as they are self-executing; no national act of transformation is needed.⁶³ In a judgment of May 3, 1999, the same Court held that EEA law takes precedence over conflicting domestic law including national constitutional law according to EEA Agreement Article 7 and Protocol 35 to the EEA Agreement.⁶⁴ The primacy of EEA law is limited only by the fundamental principles and core content of fundamental rights laid down in the Constitution and in the European Human Rights Convention.⁶⁵ Accordingly, the Supreme Administrative Court of Liechtenstein sees no difficulty in setting aside provisions of national law that conflict with EEA law. In the alternative, the Court would try to give the national rule in question an EEA-friendly interpretation. In either case, the Supreme Administrative Court will not wait until the provision has been amended or abolished either by the

59. See Høyesteretts internettsider, Summary of Recent Supreme Court Decisions, available at <http://www.hoyesterett.no/1270.asp> (last visited Mar. 10, 2005) (discussing the Norwegian Supreme Court's decisions in *Finanger*, Case 55/1999, HR-2000-00049B (2000) and *Paranova*, Case 2002/582, HR-2004-00981-A (2004)).

60. See *id.*

61. See Judgment of Dec. 16, 1999, Sveinbjörnsdóttir, Case No. 236/1999 (Sup. Ct. of Iceland); see also Thorgeir Örlygsson, *Hvernig hefur Ísland brugðist við ákvörðunum EFTA-dómstólsins?*, TÍMARIT LÖGFRÆÐINGA (2004); Graver, *supra* note 41.

62. See Andreas Batliner, *Die Anwendung des EWR-Rechts durch liechtensteinische Gerichte — Erfahrungen eines Richters*, LIECHTENSTEINISCHE JURISTENZEITUNG (forthcoming Winter 2004).

63. See Expert Opinion of the State Court 1995/14, LES 122 (1996).

64. See Jugement de la Cour d'État de la Principauté du Liechtenstein en tant que Cour constitutionnelle, StGH 1998/60, SchZBl. 585 (1999).

65. See *id.*

legislature or the State Court.⁶⁶

In the *Sveinbjörnsdóttir* case, the referring District Court of Reykjavík granted the plaintiff compensation.⁶⁷ The Supreme Court of Iceland confirmed that ruling upon appeal.⁶⁸ The Supreme Court emphasized that, under the Icelandic Constitution, it had to assess independently whether State liability had a legal basis in domestic law.⁶⁹ Nonetheless, it also held that the EEA Agreement provided a legal basis for State liability and found it natural to interpret the act that incorporated the EEA Agreement into Icelandic law such that an individual may claim that the Icelandic law may be harmonized with the EEA rules.⁷⁰ The Supreme Court held that the Icelandic State was in material breach of its obligation to guarantee Ms. Sveinbjörnsdóttir payment from the wage guarantee fund.⁷¹

In other cases, the Supreme Court of Iceland, although officially advocating dualism, found a way to implement EFTA Court rulings.⁷² The question of what effects EEA secondary law produces in the national orders of EEA/EFTA States arose in 1999 in the *Storebrand Skadeforsikring AS v. Veronika Finanger* case.⁷³ Veronika Finanger, a passenger in a car, was severely injured in a traffic accident.⁷⁴ The cause of the accident was the reduced driving ability of the driver who was under the influence of alcohol.⁷⁵ As a result, Ms. Finanger was left 60% medically disabled and 100% occupationally disabled.⁷⁶ The third-party motor vehicle liability insurance was with Storebrand Skadeforsikring AS. Ms. Finanger sued Storebrand, seeking compensation for the personal injuries she suffered in the accident.⁷⁷ Storebrand rejected Ms. Finanger's claim, referring to a provision of the Norwegian Automobile Liability Act which stated that, absent special

66. See Batliner, *supra* note 62.

67. The Sveinbjörnsdóttir judgment of the District Court of Reykjavík has not been published. It is only referred to in the judgment of the Supreme Court. See Judgment of Dec. 16, 1999, Sveinbjörnsdóttir, Case No. 236/1999 (Sup. Ct. of Iceland).

68. See *id.*

69. See *id.*

70. See *id.*

71. See *id.*

72. See Örlýgsson, *supra* note 61.

73. Case E-1/99, [1999] Rep. EFTA Ct. 119, 131, ¶ 36.

74. See *id.* ¶ 2.

75. See *id.*

76. See *id.*

77. See *id.* ¶¶ 2-3.

circumstances, a passenger injured in a traffic accident may not obtain compensation if he or she knew or should have known that the driver of the vehicle was under the influence of alcohol at the time of the accident.⁷⁸ The Supreme Court of Norway referred to the EFTA Court the question of whether that provision was incompatible with the EEA Motor Vehicle Insurance Directives.⁷⁹ The EFTA Court held that this was indeed the case.⁸⁰ The Norwegian Supreme Court did not ask the EFTA Court to answer what effect a provision of a directive may produce in the internal legal order of an EEA/EFTA State. The Court, therefore, did not address that issue in its opinion. The Supreme Court of Norway, basing its ruling on the EFTA Court's judgment, unanimously held that the provision in the Norwegian Automobile Liability Act violated EEA law.⁸¹ The Court also stated that the duty to loyally cooperate contained in EEA Article 3 (the provision mirroring EC Article 10) is applicable to courts.⁸² There was, however, dissent on how to resolve the contradiction between EEA law and domestic law. A majority of ten justices found that the clear wording of the national provision in question could not be set aside.⁸³ A minority of five justices, including the Chief Justice, concluded that EEA law must take precedence, and thus the Norwegian provision in question was not applicable.⁸⁴ As a result, Storebrand was not held liable for Finanger's compensation claim.⁸⁵ It is notable that the case did not center on the vertical relationship between a State and a private citizen, but rather the horizontal relationship between a consumer and an insurance company, a circumstance that was widely discussed by the Court's majority. One of Norway's lead-

78. See *id.* ¶ 4.

79. See Council Directive No. 72/166, O.J. L 103 (1972); Council Directive No. 84/5, O.J. L 8 (1984); Council Directive No. 90/232, O.J. L 129 (1990); see also EEA Agreement, *supra* note 4, Annex IX, at 8-10, O.J. L 1/3.

80. *Storebrand Skadeforsikring*, Case E-1/99, [1999] Rep. EFTA Ct. at ¶ 28.

81. See Høyesteretts internettsider, *supra* note 59 (providing an internet link to a summary of the Norwegian Supreme Court's decisions in *Finanger*, Case 55/1999, HR-2000-00049B (2000)).

82. For the significance of Article 10 of the EC Treaty, the provision mirroring Article 3 of the EEA, in Community law, see John Temple Lang, *The Duties of National Courts Under Community Constitutional Law*, 22 EUR. L. REV. 3 (1997).

83. See Høyesteretts internettsider, *supra* note 59 (summarizing Norwegian Supreme Court's decisions in *Finanger*, Case 55/1999, HR-2000-00049B (2000)).

84. See *id.*

85. See *id.*

ing scholars has opined that, in a vertical context, the Supreme Court would have concluded that a provision of a directive would apply.⁸⁶

Subsequently, Ms. Finanger instituted legal proceedings against the Norwegian government and claimed damages for failure to correctly implement EEA law.⁸⁷ The Oslo City Court, in a March 13, 2003 judgment, found in favor of Ms. Finanger.⁸⁸ The Court based its decision on the EFTA Court's State liability jurisprudence, and also referred to the Icelandic Supreme Court's ruling in the *Sveinbjörnsdóttir* case.⁸⁹

III. THE DIALOGUES BETWEEN THE EFTA COURT AND THE COMMUNITY COURTS

A. Community Courts Interpreting EC Law

The EFTA Court has acted as a conceptual pioneer for Community courts in fields such as: television without frontiers; labor law including equal rights; the law of parallel trade and of repackaging; State aid law; and, in particular, food safety law. In the respective cases, a number of courts have made explicit reference to EFTA Court case law. Advocates-General of the ECJ have played an important part in this dialogue.⁹⁰ Recently the EFTA Court has, for its part, referred to opinions of Advocates-General.⁹¹ For the sake of completeness, it may be added that

86. See Graver, *supra* note 41.

87. See Judgment of March 13, 2003, Case No. 02-10919 A/83 (Oslo City Court) (not published).

88. See *id.*

89. See *id.* The case has been appealed by the Norwegian Government. See Linda Helland, *The Application of the State Liability Doctrine in the EEA*, 6 EUR. L. REP. 234 (2003).

90. For details see the discussion of the respective cases *infra*, notes 136, 143-48, 170-71 and accompanying text.

91. See *Landsorganisasjonen I Norge* (Norwegian federation of Trade Unions) with *Norsk Kommuneforbund* (Norwegian Union of Municipal Employees) v. *Kommunenenes Sentralforbund* (Norwegian Assoc. of Local and Regional Author), Case E-8/00, [2002] Rep. EFTA Ct. 116, 129, ¶ 35 (referring to Opinion of Advocate-General Jacobs, *Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96, [1999] E.C.R. I-__, Opinion of Advocate-General Jacobs, *Brentjens' Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, Joined Cases C-115/97 & C-117/97, [1999] E.C.R. I-__, and Opinion of Advocate-General Jacobs, *Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, Case C-219/97, [1999] E.C.R. I-5751, ¶ 109, [2000] 4 C.M.L.R. 446); *EFTA Surveillance Auth. v. The Kingdom of Norway*, Case E-1/02, [2003] Rep. EFTA Ct. 1, ¶¶ 37, 40 (referring to Opinion of Advocate-General Tesauero, *Kalanke v. Freie Hansestadt Bremen*, Case C-450/93, [1995] E.C.R. I-3051, [1996] 1

the Commission of the European Communities which is submitting observations in all EFTA Court cases has on occasion played a key role in establishing EEA inter-court dialogue.⁹²

In the joined cases of *Forbrukerombudet v. Mattel Scandinavia A/S & Lego Norge A/S* (“*Mattel/Lego*”), the EFTA Court, upon referral from the Norwegian Market Council, held in a June 16, 1995 judgment that Articles 2(2) and 16 of Television Directive 89/552 must be interpreted as preventing an EEA State from applying a nationwide general ban on television advertising specifically aimed at children if the advertisements are part of a television program that is received from another EEA State.⁹³ At the same time, a portion of the Court’s *dicta* based on the seventeenth recital of the Television Directive’s preamble that the Television Directive was not meant to preclude Member States from taking measures under Directive 84/450 with regard to advertisements deemed misleading within the meaning of that Directive.⁹⁴ The ECJ followed the EFTA Court’s line of reasoning in its July 9, 1997 ruling in the joined cases *Konsumentenombudsmannen v. De Agostini (Svenska) Förlag AB* and *Konsumentenombudsmannen v. TV-shop i Sverige AB*, which had originally been referred to the EFTA Court. After Sweden’s accession to the E.U., the Market Court withdrew the its requests and, on March 7, 1995, referred them to the ECJ.⁹⁵ One will notice that AG Jacobs proposed that the ECJ follow the holding, but not the *dicta*, of the EFTA Court in *Mattel/Lego*.⁹⁶

C.M.L.R. 175, and Opinion of Advocate-General Saggio, Badeck & Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen, Case C-158/97, [2000] E.C.R. I-1875, [2001] 2 C.M.L.R. 6); *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Found. v. EFTA Surveillance Auth.*, Case E-2/02, [2003] Rep. EFTA Ct. 52, ¶ 37 (referring to the Opinion of Advocate-General Jacobs, *Union de Pequeños Agricultores v. Council*, C-50/00, [2002] E.C.R. I-6677, [2003] 3 C.M.L.R. 1); Judgment of November 23, 2004, *Fokus Bank ASA v. The Norwegian State*, represented by Skattedirektoratet (the Directorate of Taxes), Case E-1/04, ¶ 23 (not yet reported) (referring to Opinion of Advocate-General Geelhoed, *Ospelt v. Schlössle Weissenberg Familienstiftung*, Case C-452/01, [2003] E.C.R. I-9743).

92. See CARL BAUDENBACHER, *THE EFTA COURT TEN YEARS ON* (forthcoming, on file with author).

93. Joined Cases E-8/94 & E-9/94, [1994-1995] Rep. EFTA Ct. 113, 127, ¶ 57.

94. See *id.* ¶ 55.

95. See *Konsumentenombudsmannen v. De Agostini (Svenska) Förlag AB*, Case C-34/95, and *Konsumentenombudsmannen v. TV-shop i Sverige AB*, Cases C-35/95 & C-36/95, [1997] E.C.R. I-3843, [1998] 1 C.M.L.R. 32.

96. See Opinion of Advocate-General Jacobs, *Konsumentombudsmannen*, Case C-34/95, and *TV-shop*, Cases C-35/95 & C-36/95, [1997] E.C.R. 3843 at ¶ 85.

In *TV 1000 Sverige AB v. Norwegian Gov't* ("TV 1000"), the EFTA Court found that there is no common standard of pornography for the EEA, and held that program broadcasts which might seriously impair the physical, mental, or moral development of minors are not lawful because they are sent at night or because there is a technical device.⁹⁷ In *R. v. Secretary of State for Culture, Media and Sport*, the U.K. Government, after having informed the Commission and the broadcaster that in its view the broadcasting of pornographic movies from Denmark to the United Kingdom manifestly, seriously, and gravely infringed Article 22 of Directive 89/552, prohibited the broadcast and informed the Commission, which by a decision addressed to the United Kingdom stated that the measure was not discriminatory and was appropriate for the purpose of protecting minors.⁹⁸ The High Court dismissed an application by Danish Satellite TV ("DSTV") against the order of the U.K. Government referring to EFTA Court *TV 1000*.⁹⁹ The judge also rejected DSTV's alternative request for a question to be referred to the ECJ under the EC Article 234 procedure stating that the judgment was unequivocal.¹⁰⁰ Moreover, the High Court refused DSTV leave to appeal to the Court of Appeal as DSTV's application for leave to appeal was dismissed.¹⁰¹ An action for annulment by DSTV against the Commission was dismissed as inadmissible by the CFI under 230(4) EC.¹⁰²

The preliminary reference series of *Eidesund v. Stavanger Catering A/S*,¹⁰³ *Langeland v. Norske Fabricom A/S*,¹⁰⁴ *Ulstein & Røiseng v. Møller*,¹⁰⁵ and *Ask & Others v. ABB Offshore Technology AS & Aker Offshore Partner AS*¹⁰⁶ was primarily concerned with the question of whether the Directive on Transfers of Undertakings was applicable to the replacement of independent service providers, i.e., the termination of a contract with one service provider followed

97. Case E-8/97, [1998] Rep. EFTA Ct. 70, 77, ¶ 24.

98. Danish Satellite TV A/S (Eurotica Rendez-vous Television) v. Commission, Case T-69/99, [2000] E.C.R. II-4039, ¶¶ 5, 10.

99. *See id.* ¶ 13.

100. *See id.*

101. *See id.*

102. *See id.* ¶¶ 30-32.

103. Case E-2/95, [1995-96] Rep. EFTA Ct. 3.

104. Case E-3/95, [1995-96] Rep. EFTA Ct. 38.

105. Case E-2/96, [1995-96] Rep. EFTA Ct. 67.

106. Case E-3/96, [1997] Rep. EFTA Ct. 3.

by the entering into a contract with a new, more competitive company. In the wake of the ECJ's affirmation in *Christel Schmidt v. Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen* of the Directive's applicability in cases concerning the mere outsourcing of an activity,¹⁰⁷ this question had become a bone of contention, particularly in Germany and the United Kingdom. In *Eidesund*,¹⁰⁸ the operator of an oil drilling platform in the North Sea terminated a contract relating to the provision of catering and cleaning services by an independent company, invited tenders, and based on those tenders, awarded a contract to another company.¹⁰⁹ After obtaining the contract, the successful employer offered fourteen of the former contractor's nineteen employees continued work on the platform.¹¹⁰ No contractual relations existed between the former service provider and the successor, and tangible assets were taken over to a very limited extent.¹¹¹ The EFTA Court found that the supply of services and goods alone did not constitute part of a service provider's business within the meaning of the Directive.¹¹² Accordingly, the loss of one customer to a competing company would normally not qualify as a transfer of a business within the meaning of the Directive.¹¹³ Nonetheless, the EFTA Court concluded that the replacement of an independent service provider with another might constitute a transfer of business within the meaning of the Directive, depending on the circumstances of the individual case.¹¹⁴ The EFTA Court changed its approach in *Ulstein & Røiseng*.¹¹⁵ In that case, an outside company that carried out ambulance services for a hospital was no longer considered after public tenders had been invited, but replaced by a second company.¹¹⁶ No tangible assets were taken over.¹¹⁷ The second company invited potential candidates to send in applications, but

107. Case C-392/92, [1994] E.C.R. I-1311, [1995] 2 C.M.L.R. 331.

108. Case E-2/95, [1995-96] Rep. EFTA Ct. 3, 6, ¶ 6.

109. *See id.* ¶ 5.

110. *See id.*

111. *See id.* ¶¶ 30, 32.

112. *See id.* ¶ 35.

113. *See id.* ¶ 36.

114. *See id.* ¶¶ 38, 46.

115. Case E-2/96, [1995-96] Rep. EFTA Ct. 67.

116. *See id.* ¶ 12.

117. *See id.* ¶ 13.

reemployed only a limited number of the original employees.¹¹⁸ In its ruling, the EFTA Court held that "a mere succession of two contracts for the provision of the same or similar services will not, as a rule, be sufficient for there to be a transfer of an undertaking, business or part of a business" within the meaning of the Directive.¹¹⁹ The EFTA Court confirmed this jurisprudence in the *Ask & Others* case.¹²⁰ In *Süzen v. Zehnacker Gebäudereinigung GmbH Krankenhausservice*¹²¹ the ECJ did not qualify the replacement of a service provider as falling within the scope of the Transfer of Undertakings Directive, making reference to the EFTA Court's ruling in *Ulstein & Røiseng*.¹²² In *Adi (U.K.) Limited v. Firm Security Group Ltd.*, a case on succession of contracts, the Court of Appeals based itself on the ECJ's *Süzen* judgment and indirectly referred to the *Ulstein & Røiseng* case by quoting verbatim the paragraph in which the ECJ cites that EFTA Court ruling.¹²³ The Austrian Supreme Court interpreted the notion of transfer by reference to EFTA Court *Ulstein & Røiseng*.¹²⁴ The question was whether the transfer rules would also apply if the worker is an apprentice. The Supreme Court answered in the affirmative.

In the *Eidesund*, *Ulstein & Røiseng*, and *Ask & Others* cases, the EFTA Court also found that the Transfer of Undertakings Directive was applicable where, in the event of succession of contracts, the new contract was awarded after a public tender had taken place.¹²⁵ However, the Court expressed its reservation that in most cases of public tendering, regardless of whether it was stipulated by EEA law or not, the replacement of a service provider would not constitute a transfer of an undertaking, business, or part of a business within the meaning of the Transfer of Undertakings Directive.¹²⁶ The ECJ followed EFTA Court cases,

118. *See id.*

119. *See id.* ¶ 27.

120. Case E-3/96, [1997] Rep. EFTA Ct. 3, 8, ¶ 19.

121. Case C-13/95, [1997] E.C.R. I-1259.

122. *See id.* ¶ 10.

123. [2001] 3 C.M.L.R. 8, ¶¶ 15, 25 (Eng. C.A.).

124. *See Osman P. v. Gunther D., Ges.mbH*, 9 ObA 193/98t, 269 (Aus.).

125. *See Eidesund v. Stavanger Catering A/S*, Case E-2/95, [1995-96] Rep. EFTA Ct. 3, 14, ¶ 48; *Ulstein & Røiseng v. Møller*, Case E-2/96, [1995-96] Rep. EFTA Ct. 67, 76, ¶ 44, *Ask & Others*, [1997] Rep. EFTA Ct. ¶ 33.

126. *Eidesund*, [1995-96] Rep. EFTA Ct. ¶ 46; *Ulstein & Røiseng*, [1995-96] Rep. EFTA Ct. ¶ 27, *Ask & Others*, [1997] Rep. EFTA Ct. ¶ 19.

Eidesund and *Ask v. ABB & Aker in Oy Liikenne Ab v. Pekka Lis-kojärvi & Pentti Juntunen*, holding that a public tender does not exclude the applicability of the Directive.¹²⁷

In the cases *Eidesund* and *Langeland*, the national courts also asked whether an obligation of the transferor of a business or of part of a business to pay premiums into a supplementary pension scheme would be transferred to the purchaser.¹²⁸ The Court found that the Directive exempted all the rights and obligations regarding old-age, invalidity, and survivors' benefits.¹²⁹ It noted that the accrual of pension benefits and the payment of pension premiums were inseparable and that it made no economic sense to transfer the obligation to pay premiums once it was clear that there was no obligation to pay pensions.¹³⁰ The England and Wales Court of Appeal held in the *Adams v. Lancashire CC & BET Catering Serv. Ltd.* case,¹³¹ that Article 3(3) of the Transfer of Undertakings Directive exempts all the rights concerning supplementary pension schemes in case of old-age, invalidity, and survivors' benefits from the transfer. It referred, *inter alia*, to EFTA Court *Eidesund* holding that this ruling was not binding, but constituted "persuasive authority."¹³² The House of Lords denied appeal.¹³³ The Employment Appeal Tribunal came to the same conclusion in *Frankling v. BPS Public Sector Ltd.* and referred to the EFTA Court's *Eidesund* ruling.¹³⁴

In the case *Briheche v. Ministère de l'intérieur*, AG Poiares Maduro proposed that the ECJ hold that the Equal Rights Directive 76/207 and EC Article 141(4) preclude national legislation that discriminates between widowers and widows who have not remarried as regards the age limit imposed on them for access to posts in the administration, without being aimed either at removing existing inequalities or at compensating them.¹³⁵ The

127. [2001] E.C.R. I-745 ¶ 44.

128. See *Eidesund*, [1995-96] Rep. EFTA Ct. ¶ 3; *Langeland v. Norske Fabricom A/S*, Case E-3/95, [1995-96] Rep. EFTA Ct. ¶ 3.

129. See *Eidesund*, [1995-96] Rep. EFTA Ct. ¶ 60; *Langeland*, [1995-96] Rep. EFTA Ct. ¶ 32.

130. See *Eidesund*, [1995-96] Rep. EFTA Ct. ¶ 66; *Langeland*, [1995-96] Rep. EFTA Ct. ¶ 38.

131. [1997] 3 C.M.L.R. 79 (Eng. C.A.).

132. See *id.* at 92.

133. See *id.*

134. [1999] I.C.R. 347, [1999] I.R.L.R. 212.

135. Case 319/03, [2004] E.C.R. __, ¶ 53.

AG emphasized that positive measures, i.e. measures that favor women in order to reduce their under representation in professional life, must be reconciled with the equal treatment principle and referred, *inter alia*, to the EFTA Court's judgment in the *EFTA Surveillance Auth. v. The Kingdom of Norway* ("University of Oslo") case.¹³⁶ In *University of Oslo*, the EFTA Court held that the "earmarking" of academic posts for women was contrary to the principle of equal treatment.¹³⁷

In *Mag Instrument Inc. v. Cal. Trading Co. Norway, Ulsteen* ("Maglite"),¹³⁸ a Norwegian business had directly imported trademarked Maglite flashlights from California to Norway without the trademark owner's consent. According to Article 7(1) of the Trade Mark Directive, "the trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in a Member State under that trademark by the proprietor or with his consent."¹³⁹ The EFTA Court held in a ruling on December 3, 1997, that this provision is to be interpreted as leaving it up to the EFTA States which are parties to the EEA Agreement to decide whether they wish to introduce or maintain the principle of international exhaustion of rights conferred by a trademark with regard to goods originating from outside the EEA¹⁴⁰ The Court found that the principle of international exhaustion is in the interest of free trade and competition and thus in the interest of consumers, that it is in line with the main function of a trademark to allow consumers to identify with certainty the origin of the goods, and that this interpretation of Article 7(1) of the Trade Mark Directive was also consistent with the TRIPs Agreement, which left the issue open for the Member States to regulate.¹⁴¹ In its *Silhouette Int'l Schmied GmbH & Co. KG v. Harlauer Handelsgesellschaft mbH* judgment of July 16, 1998, the ECJ came to the opposite conclusion, holding that national rules of EC Member States providing for international exhaustion of trademark rights were incompatible with Article 7(1)

136. See *EFTA Surveillance Auth. v. The Kingdom of Norway*, Case E-1/02, [2003] Rep. EFTA Ct. 3.

137. See *id.* ¶ 59.

138. Case E-2/97, [1997] Rep. EFTA Ct. 127.

139. See *id.* ¶ 2.

140. See *id.* ¶ 28.

141. See *id.* ¶¶ 19-20.

of the Trade Mark Directive.¹⁴² The ruling was essentially based on the consideration that this result comports with the goal of securing the functioning of the internal market. The ECJ did not make reference to the EFTA Court's *Maglite* judgment, but AG Jacobs did.¹⁴³ He distinguished the two cases on the facts (in *Maglite*, unlike in *Silhouette*, the parallel imports stemmed from the United States, i.e. from outside the EEA) and on the law (unlike the EC Treaty, the EEA Agreement has not established a customs union, but rather a free trade area in which sovereignty in foreign trade matters lies with the contracting parties).¹⁴⁴ AG Jacobs moreover found the argument advanced in *Silhouette* by the Swedish government that the function of trademarks is not to enable the trademark owner to divide up the market and to exploit price differentials and that the adoption of international exhaustion would bring substantial advantages to consumers, and would promote price competition, "extremely attractive."¹⁴⁵ One will notice that this approach also underlies the EFTA Court's *Maglite* ruling.¹⁴⁶ However, the AG concluded that the ECJ's case law on the function of trademarks was developed in the context of the Community, not the world market, and to allow Member States to opt for international exhaustion would itself result in barriers between Member States.¹⁴⁷ It is not for the President of the EFTA Court to comment on the ECJ's *Silhouette* judgment. It is doubtful, however, that the actual legal situation constitutes a contribution to making Europe "the most competitive and dynamic economy in the world" in this decade.¹⁴⁸ For the sake of order, it may be added that in the *Zino Davidoff SA v. A & G Imports Ltd., Levi Strauss & Co. & Others v. Tesco Stores Ltd. & Others*, and *Levi Strauss & Co. & Others v. Costco Wholesale UK Ltd.* joined cases, which in the meantime has led to a judgment by the ECJ,¹⁴⁹ the Chancery Division referred in its decision to

142. Case C-355/96, [1998] E.C.R. I-4799, [1998] 2 C.M.L.R. 953.

143. See Opinion of Advocate-General Jacobs, *Silhouette*, [1998] E.C.R. I-4799, ¶ 43.

144. See *id.*

145. *Id.* ¶ 49.

146. *Mag Instrument Inc. v. Cal. Trading Co. Norway, Ulsteen*, [1997] Rep. EFTA Ct. ¶ 19.

147. See Opinion of Advocate-General Jacobs, *Silhouette*, [1998] E.C.R. I-4799, ¶ 43.

148. Remarks by the European Council at the EU Feira Summit in Lisbon, March 2001 available at http://www.weforum.org/pdf/Gcr/LisbonReview/LisbonReview_2002.pdf (last visited Mar. 11, 2005).

149. Joined Cases C-414/99, C-415/99, and C-416/99, [2001] E.C.R. I-8691; see also

ask the ECJ for a preliminary ruling, *inter alia*, to the EFTA Court's *Maglite* judgment.¹⁵⁰

In *Merck & Co., Inc. & Others v. Paranova AS* ("Paranova"),¹⁵¹ the U.S. pharmaceutical manufacturer Merck brought a lawsuit against the Danish parallel importer Paranova. Paranova repackaged the original products and reaffixed Merck's trademark onto the repackaging as well as information on the identity of the repackager.¹⁵² Moreover, along the edges of the repackaging, it affixed vertical or horizontal stripes, whose colors would vary in accordance with those employed by the original producer. The action brought by Merck against Paranova before the Norwegian courts aimed at prohibiting the use of those colored stripes.¹⁵³ The Norwegian Supreme Court asked the EFTA Court whether, in a case where it has been established that repackaging of a pharmaceutical product was necessary to allow a parallel importer effective access to the market, "legitimate reasons" within the meaning of Article 7(2) of the Directive existed on the grounds that the parallel importer has equipped the new packaging with colored stripes, and whether the use of such packaging design should be measured against a "necessity test," along the lines developed in the case law of the Court of Justice of the European Communities.¹⁵⁴ The EFTA Court emphasized the importance of free trade in markets partitioned along national boundaries, such as the pharmaceutical market.¹⁵⁵ In recognition of their contribution to overcoming this partition, certain privileges are conferred on parallel importers. Once the right to repackage and to reattach the original trademark is established and market access is thereby ensured, the parallel importer is to be considered as an operator on basically equal foot-

Carl Baudenbacher, *Internationale Erschöpfung des Markenrechts und der Begriff der Zustimmung*, EUR. L. REP. 2001, 382 et. seq.

150. See *ADI v. Willer*, [2001] 3 C.M.L.R. 8, [2001] I.R.L.R. 542. For the sake of completeness, the judgment of the Zurich Commercial Court in the *Kodak* case may be mentioned. In this case the Commercial Court found by four to one vote that patent rights were subject to international exhaustion. The Court referred, *inter alia*, to EFTA Court *Maglite*. See *Kodak SA v. Jumbo-Markt AG*, ZR 1998 Nr. 112. Upon appeal by the patent owner, the judgment was overruled by the Swiss Federal Supreme Court in a three to two decision. See *Kodak SA v. Jumbo-Markt AG*, BGE 126 III 129.

151. Case E-3/02, [2003] Rep. EFTA Ct. 101.

152. See *id.* ¶ 3.

153. See *id.* ¶¶ 8-9.

154. See *id.* ¶ 16.

155. See *id.* ¶¶ 34-37.

ing with the manufacturer and trademark proprietor within the framework of the Trade Mark Directive.¹⁵⁶ Consequently, its strategy of product presentation and the new design cannot mechanically be assessed on the basis of the necessity criterion. Instead, the EFTA Court found, a comprehensive balancing of the interests of the trademark proprietor and the parallel importer must be undertaken.¹⁵⁷ In doing so, the national court must take into account whether the packaging design used by Paranova is liable to damage the reputation of Merck's trademark, whether the trademark is used in a way that may give rise to the impression that there is a commercial connection between Paranova and Merck, and whether the marketing of Merck's products under the same trademark by various parallel importers with various package designs would evoke the risk of degeneration of the mark.¹⁵⁸ If this were the case, the EFTA Court concluded, the trademark owner would have "legitimate reasons" within the meaning of Article 7(2) of the Trade Mark Directive to oppose Paranova's use of colored stripes.¹⁵⁹ The EFTA Court's ruling in *Paranova* prompted the England and Wales Court of Appeal in *Boehringer Ingelheim KG v. Swingward Ltd.* to refer to the ECJ the question of whether the use of its own design elements (referred to as "co-branding") by a parallel importer and repackager of pharmaceuticals is in line with the Directive provisions on the exhaustion principle and the ECJ's case law related thereto, in particular the "necessity test."¹⁶⁰ The Court of Appeal emphasized that with regard to this question, there appear to be two schools of thought in European justice.¹⁶¹ Whereas the EFTA Court's jurisprudence shows a positive approach towards the parallel importer creating a package design of its own, the Supreme Courts of Austria, Denmark, and Germany, as well as the Court of Appeal of Sweden, apply a strict necessity test and tend to prohibit conduct such as Paranova's in the EFTA Court's judgment.¹⁶² One will notice in this context that the EFTA Court itself has mentioned the case law of the

156. *See id.* ¶ 45.

157. *See id.* ¶ 34.

158. *See id.* ¶¶ 40-56.

159. *See id.* ¶ 53.

160. [2004] 3 C.M.L.R. 3 (Eng. C.A.).

161. *See id.* ¶ 86.

162. *See id.*

Danish Supreme Court in its *Paranova* judgment.¹⁶³

In *Norwegian Bankers Assoc. v. EFTA Surveillance Auth.* (“*Husbanken II*”),¹⁶⁴ the EFTA Surveillance Authority, upon a complaint by the Norwegian Bankers’ Association, found that the State guarantee for Husbanken, the Norwegian State Housing Bank, amounted to State aid within the meaning of EEA Article 61(1), the provision mirroring EC Article 87(1), but that it was essentially justified under EEA Article 59(2), the provision mirroring Article 86(2) EC as constituting an operation of services of general economic interest.¹⁶⁵ The Norwegian Bankers’ Association brought an action for annulment of that decision under Surveillance and Court Agreement Article 36.¹⁶⁶ The EFTA Court held that an institution performing the tasks of Husbanken may be considered as an undertaking entrusted with the operation of a service of general economic interest within the meaning of that provision and that the aid in question was necessary for Husbanken to perform the tasks entrusted to it.¹⁶⁷ However, the Court annulled the decision of E.S.A. on the grounds that the latter had not considered the following points to the extent necessary: the definition of the relevant market; the question of whether there were alternative means less distortive of competition; the issue of a cost-benefit analysis; and the application of a proportionality test.¹⁶⁸ E.S.A. had thereby wrongly interpreted EEA Article 59(2). The Court confirmed in *State Debt Mgmt. Agency v. Íslandsbanki-FBA* that “a [S]tate guarantee system for a publicly owned bank may constitute [S]tate aid within the meaning of Article 61 E.E.A.”¹⁶⁹ At the same time, it found that a national court does not have the competence to declare that State aid granted by an EFTA State is contrary to the EEA Agreement.¹⁷⁰ In *Ministre de l’économie v. GEMO SA*, AG Jacobs mentioned the EFTA Court’s *Husbanken II* judgment as a reference

163. *Merck & Co., Inc. & Others v. Paranova AS*, Case E-3/02, [2003] Rep. EFTA Ct. at ¶ 19.

164. Case E-4/97, [1999] Rep. EFTA Ct. 1.

165. *See id.* ¶¶ 9-10.

166. *See id.* ¶ 11.

167. *See id.* ¶ 67.

168. *See id.* ¶¶ 69-70.

169. *State Debt Management Agency v. Íslandsbanki-FBA*, Case E-1/00, [2000-2001] Rep. EFTA Ct. 10, 26, ¶ 37.

170. *See* Opinion of Advocate-General Jacobs, *Ministre de l’économie v. GEMO SA*, Case C-126/01, [2002] E.C.R. —, ¶ 50.

for the so-called “[S]tate aid approach” with regard to whether financial compensation granted by a Member State to an undertaking providing a public service should be regarded as State aid.¹⁷¹ The question was and partly still is one of the most controversial in EC State aid law and has recently been answered by the ECJ in cases *Ferring SA v. Agence Central des Organismes de Sécurité Sociale* and *Altmark Trans GmbH & Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH* conversely, i.e., in favor of the so-called “compensation approach.”¹⁷²

In *Government of Norway v. EFTA Surveillance Auth.*,¹⁷³ the EFTA Court dismissed an application brought by Norway for the annulment of a decision of E.S.A. regarding State aid in the form of regionally differentiated social security taxation in Norway.¹⁷⁴ The National Insurance Act of February 28, 1997, provided for an insurance scheme under which employees and employers pay social security contributions.¹⁷⁵ The contribution rates for employers, ranging from 0 to 14.1%, were calculated on the basis of the individual employee’s gross salary income, with the contribution rate depending on which of five designated zones the employee had his or her registered permanent residence.¹⁷⁶ The highest rate was payable in central municipalities in southern Norway and a zero rate applied in certain areas in northern Norway.¹⁷⁷ Following an investigation, ESA adopted the contested decision, finding that the scheme involved State aid in breach of EEA Article 61(1).¹⁷⁸ ESA found that a general exemption was not warranted but that parts of the aid might, subject to certain conditions, be exempted under EEA Article 61(3)(c).¹⁷⁹ The EFTA Court held the contribution system to be selective, favoring certain undertakings, and thus constituting

171. *See id.* at n.64, 77.

172. *See* *Ferring SA v. Agence Central des Organismes de Sécurité Sociale*, Case C-53/00, [2001] E.C.R. I-9067, [2003] 1 C.M.L.R. 34.; *Altmark Trans GmbH & Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, Case C-280/00, [2003] E.C.R. I-7747, [2003] C.M.L.R. 12; *Transportbedriftenes Landsforening and Nor-Way Bussekspress AS v. EFTA Surveillance Auth.*, Case E-3/03, available at http://www.EFTAcourt.lu/pdf/E_3_03Decision.pdf (withdrawn) (last visited Feb. 21, 2005).

173. Case E-6/98, [1999] Rep. EFTA Ct. 74.

174. *See id.* ¶ 43.

175. *See id.* ¶ 1.

176. *See id.* ¶ 2.

177. *See id.*

178. *See id.* ¶¶ 64-67.

179. *See id.* ¶ 16.

State aid within the meaning of EEA Article 61(1).¹⁸⁰ The argument that it constituted a general measure falling outside the scope of that provision was rejected. Whereas, as a general rule, a tax system of an EEA/EFTA State was not deemed to be covered by the EEA Agreement, such a system may have consequences that would bring it within the scope of application of EEA Article 61(1).¹⁸¹ In *Salzgitter AG v. Commission*,¹⁸² the CFI *inter alia*, had to answer the question of whether the Commission had wrongly classified the tax provisions of Paragraph three of the German law on the development of the border zone between the former German Democratic Republic and the former Czechoslovak Socialist Republic (*Zonenrandförderungsgesetz*, “ZRFG”).¹⁸³ The provision provided for tax incentives in the form of special depreciation allowances and tax-free reserves for investments made in any establishment of an undertaking situated along the border area between the former German Democratic Republic and the former Czechoslovak Socialist Republic.¹⁸⁴ The Commission found that these privileges constituted State aid within the meaning of the ECSC Treaty.¹⁸⁵ The CFI rejected Salzgitter’s plea that the tax provisions in question constitute general tax provisions.¹⁸⁶ It noted that Paragraph three of the ZRFG applied without distinction to all sectors of activity, all types of investments, and all undertakings regardless of size, sector of activity, or seat.¹⁸⁷ The advantage conferred by the measures was, however, subject to the condition that the investments were made in the zone in question, i.e. in a geographically limited area within a Member State.¹⁸⁸ In the CFI’s view, that was sufficient for the measures to be viewed as relating to a specific category of undertakings.¹⁸⁹ The CFI concluded that it does not matter that the selective nature of the measure flows from a sectoral criterion or, as on the case at hand,

from a criterion relating to geographic location in a defined

180. *See id.* ¶ 38.

181. *See id.* ¶ 34.

182. Case T-308/00, [2004] E.C.R. ___.

183. *See id.* ¶ 22.

184. *See id.*

185. *See id.* ¶ 11.

186. *See id.* ¶ 43.

187. *See id.* ¶ 35.

188. *See id.* ¶ 36.

189. *See id.* ¶ 37.

part of the territory of a Member State. What matters, however, for a measure to be found to be State aid, is that the recipient undertakings belong to a specific category determined by the application, in law or in fact, of the criterion established by the measure in question (see, to that effect, Case E-6/98 Norway v. EFTA Surveillance Authority [1999] EFTA Court Report 74, paragraph 37).¹⁹⁰

In its 1983 *Officier van Justitie v. Sandoz* judgment, the ECJ held that the Member States must give marketing permission for fortified foodstuffs, if the addition of vitamins will satisfy a real need, in particular, of technological or nutritional nature. At the same time, the ECJ found that a national regulation according to which the marketing approval for foodstuffs fortified with vitamins which have been lawfully put on the market in other Member States depends on whether the importer shows that there is a need on the market is incompatible with Community law.¹⁹¹ In *EFTA Surveillance Authority v. Norway* (“*Kellogg Case*”),¹⁹² Norway banned the import and marketing of Kellogg’s cornflakes fortified with vitamins and iron which had been lawfully manufactured and marketed in other EEA States. The EFTA Court rejected the argument of the Norwegian government that in order to justify a marketing ban on cornflakes produced in Denmark it was sufficient to show the absence of a nutritional need for the fortification with vitamins and iron in the Norwegian population.¹⁹³ The question of need with regard to additives to foodstuffs may have a proper place in the context of the proportionality test.¹⁹⁴ At the same time, the EFTA Court found that in examining whether the marketing of fortified cornflakes may be banned on grounds of the protection of human health, a national government may, in the absence of harmonization, invoke the “precautionary principle.”¹⁹⁵ According to the “precautionary principle,” it is sufficient to show that there is relevant scientific uncertainty with regard to the risk in question.¹⁹⁶ The Court stressed that measures taken “must be

190. *Id.* ¶ 38.

191. See *Officier van Justitie v. Sandoz*, Case C-174/82, [1983] E.C.R. 2445, ¶ 24.

192. Case E-3/00, [2001-2002] Rep. EFTA Ct. 73.

193. See *id.* ¶¶ 23, 38.

194. See *id.* ¶ 28.

195. See *id.* ¶¶ 30-33.

196. See *id.* ¶ 31.

based on scientific evidence; they must be proportionate, non-discriminatory, transparent, and consistent with similar measures already taken.”¹⁹⁷ In the view of the Court, the conditions to be fulfilled by a proper application of the precautionary principle were, first, an identification of potentially negative health consequences, and second, a comprehensive evaluation of the risk to health, which must be based on the most recent scientific information.¹⁹⁸ The EFTA Court added that the precautionary principle can never justify the adoption of arbitrary decisions and can justify the pursuit of the objective of “zero risk” only in the most exceptional circumstances.¹⁹⁹ The Norwegian fortification policy did not fulfill these requirements. It was particularly inconsistent due to the long-standing fortification of certain products initiated by the government, and therefore, held to be contrary to EEA Article 11.²⁰⁰ The EFTA Court’s *Kellogg* Case judgment had a considerable impact on the case law of the ECJ and has also influenced the practice of the CFI. In September 2002, the CFI in two cases involving the fortification of animal food with antibiotics acknowledged the precautionary principle as being part of Community law and referred, *inter alia*, to the EFTA Court’s judgment in the *Kellogg* Case.²⁰¹ In September 2003, the ECJ in *Monsanto Agricoltura Italia SpA & Others v. Presidenza del Consiglio dei Ministri & Others* (“*Monsanto*”) decided on a case concerning the release of genetically modified maize.²⁰² It too relied on EFTA Court *Kellogg* Case when stating that “protective measures . . . may not properly be based on a purely hypothetical approach to risk, founded on mere suppositions which are not yet scientifically verified.”²⁰³ The most important judgment in the field is undoubtedly the ECJ’s ruling in *Commission v. Denmark*.²⁰⁴ The facts of the case were similar to the ones in the EFTA Court’s *Kellogg* Case.²⁰⁵ AG Mischo proposed that the

197. *Id.* ¶ 26.

198. *See id.* ¶ 30.

199. *See id.* ¶ 32.

200. *See id.* ¶ 33.

201. *See* Pfizer Animal Health v. European Union, Case T-13/99, [2002] E.C.R. II-3305; Alpharma v. Council of the European Union, Case T-70/99, [2002] E.C.R. II-3495.

202. Case C-236/01, [2003] E.C.R. I-8105.

203. *Id.* ¶ 106.

204. Case C-192/01, [2003] E.C.R. I-9693.

205. *See id.* ¶ 1.

Court acknowledge the precautionary principle along the lines developed by the EFTA Court in *Kellogg*.²⁰⁶ However, he wanted to save the nutritional need argument and took the view that the ECJ should dismiss the Commission's application.²⁰⁷ The ECJ followed the EFTA Court's ruling in its entirety.²⁰⁸ It held that it was not sufficient for a government to make the argument that a marketing ban on fortified foodstuffs may be justified by the sheer lack of a nutritional need in the respective country.²⁰⁹ At the same time, the ECJ recognized the precautionary principle and formulated the same conditions for its application as the EFTA Court had done in *Kellogg*. The ECJ ruled in favor of the Commission.²¹⁰ In a preliminary ruling case, the ECJ confirmed its stand with regard to the significance of the precautionary principle in foodstuff law.²¹¹ In this case, the link to the EFTA Court was established by AG Mischo.²¹²

B. Community Courts Interpreting EEA Law

The EEA Agreement was concluded by the European Community on the basis of EC Article 310.²¹³ According to settled case law, its provisions form an integral part of the Community legal order.²¹⁴ It goes without saying that the cross-fertilization between the EFTA Court and the Community courts may be particularly intense in proceedings in which the Community courts have to give an interpretation of EEA law. Cases concerning the "principle of homogeneity" in general, EEA/EFTA States' liability, free movement of capital, and food safety law are to be mentioned here. In *CFI Opel Austria GmbH v. Council of the European*

206. *See id.* ¶¶ 49-52.

207. *See* Opinion of Advocate-General Mischo, *Commission v. Denmark*, [2003] E.C.R. ¶ 77.

208. *See id.* ¶¶ 4-52.

209. *See id.* ¶ 54.

210. *See id.* ¶ 54.

211. *See* *John Greenham v. Léonard Abel*, Case C-95/01, [2004] E.C.R. __, ¶ 43.

212. *See* Opinion of Advocate-General Mischo, *John Greenham v. Léonard Abel*, Case C-95/01, [2004] E.C.R. __, ¶¶ 44, 53.

213. *See* EC Treaty, *supra* note 30, art. 310, O.J. C 224/1 (1992); *see also* European Parliament, *The European Economic Area (EEA)*, available at http://www.europarl.int/factsheets/6_3_2_en.htm (last visited Feb. 21, 2005).

214. *See* *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze*, Case 87/75, [1976] E.C.R. 129, ¶ 25; *see also* *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, Case 104/81, [1982] E.C.R. 3641, ¶ 23.

Union,²¹⁵ a case on the compatibility with the EEA Agreement of a Council Regulation withdrawing tariff concessions by imposing a 4.9% duty on certain F-15 car gearboxes produced by General Motors Austria and originating in Austria, the CFI dealt with the homogeneity goal informing the EEA Agreement and referred, with regard to the interpretation of Surveillance and Court Agreement Article 3(2), to the judgments of the EFTA Court in *Restamark*²¹⁶ and in *Scottish Salmon Growers Assoc. Ltd. v. EFTA Surveillance Auth.*²¹⁷ The CFI found that the EEA Agreement involves a high degree of integration, with objectives exceeding those of a mere free-trade agreement,²¹⁸ and that the significance in regard to the interpretation and application of the Agreement and of the contracting parties' objective to establish a dynamic and homogeneous EEA had not been diminished by the ECJ's Opinion 1/91.²¹⁹ The CFI further held that Article 10 of the EEA Agreement, the provision corresponding to Articles 12, 13, 16, and 17 of the EC Treaty, has direct effect in Community law.²²⁰ The ECJ's *Bellio F.lli Srl v. Prefettura di Treviso* case concerned, *inter alia*, the compatibility of two decisions of the Council and the EC Commission on certain Bovine Spongiform Encephalopathy ("BSE") protection measures with EEA Article 13.²²¹ Except for referring in a comprehensive way to the EFTA Court's *Kellogg* Case judgment,²²² the ECJ stated that "both the Court and the EFTA Court have recognized the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly."²²³ Insofar as the ECJ referred to its *Ospelt & Schlössle Weissenberg Familienstiftung* judgment²²⁴ and to the EFTA Court's judgment in *EFTA Surveillance Auth. v. Iceland*,²²⁵ which in the relevant paragraph itself contains a reference to ECJ *Ospelt*, one will notice

215. Case T-115/97, [1997] E.C.R. II-39.

216. Case E-1/94, [1994-1995] Rep. EFTA Ct. 15

217. Case E-2/94, [1994-1995] Rep. EFTA Ct. 59.

218. See *Opel Austria*, [1997] E.C.R. II-39, ¶ 107.

219. See Opinion 1/91 of the Court of Justice on the EEA Agreement, [1991] E.C.R. I-6097; see also *Opel Austria*, [1997] E.C.R. II-39, ¶ 109.

220. See *Opel Austria*, [1997] E.C.R. II-39, ¶ 102.

221. Case C-286/02, [2004] E.C.R. ___, [2004] 3 C.M.L.R. 34.

222. See *EFTA Surveillance Auth. v. The Kingdom of Norway*, Case E-3/00, [2001-2002] Rep. EFTA Ct. 75; *Bellio F.lli Srl*, Case C-286/02, [2004] E.C.R. ___.

223. *Bellio F.lli Srl*, [2004] E.C.R. ___, ¶ 34.

224. Case C-452/01, [2003] E.C.R. I-9743.

225. Case E-1/03, [2003] Rep. EFTA Ct. 143, ¶ 27.

that ECJ *Ospelt*, a case on free movement of capital in the EEA, is, for its part, linked to the EFTA Court's ruling in *Íslandsbanki*²²⁶ by way of a reference in AG Geelhoed's opinion.²²⁷ The EFTA Court has, for its part, made reference to the ECJ's decision in *Ospelt* and to its own judgment in *EFTA Surveillance Auth. v. Iceland in Fokus Bank ASA v. The Norwegian State*, a free movement of capital case.²²⁸

In its 1999 *Rechberger v. Republik Österreich*²²⁹ judgment, the ECJ was, *inter alia*, asked by the Landesgericht Linz whether the principle of State liability applied in Austria after January 1, 1994, in view of the fact that Austria had become part of the EEA on that date. Austria had not implemented the Package Tour Directive in good time, and travelers had suffered damage.²³⁰ In view of the planned accession of four of them to the E.U., the five EFTA/EEA States had entered into an Agreement on transitional arrangements for a period after the accession of certain EFTA States to the E.U. on September 28, 1994.²³¹ According to Article 5 of this Agreement, after accession, new preliminary ruling proceedings could only be brought before the EFTA Court in cases in which the facts occurred before accession, and where the application was lodged with the Court within three months after accession. Under Article 7 of that Agreement, the EFTA Court of five judges was to conclude all pending cases within six months after accession.²³² On January 1, 1995, Austria, Finland, and Sweden joined the EU. In its ruling of June 15, 1999, the ECJ held that Austria was, according to EEA Article 7 in conjunction with Section 11 of Protocol 1 to the EEA Agreement, required to transpose the directive in question on the day the EEA Agreement entered into force, on January 1, 1994.²³³ However,

226. Case E-1/00, [2000-2001] Rep. EFTA Ct. 8.

227. See Opinion of Advocate-General Geelhoed, *Ospelt*, Case C-452/01, [2003] E.C.R. I-9743.

228. See Judgment of November 23, 2004, *Fokus Bank ASA v. The Norwegian State*, represented by Skattedirektoratet (the Directorate of Taxes), Case E-1/04, ¶ 22 (not yet reported).

229. Case C-140/97, [1999] E.C.R. I-3499, [2000] 2 C.M.L.R. 1.

230. See *id.* ¶ 17.

231. See Agreement on transitional arrangements for a period after the accession of certain EFTA States to the European Union, [1994-1995] Rep. EFTA Ct. 161-64.

232. See Samuelsson v. Svenska staten, Case E-1/95, [1994-1995] Rep. EFTA Ct. 146. *Samuelsson* was referred to the EFTA Court by the Varbergs tingsrätt, Sweden, on March 2, 1995 and decided by the EFTA Court on June 20, 1995.

233. See *Rechberger*, [1999] E.C.R. at Ruling ¶ 2.

the Court declared itself not competent to rule on a question of interpretation related to the application by Austria of the EEA Agreement during the period preceding its accession to the Community.²³⁴ The Court went on, however, by stating:

Moreover, in view of the objective of uniform interpretation and application which informs the EEA Agreement, it should be pointed out that the principles governing the liability of an EFTA State for infringement of a directive referred to in the EEA Agreement were the subject of the EFTA Court's judgment of 10 December 1998 in *Sveinbjörnsdóttir*.²³⁵

One will conclude from this that the Austrian judge was at least indirectly encouraged to grant compensation in this case provided that the conditions set out by the EFTA Court in *Sveinbjörnsdóttir* (which correspond to those developed in Community law by the ECJ) were fulfilled. It appears that compensation was in fact paid in the framework of a settlement before the referring Austrian court. For the sake of completeness, it must be added that in the *Karlsson* case,²³⁶ the Norwegian government invited the EFTA Court to overrule *Sveinbjörnsdóttir*. In rejecting the government's position, the EFTA Court in turn referred to ECJ's *Rechberger*.²³⁷ One commentator has noted that with this, the EFTA Court has in a skilful way taken the ECJ as an ally on board.²³⁸

In the *Ospelt* case, a Liechtenstein citizen owning agricultural land in Vorarlberg, Austria had been refused authorization to transfer that land to a foundation established in Liechtenstein.²³⁹ The ECJ held that a rule such as that of the Vorarlberger Land Transfer Law, making transactions between nationals of States party to the EEA Agreement relating to agricultural land subject to administrative controls, must be assessed in light of Article 40 and Annex XII of that Agreement, "which are provisions possessing the same legal scope as that of Article 73b of the EC Treaty (currently Article 56 of the EC Treaty),

234. *See id.* ¶ 38.

235. *Id.* ¶ 39.

236. *See Karlsson v. Icelandic State*, Case E-4/01, [2002] Rep. EFTA Ct. 242, 248-49, ¶¶ 24-34.

237. *See id.* ¶ 25.

238. *See Georg Gorton, Bestätigung der Staatshaftungsrechtsprechung des EFTA-Gerichtshofs*, 7-8 EUR. L. REP. 260, 263 (2002).

239. *See Ospelt v. Schlössle Weissenberg Familienstiftung*, Case C-452/01, [2003] E.C.R. I-9743, ¶ 2.

which is identical in substance.”²⁴⁰ The ECJ stressed that “one of the principal aims of the EEA Agreement is to provide for the fullest possible realization of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States.”²⁴¹ It is to be noted that the ECJ referred in that respect to its EEA-friendly Opinion 1/92.²⁴² Based on these contentions, the ECJ found that the provisions of the EC Treaty on the free movement of capital (which are identical to the respective provisions of the EEA Agreement) do not preclude the requirement of a prior authorization, but “do preclude such authorization being refused in every case in which the acquirer does not himself farm the land concerned as part of a holding and on which he is not resident.”²⁴³ As stated above, AG Geelhoed had in his Opinion referred to the EFTA Court’s *Íslandsbanki* ruling, in which the EFTA Court had assumed that the provisions of the EEA Agreement and of the EC Treaty on free movement of capital are essentially identical in substance in spite of the fact that the latter have been amended in Maastricht.²⁴⁴ In his recent judgment in the *Fokus Bank* case, the EFTA Court, referring to the ECJ’s ruling and AG Geelhoed’s Opinion in the *Ospelt* case as well as its *Íslandsbanki* judgment, confirmed that view.²⁴⁵

In the above-mentioned *Bellio* case, Bellio had imported from Norway a consignment of fish flour for the production of feed for animals other than ruminants.²⁴⁶ After samples taken by the competent Italian authority showed that the fish meal contained fragments of unidentified animal bones, the consignment in question was seized.²⁴⁷ Bellio brought proceedings in the Treviso Court, which referred to the ECJ, *inter alia*, a ques-

240. Opinion of Advocate-General Geelhoed, *Ospelt*, Case C-452/01, [2003] E.C.R. I-9743 (operative part).

241. *Id.* ¶ 29.

242. *See id.*

243. *Id.* at Ruling ¶ 2.

244. *See id.* at n.32.

245. *See* Judgment of November 23, 2004, *Fokus Bank ASA v. The Norwegian State*, represented by Skattedirektoratet (the Directorate of Taxes), Case E-1/04, ¶ 23 (not yet reported).

246. *See* *Bellio F.lli Srl v. Prefettura di Treviso*, Case C-286/02, [2004] E.C.R. __, ¶ 21.

247. *See id.*

tion concerning the application of the "precautionary principle."²⁴⁸ The seizure was based on two decisions of the Council and the EC Commission on certain BSE protection measures.²⁴⁹ The ECJ found that the provisions on which the seizure had been based were compatible with EEA Article 13, the provision mirroring EC Article 30.²⁵⁰ With regard to the "precautionary principle" and the conditions of its application, the ECJ referred to EFTA Court's *Kellogg* and to those judgments of the ECJ which are based on that ruling.²⁵¹

IV. BEYOND THE EUROPEAN ECONOMIC AREA

The ECJ has a long-standing tradition of referring to the European Convention on Human Rights (European Convention) and to judgments of the European Court of Human Rights in cases involving fundamental rights.²⁵² Fundamental rights are part of the general principles of EC law. The EFTA Court has followed suit on the first occasion. In *TV 1000*,²⁵³ the Court interpreted the transmitting State principle underlying the Television without Frontiers Directive 89/552 and referred to the freedom of expression granted by European Convention Article 10 as well as, with regard to the limitations of that freedom, to the landmark ruling of the European Court of Human Rights in *Handyside v. United Kingdom*.²⁵⁴ In *Technologien Bau- und Wirtschaftsberatung GmbH & Bellona Foundation v. EFTA Surveillance Auth.*,²⁵⁵ the EFTA Court dealt with an action for nullity against a decision of the EFTA Surveillance Authority approving State aid. It held that access to justice constitutes an essential element of the EEA legal framework.²⁵⁶ The EFTA Court pointed to the significance of the judicial function which is inspired by the idea that of human rights appeared to be on the increase, both on

248. *See id.* ¶ 25.

249. *See id.* ¶ 39

250. *See id.* ¶¶ 31-35.

251. *See id.* ¶¶ 57-60.

252. *See, e.g.,* Hauer v. Land Rheinland-Pfalz, Case 44/79, [1979] E.C.R. 3727; Regina v. Kent Kirk, Case 63/83, [1984] E.C.R. 2689; Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 222/84, [1986] E.C.R. 1651, [1986] 3 C.M.L.R. 240.

253. *TV 1000 Sverige AB v. Norwegian Gov't*, Case E-8/97, [1998] Rep. EFTA Ct. 70, 78, ¶ 26.

254. [1979] 1 Eur. H.R. Rep. 737.

255. Case E-2/02, [2003] Rep. EFTA Ct. 52, ¶ 36.

256. *See id.* ¶ 36.

the national and international level.²⁵⁷ The EFTA Court's case law culminated in *Public Prosecutor v. Ásgeirsson*,²⁵⁸ also referred to as the *Bacalhao* case. In these proceedings, one of the defendants in the national proceedings had alleged that the reference of the case to the EFTA Court prolonged the duration of the proceedings and thereby infringed European Convention Article 6.²⁵⁹ The EFTA Court held in a general way that provisions of the EEA Agreement as well as procedural provisions of the Surveillance and Court Agreement are to be interpreted in the light of fundamental rights and that the provisions of the European Convention and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights.²⁶⁰ With regard to the right to a fair and public hearing within a reasonable time granted by European Convention Article 6(1), the EFTA Court observed that the European Court of Human Rights held, in a case concerning a delay of two years and seven months due to a reference by a national court to the ECJ for a preliminary ruling, that to take this period into consideration would adversely affect the system instituted by Article 177 of the EEC Treaty (currently Article 234 of the EC Treaty) and work against the aim pursued in substance in that Article.²⁶¹ The EFTA Court found that the same must apply with regard to the procedure established under Surveillance and Court Agreement Article 34, which, as a means of inter-court cooperation, contributes to the proper functioning of the EEA Agreement to the benefit of individuals and economic operators.²⁶² The EFTA Court added that in the present case the period from the registration of the request to the delivery of judgment amounted to a little more than five months.²⁶³

V. BEYOND EUROPE?

The EFTA Court sometimes deals with issues in which a look beyond the boundaries of Europe could be useful. Cases concerning the international exhaustion of intellectual property

257. *See id.* ¶ 37.

258. Case E-2/03, [2003] Rep. EFTA Ct.

259. *See id.* ¶ 23.

260. *See id.*

261. *See Pafitis & Others v. Greece*, [1999] 27 Eur. H.R. Rep. 566, 601, ¶ 95.

262. *See Ákaeruvaldá*, [2003] Rep. EFTA Ct. ¶ 24.

263. *See id.*

rights,²⁶⁴ the relationship between collective bargaining and competition law,²⁶⁵ the question of whether certain agreements restricting competition should be dealt with under a U.S.-style rule of reason²⁶⁶ or the question whether the fortification of foodstuffs ought to be governed by the “precautionary principle”²⁶⁷ could be mentioned in that context. The EFTA Court unlike the ECJ, does, however, not have a research department nor does it have an AG. Its means to carry out a comparative analysis going beyond the EEA (which actually consists of twenty eight countries) are therefore extremely limited. It is still possible for the judges and their cabinets to do comparative work. In cases in which the ECJ has been dealing with one or several parallel or similar cases, materials concerning ideas from outside of Europe may be made available to the EFTA Court in the Opinion(s) of the AG. An example is provided by AG Jacobs’ Opinion in *Albany Int’l BV v. Stichting Bedrijfspensioenfonds Textielindustrie* which gives a comparative overview of the legal situation with regard to the relationship of collective bargaining and competition law in several European jurisdictions and in the United States.²⁶⁸ In the *Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) v. Kommunalansattes Fellesorganisasjon (Norwegian Confederation of Municipal Employees)* case, the EFTA Court referenced AG Jacobs’ opinion²⁶⁹ and found that, when assessing whether a collective agreement was caught by the EEA competition rules, the good faith of the parties in concluding and implementing that agreement was to be taken into account.²⁷⁰ Whether the collective bargaining has been carried out *bona fide*

264. See *Mag Instrument Inc. v. Cal. Trading Co. Norway, Ulsteen*, Case E-2/97, [1997] Rep. EFTA Ct. 129, 134, ¶ 19.

265. See *Norwegian Fed. of Trade Unions & Others v. Norwegian Ass’n. of Local & Regional Auth. & Others*, Case E-8/00, [2002] Rep. EFTA Ct. 116.

266. See *Jan & Kristian Jæger AS v. Opel Norge AS*, Case E-3/97, [1998] Rep. EFTA Ct. 3; see also *Hegelstad Eiendomsselskap Arvid B. Hegelstad & Others v. Hydro Texaco AS*, Case E-7/01, [2002] Rep. EFTA Ct. 310.

267. See *EFTA Surveillance Auth. v. The Kingdom of Norway*, Case E-3/00, [2001-2002] Rep. EFTA Ct. 73, 82, ¶ 25.

268. See *Albany Int’l BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, Joined opinion in Case C-67/96, *Brentjens’ Handelonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, C-115/97 to C-117/97, *Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, Case C-219/97, [1999] E.C.R. I-05751.

269. Case E-8/00, [2002] Rep. EFTA Ct. 116, 129, ¶ 35

270. See *id.* ¶ 56.

may be an issue in U.S. law.²⁷¹

To date, the EFTA Court has not openly acted as a giver of ideas beyond Europe. This result is hardly surprising in view of the Court's size and the fact that its case load is limited. Certain rulings have nevertheless prompted reactions outside of the European law community.²⁷² Considering the effect of its case law on State liability, the EFTA Court may have made a contribution to the development of international law in general.²⁷³

VI. CONCLUSIONS

The vertical dialogue with the national courts of the EEA/EFTA States, in particular the Supreme Courts, has assisted the EFTA Court in developing its case law concerning effect and State liability. Through this jurisprudence, EEA homogeneity in the field of effect and State liability has been maintained. The EEA Main Agreement has been implemented in the domestic legal orders of the EFTA States. EEA secondary law is being implemented in an ongoing process. The same holds true for the rulings of the EFTA Court. There has, to this writer's knowledge, never been a case in which a national court refused to set aside a conflicting rule of domestic law, at least not in a vertical context. That fact is also important from a reciprocity perspective. "[S]ince EFTA operators benefit from the characteristics of direct effect and supremacy of the EC legal order to enforce their EEA rights within the EC national Courts, their EC coun-

271. See *Brown v. Pro Football Inc.*, 518 U.S. 231, 238 (1996).

272. See PAUL GOLDSTEIN, *INTERNATIONAL INTELLECTUAL PROPERTY LAW*, 515 (2001) (regarding the EFTA Court's *Maglite* judgment); see also Irene Calboli, *Trademark Exhaustion in the European Union: Community-Wide or International? The Saga Continues*, 6 MARQ. INTELL. PROP. L. REV. 47, 70 (2002); Juliane Kokott & Patricia Egli, *International Decision: Sebago Inc. & Ancienne Maison Dubois & Fils, SA v. GB-UNIC SA, Case C-173/98, Court of Justice of the European Communities, July 1, 1999*, 94 AM. J. INT'L L., 386, 389 (2000); Marco M. Slotboom, *Do Public Health Measures Receive Similar Treatment in European Community and World Trade Organization Law?*, 37(3) J. WORLD TRADE 553, 585 (2003) (regarding the EFTA Court's *Kellogg's* judgment); Ate Sonmsteli Johansen, *The "Albany-Test" compared with the "EFTA Guidelines"*, 33 INDUS. L. J. 73 (2004) (regarding the EFTA Court's *Landsorganisasjonen* judgment); Thomas Hays, *Paranova v. Merck and Co-Branding of Pharmaceuticals in the European Economic Area*, 94 TRADEMARK REP. 821 (2004); Thomas Trelogan et al., *The European Free Trade Association Court and Positive Action*, 28 HASTINGS INT'L & COMP. L. REV. 25, 27-34 (2004) (discussing the EFTA Court's University of Oslo judgment in *EFTA Surveillance Auth. v. The Kingdom of Norway*).

273. See, e.g., Ole Spiermann, *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order*, 10 EUR. J. INT'L L. 763, 763-89 (1999).

terparts should be in a similar position to obtain a comparable level of legal redress in the EFTA national Courts."²⁷⁴

With respect to the horizontal dialogue with the Community Courts, one must remember that in its Opinion 1/91 on the first version of the EEA Agreement the ECJ struck down a provision according to which the Community courts would have been under an obligation to take into account the case law of the EEA courts.²⁷⁵ In practice, the Community courts have shown openness in cases in which they agree with the outcome as well as with the reasoning of an EFTA Court decision. The EFTA Court is the only court besides the European Court of Human Rights which is referred to in the judgments of the ECJ and of the CFI²⁷⁶ One-quarter of the judgments rendered by the EFTA Court in its first ten years of existence have prompted reactions by the ECJ, by the CFI, by Advocates-General, or by national courts of EC Member States, particularly by English courts. The Community courts' policy is less clear in cases in which they do not agree with the reasoning of an EFTA Court decision. The ECJ, in particular, seems to be reluctant to enter a debate in such cases.²⁷⁷ One will nevertheless have to assume that in such cases, EFTA Court rulings will have entered Community judges' minds. For the sake of order, it must be pointed out that there has not been a judicial conflict between the ECJ and the EFTA Court in the first ten years of EEA existence, not even in cases in

274. See Editorial comments: *European Economic Area and European Community: Homogeneity of Legal Orders?*, 36 COMMON MKT. L. REV. 697-98 (1999); see also Sevón & Johansson, *supra* note 53, at 384.

If individuals and economic operators would not be ensured the same possibility of invoking the Agreement there would be an imbalance in the Agreement. While individuals and economic operators from the EFTA States would be in the position to invoke the Agreement before courts and administrative authorities in the EC Member States, this would not be the case for individuals and economic operators from the EC Member States in the EFTA States.

Sevón & Johansson, *supra* note 53, at 384.

275. See Opinion 1/91 of the Court of Justice on the EEA Agreement, [1991] E.C.R. I-6097, ¶ 3.

276. See, e.g., Francis G. Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 TEX. INT'L L.J. 547, 552 (2003); Christiaan Timmermans, *The European Union's Judicial System*, 41 COMMON MKT. L. REV. 393, 400 (2004).

277. A case in point could have been the ECJ's judgment in *Sweden v. Franzén*, Case C-189/95, [1997] E.C.R. I-5909 which dealt with essentially the same questions as the EFTA Court's *Tore Wilhelmsen AS v. Oslo kommune*, Case E-6/96, [1997] Rep. EFTA Ct. 53.

which the EFTA Court had to decide on a legal question as the first EEA court. The only cases in which the outcome the ECJ reached a conclusion that was not in line with an earlier EFTA Court decision were characterized by a difference of facts and of law.²⁷⁸

278. *See* Mag Instrument Inc. v. California Trading Co. Norway, Ulsteen, Case E-2/97, [1997] Rep. EFTA Ct. 127; *see also* Silhouette Int'l Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH, Case C-355/96, [1998] E.C.R. I-4799, 2 C.M.L.R. 953. *See supra* note 138-48 and accompanying text.