EEA – a "distinct legal order of its own"?

1 Introduction

The development of European cooperation, from the EURATOM treaty of the early 1950s to today's European Union, may be characterised as an evolution from a co-operation between European states towards a federation of European states; already labelled by the European Court of Justice (ECJ) in 1963 as a "new order of international law" (in case 26/61, Van Gend en Loos).

The establishment of the European Communities, the enlargement from the original six to a community of twelve, and in particular the single market, established by the Single European Act of 1986, together necessitated a closer link both between European states who were not part of the (then) European Communities, as well as between those states and the European Communities. An early unilateral step in this direction was Norwegian Prime Minister Brundtland's letter to the Norwegian ministries in 1987, requiring that proposals for new legislation should consider relevant community law, and that departures from community law should be explained and justified. The dissolution of the Soviet Union, the fall of the Iron Curtain and the end of the Cold War provided a window of opportunity for the members of the European Free Trade Association (EFTA)[1] to link themselves to the development of the European Communities. The Agreement on the European Economic Area (the EEA Agreement) is one of these links,[2] or gateways, and constitutes a development from free trade between markets, to integration of markets.[3]

The EEA Agreement was negotiated and signed more or less in parallel with the Treaty on European Union (TEU).

A draft treaty was presented in 1991, and the treaty on European Union was signed in February 1992. The Treaty entered into force in November 1993. The negotiations on what was to be the EEA Agreement were opened in June 1990, and completed in April 1992. The EEA Agreement was signed in May 1992, and the agreement entered into force in January 1994.[4]

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[1] EFTA was founded in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Finland joined in 1961, Iceland in 1970 and Liechtenstein in 1991. In 1973, the United Kingdom and Denmark left EFTA to join the EC. They were followed by Portugal in 1986 and by Austria, Finland and Sweden in 1995. Today the EFTA Member States are Iceland, Liechtenstein, Norway and Switzerland.

[2] Oporto, 2nd May 1992.

[3] See Peter-Christian Müller-Graff, EEA-Agreement and EC Law, in Peter-Christian Müller-Graff/Erling Selvig eds., The European Economic Area. Deutsch-Norwegisches Forum des Rechts, Band 1, page 17 et seq.

[4] As for the implications of this for the interpretation of the EEA Agreement, see case E-1/01, Einarsson, para 43. Here the EFTA Court was invited to base its interpretation of art. 14 EEA on an analogous application of Article 6(3) TEU, now Article 4 (2) TEU. This provision stated that the Union respects the national identities of the Member States. The EFTA Court, however, rejected this invitation on the basis that the EEA Agreement contains no corresponding provision, and as the Treaty on European Union was negotiated before the conclusion of the EEA Agreement, it had to be assumed that this discrepancy was intentional.

One of the features of the TEU was its three-pillar structure. The European Communities constituted one of these pillars. The substantive provisions of the EEA Agreement mirror provisions in this first pillar. The two other pillars – the Common Foreign and Security Policy, and Justice and Home Affairs – were not reflected in the EEA Agreement.

The institutional setup of the EEA Agreement reflects this structure. Since the completion of the EEA Agreement, the treaties constituting the European Communities have been changed a number of times, and from a EEA perspective there are two changes in particular that are worth reflecting on: the increase in the European Parliament's legislative role, and the removal of the three-pillar structure.[5] The main part of the EEA Agreement, however, remains unchanged. And because nothing – from the perspective of the EEA Agreement – has changed, it could be argued that a lot of things have.[6]

In case E-9/97 Sveinbjörnsdóttir, the EFTA Court paraphrased the ECJs findings in case 26/62, Van Gend en Loos, and found that the EEA Agreement contains "a distinct legal order of its own", different both from the legal order of the European Union and from what is usual for agreements under public international law.[7] The task of this paper is to elaborate upon the characteristics of this legal order.

The EFTA Court has not so far had the opportunity to elaborate upon the features that separate the legal order contained in the EEA Agreement from what is usual for agreements under public international law, but a number can nonetheless be discerned. First, the EEA Agreement presupposes that the EFTA/EEA States will establish an independent surveillance authority to monitor the implementation of the agreement in those EFTA states which are parties, as well as a court to settle disputes over the interpretation of the EEA Agreement, both between the EFTA states and between the EFTA states and the surveillance authority.[8] Thus, the EEA Agreement establishes a dual surveillance and dispute resolution regime, whereas the European Commission and the ECJ monitor the EU parties to the Agreement, and the EFTA Surveillance Authority (ESA) and the EFTA Court monitor the EFTA parties.

Second, the EEA Agreement establishes a legislative body, the EEA Joint Committee, consisting of representatives of the Contracting Parties.[9] It is not uncommon under international agreements to set up bodies with legislative or quasi-legislative powers. However, as we will see, there are certain features of the legislative powers of the EEA Joint Committee that are both rather unique and of relevance when discussing the *sui generis* character of the EEA legal order.

Another feature that the EEA legal order shares with most agreements under public international law, is that the effects of the EEA Agreement within the domestic law of the

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[5] The three-pillar structure was abolished by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, effective from 1st December 2009.

[6] For a discussion of the impact of these changes on the EEA, see Peter-Christian Müller-Graff, The Treaty of Amsterdam: Content and implications for EEA-EU Relations, in Peter-Christian Müller-Graff/Erling Selvig eds., EEA-EU Relations. Deutsch-Norwegisches Forum des Rechts, Band 2, pp. 11 et seq. See also the excellent treatise by Halvard Haukeland Fredriksen and Christian K. Franklin, Of Pragmatism and Principles: The EEA Agreement 20 years on, [2015] Common Market Law Review 52, pp 629-684.

[7] Case E-9/97, para. 59.

[8] See Article 108 EEA.

[9] See Article 93 EEA

Contracting Parties are determined by domestic law. Hence, even though individuals and undertakings are given – as in EU law – rights and obligations that can be invoked before national courts, the possibility of invoking these rights and obligations is contingent upon other legal orders. Thus, provisions of EEA law have direct effect in the EU Member States by virtue of European Union law. Whether the same provisions have direct effect in the EEA/EFTA States depends on the legal orders of those states. The EEA Agreement does not in itself establish either direct applicability or direct effect.[10] The same goes for supremacy and State liability.

2 The Architecture of the EEA

2.1 The institutional structure

One distinctive feature of the EEA legal order is its institutional structure, facilitating a dual, and parallel, international supervision and control regime, with what we may call trajectories from the legal orders of the EEA Member States to the EEA legal order.

Article 109 EEA provides that the European Commission, acting in conformity with the EU treaties, shall monitor the fulfillment of the obligations under the EEA Agreement as far as the European Union and its member states are concerned, while the ESA shall monitor the EFTA states, fulfillment of their obligations.

If the European Commission considers a EU Member State to be in breach of its obligations under the EEA Agreement, that state may be brought before the ECJ under the infringement procedures provided for by Article 258 of the Treaty on the Functioning of the European Union (TFEU). Likewise, where the ESA considers an EFTA State to be in breach of its obligations under the EEA Agreement, that state may be brought before the EFTA Court. The procedures are found in Article 31 of the EFTA Surveillance and Court Agreement (SCA), and mirror Article 258 TFEU.

We find the same dual approach with regard to the application of the competition rules concerning undertakings and the provisions on state aid.[11]

In the context of European Union law, the EEA Agreement is an association agreement under Article 217 TFEU. Thus, within the EU pillar of the EEA Agreement, EEA-related issues are dealt with through the procedures and mechanisms set up by the EU Treaties. In the EFTA pillar, treaties entered into between the EEA-EFTA States regulate the handling of EEA-related issues. The most important of these treaties is the SCA.[12] EEA-related issues are

[10] In case C-431/11, UK v Council, the ECJ held that it follows from Article 7 b EEA that regulations made part of the EEA Agreement have direct applicability in the EEA/EFTA States. This is impossible to reconcile with the ECJ's views in Opinion 1/91 on the EEA Agreement, the wording of Article 7 and the case law of the EFTA court, both prior to and after the decision in case C-431/11. On this point, the judgment in case C-431/11 is therefore to be disregarded.

[11] See Articles 55 to 58 EEA concerning competition rules applicable to undertakings, and Article 62 EEA concerning state aid.

[12] The other agreements being Agreement on a Standing Committee of the EFTA States and the Agreement on a Committee of Members of Parliaments of the EFTA States.

also handled unilaterally within each EEA-EFTA State, in a way which resembles how EU-related issues are discussed and handled within each EU member state. However, as we will see, there are crucial differences as to the impact these discussions may have on the shaping of decisions.

The EU and EFTA pillars meet in four joint bodies. The most important of these is the EEA Joint Committee, established by Article 92 EEA. The EEA Joint Committee, according to Article 98 EEA, has the power to amend the Annexes and a number of the protocols to the EEA Agreement, which entrusts it with the herculean task of providing the legal basis for continuing homogeneity between EU and EEA law, within the areas covered by the EEA Agreement. Thus, the EEA Joint Committee can, to a certain degree, be compared to the EU's Council, in that the EEA Joint Committee has legislative powers. However, as the amendment of protocols and annexes to the EEA Agreement follows a simplified treaty procedure, it is not a legislative power in its truest sense.

The EEA Joint Committee is also the forum for resolving disputes between the EU and one or more EFTA states, concerning the interpretation or application of the EEA Agreement.[13]

The other body worth mentioning in this connection is the EEA Council.[14] According to Article 89 EEA, it is responsible for providing the political impetus in the implementation of the EEA Agreement, and also for laying down the general guidelines for the EEA Joint Committee. Thus, the EEA Council may, to a certain extent, be compared to the European Council.

When analyzing the EEA legal order, we see a number of different elements, having their legal basis either in the EEA legal order, in the legal order of the EFTA States, in agreements between the EFTA States, or in the EU legal order. Thus, the institutional aspects of the EEA legal order make it something truly distinct. This impression is confirmed by the other elements in the EEA architecture discussed below.

2.2 Written law

The EEA legal order is based upon the main part of the EEA Agreement. Here we find provisions concerning the institutions, dispute resolution, decision-making procedures and a number of other issues necessary to make the EEA work. More important, when discussing the elements that make the EEA legal order distinct, is the fact that the substantive provisions of the main part of the EEA Agreement mirror the provisions on the same subjects in another international legal order: the EU legal order. This is a rare instance of an international agreement in which some of the parties, the EEA-EFTA States, subordinate themselves to provisions of the legal order of another party to the agreement – in this case the EU legal order.

This becomes all the more evident when we turn our attention to the legislative acts referred to in the annexes to the main part of the EEA Agreement. These acts are regulations,

[13] See Article 111 EEA.

[14] According to Article 90 EEA, the EEA Council shall consist of members of the Council of the European Union, members of the European Commission and one member of each of the governments of the EFTA States.

directives and other legislative acts adopted within the framework of the EU legal order. By including them in the EEA Agreement, they also become EEA law.

In the EU legal order, the treaty provisions are often referred to as primary law, and regulations and directives are referred to as secondary law. In the context of EU law, this makes sense as the decisions made by the EU institutions, as well as general legislative acts, are subject to legal review. However, as we shall see, this is not the case in the EEA legal order. Thus, and in spite of the EFTA Court's use of the term «primary» EEA law when referring to provisions found in the main part of the EEA Agreement,[15] the use of the distinction between primary and secondary EEA law is neither necessary nor helpful. Rather, it is potentially misleading, as it gives the impression that regulations and directives included in the EEA Agreement are given pursuant to that agreement, which is not the case.

2.3 Legislative mechanism

2.3.1 The EEA "legislator"

The aim of the EEA Agreement, according to Article 1 no. 1 EEA, is to create a homogeneous European Economic Area by promoting a continuous and balanced strengthening of trade and economic relations between the parties to the agreement, with equal conditions of competition, and respect for the same rules. Thus, a basic principle in the EEA Agreement is that it shall be dynamic, in the sense that it shall develop in step with changes in EU law that lie within the scope of the EEA Agreement, creating homogeneity between the law of the EU and that of the EEA, within the field of application of the EEA Agreement.

In order to facilitate homogeneity, the basic substantive provisions are placed in the main part of the EEA Agreement, and EU secondary legislation in the annexes. The EEA Joint Committee is vested with the power to amend both a number of the protocols to the EEA Agreement and all of the annexes, in order to make new EU secondary legislation a part of the EEA Agreement. The decisions of the EEA Joint Committee are made by unanimity between the EU on the one side, and the EFTA States, speaking with one voice, on the other.[16] This power to amend parts of the Agreement may be considered a legislative power. Strictly legally speaking, however, this is not the case, since each amendment to the EEA Agreement is made by the parties acting by consent in the EEA Joint Committee. Thus, the procedure by which protocols and annexes to the EEA Agreement is amended is a simplified treaty-making procedure, not a legislative procedure in the truest sense.

The discretion of the EEA Joint Committee is quite limited, since proposals for new legislation to be included in the EEA Agreement have to be treated in a rather binary manner. Either the proposal has to be adopted, as they always have been until now, or it has to be rejected. Admittedly, minor adjustments may be made, but this does not alter the main point.

Keeping the backlog as short as possible may seem to be a task comparable to Hercules' assignment of cleaning the Augean stables. The backlog is currently considerable and causing

[15] See to that effect, for instance case E-9/14, Otto Kaufmann AG.

[16] Article 93 (2) EEA.

some concern on the EU side. Still, the inclusion of secondary legislation in the EEA Agreement is normally uncontroversial.

As mentioned, the EEA Agreement is connected to the «community pillar» of the then EC. With the dismantling of the pillar structure, the inclusion of new policy areas and a shift towards legislation covering more than one of the old pillars, the issue of EEA relevance, i.e. whether a legislative act adopted by the EU also falls within the ambit of the EEA Agreement, has become more pressing. This gives rise to the issue of whether the decision to add a legislative act to the annexes to the EEA Agreement can be made the subject of legal review.

2.3.2 Assessment of the legality of acts adopted

The legislative acts included in the EEA Agreement are all acts already adopted by the European Union. As such, they may be made subject to legality scrutiny according to EU law. Where an extension of a piece of EU legislation to the EEA Agreement entails more than technical adjustments, the EU's stance in the EEA Joint Committee to such adjustments is established by a decision of the EU Council.[17] This decision can be challenged before the ECJ under Article 263 TFEU.[18]

Article 108 EEA requires the EFTA States to establish the EFTA Court, but does not require that court to have jurisdiction over decisions establishing the stance which EFTA States are to take in the EEA Joint Committee on proposed amendments to annexes and protocols to the EEA Agreement. Neither does the SCA give the EFTA Court jurisdiction over this issue, something that underlines the political aspect of the decision of the EEA-EFTA States in these matters.

As far as the decisions of the EEA Joint Committee are concerned, the EEA Agreement does not provide for legal scrutiny of whether the decisions made are within the limits of the EEA Agreement. One could argue that there is no need for such mechanisms, since unanimity is required by the EEA Joint Committee. It is, however, not difficult to envisage situations where judicial control could be desirable. The consequences of not amending an annex to the EEA Agreement may be quite serious. Article 102 (5) EEA provides that where a decision has not been taken on amending an annex to the Agreement, the affected part of that annex is to be regarded as provisionally suspended. On the face of it, this does not seem very burdensome. However, the European Commission has stated that

> "In order to effectively oppose any attempt by an EEA EFTA partner to incorporate EEA-relevant EU legislation in a selective manner, the EU side should, evidently, ensure that the part of the Annex to be ultimately suspended would impact negatively on the partner's interests, rather than merely suspend parts of the Agreement that the contravening partner wishes to ignore."[19]

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[17] See regulation (EC) 2894/94 concerning arrangements for implementing the Agreement of the European Economic Area, art. 1.

[18] Case C-431/11, United Kingdom of Great Britain and Northern Ireland v Council of the European Union may serve as an example.

[19] Commission Staff Working Document, A review of the functioning of the European Economic Area, SWD(2012) 425 final, page 9.

Thus, one can envisage a situation in which the EEA EFTA States accept EU legislation that falls outside the scope of the Agreement, out of fear of the consequences of refusal. Some would therefore welcome the possibility of legal scrutiny of that decision. Another potential issue is that a legislative act may encroach upon fundamental rights. The judgment in Digital Rights Ireland may serve as an example.[20]As the EEA legal order does not offer judicial control on the EEA level of these issues, they have to be dealt with either in the EU pillar or in the EFTA pillar.

Turning to the EFTA pillar, the Surveillance and Court Agreement gives the EFTA Court the power to review the legality of decisions adopted by the EFTA Surveillance Authority, but not those of the EEA Joint Committee. Despite this, the EFTA Court has found that it has jurisdiction, under the advisory opinion procedure, to give advisory opinions on the interpretation of provisions of the EEA Agreement concerning the functioning of the EEA Joint Committee.[21] The same must apply in relation to the ECJ. There is thus the possibility for legal review to establish that the EEA Joint Committee has acted ultra vires when adjusting a legislative act of EU law for the EEA Agreement.

The EFTA Court has found that:

> "the 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. The provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights".[22]

Thus, if the issue in Digital Rights Ireland had been put before the EFTA Court under an Article 34 SCA procedure,[23] it is rather unlikely that the EFTA Court would have found that it lacked jurisdiction to determine whether a directive or regulation included in the EEA Agreement encroaches upon fundamental rights, for instance rights also protected by the European Convention on Human Rights. This could have been seen as a challenge to the monopoly of the ECJ to assess the validity of legislative acts of EU institutions. However, it could be argued that the EFTA Court in such a case would only be assessing the compatibility of that legislative act with EEA law, leaving it to the ECJ to do the same with regard to EU law. It would, however, be near to impossible for the ECJ to find that the act is in accordance with EU law, while at the same time incompatible with EEA law, as determined by the EFTA Court.

In Digital Rights Ireland, the ECJ found that directive 2006/24/EC, the Data Retention Directive, was invalid, since it interfered with the rights laid down in the Charter of Fundamental Rights of the European Union. That directive was of EEA-relevance, but due to Icelandic concerns it had not yet been incorporated into the EEA Agreement. However, if the directive had been incorporated into the EEA Agreement, this would have raised the question as to the EEA implications of the judgment. One could argue that a judgment from the ECJ, declaring invalid a legislative act incorporated into the EEA Agreement, also implies EEA invalidity. As both the EU and the EU Member States are bound by the EEA Agreement, it

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[20]Joined cases C-293/12 and C-594/12, Digital Rights Ireland Ltd. Judgment 8. April 2014.

[21]Case E-6/01, CIBA.

[22] See case E-18/11, Irish Bank Resolution Corporation Ltd., paragraph 63,

[23]Joined cases C-293/12 and C-594/12, Digital Rights Ireland Ltd.

seems impossible to accept that a legislative act can be found invalid as a matter of EU law, but can at the same time be binding as a matter of EEA law. On the other hand, it could be argued that the decision of the EEA Joint Committee to adopt a legislative act of the EU, which later turns out to be invalid, must be assessed on the basis of EEA law. Whichever view is correct, the relevant point is that the law within one of the pillars of the EEA may have repercussions for the EEA legal order.

Looking at the EEA legal order, we see that there are no mechanisms for judicial control of the actions of the EEA institutions on the EEA level. Judicial control is handled in the pillars, and only indirectly. We have also seen that this gives rise to questions seldom relevant to other legal orders, making the EEA legal order distinct in this respect.

2.4 Dispute resolution and legal clarification

2.4.1 Introduction

In its Opinion 1/91, the ECJ found that establishing a court system with a common EEA Court would pose a threat to the autonomy of the Community legal order that conflicted with the very foundations of the Community. In its Opinion 1/92, the Court found that the new system for settlement of disputes, with an EFTA Court with jurisdiction only within the framework of EFTA and with no personal or functional links with the ECJ, and an EEA Joint Committee to settle disputes brought before it by the European Union or an EFTA state, was compatible with the EC Treaty.

Thus, under the EEA Agreement, we have a system where two international courts with no personal or functional links between them – the ECJ and the EFTA Court – have jurisdiction over the same body of provisions – the EEA Agreement.

Courts settle disputes. Their power to do so is either embedded in the constitution, or in the instrument establishing the court. Dispute resolution in court is usually mandatory in the sense that, if sued, a party to the dispute subject to the jurisdiction of the court must accept that the court will settle that dispute. A final judgment is usually respected, and if not it can be executed through public authorities. Thus, one element giving a final judgment authority is the fact that it acts as an order to the parties in the dispute, which can be executed by utilizing the powers of other public authorities. The judgments of international courts and tribunals cannot rely to the same extent on the powers of other bodies, in order to be respected. Thus, the procedure under Article 267 TFEU is considered one of the main explanations for the effectiveness of EU law, and the impact of ECJ rulings, on the domestic legal orders of the EU member states. As stated by Weiler:

> "When European Community Law is spoken through the mouths of the national judiciary it will also have the teeth that can be found in such a mouth and will usually enjoy whatever enforcement value that national law will have on that occasion".[24]

[24] *J.H.H. Weiler*, Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration, (1993) 31 Journal of Common Market Studies page 417, at page 422.

We find a preliminary ruling mechanism in the EEA Agreement, as well as in the SCA. The preliminary ruling mechanism in the EEA Agreement, found in Article 107 EEA, which makes it possible for courts in the EFTA States to ask the ECJ to decide upon questions of interpretation of provisions of the EEA Agreement identical in substance to provisions of EU law, has so far not been activated. However, under Article 34 SCA, courts in the EFTA states can request the EFTA Court to give advisory opinions on the interpretation of the EEA Agreement and the SCA.

2.4.2 The EU Pillar

The EEA Agreement is, in the EU pillar, part of the EU legal order. Issues pertaining to the interpretation and application of EEA law in the EU pillar are therefore treated in the same fora as (other) issues pertaining to the interpretation and application of EU law.

Thus, EFTA citizens and undertakings can invoke EEA law, as a part of the EU legal order, in cases pending before national authorities and courts in the European Union, and the preliminary ruling procedure according to Article 267 TFEU also applies to questions on the interpretation of the EEA Agreement, included legislative acts originating from the EU legal order in their EEA guise.

2.4.3 The EFTA Pillar

The EFTA Court has, like the ECJ, the power to settle disputes over the interpretation of the EEA agreement, and to give advisory opinions on its interpretation. Reflecting the advisory nature of these opinions, the referring court may, or may not, follow the advice given by the EFTA Court. There are also no provisions in the EEA Agreement or the EFTA Court Agreement obliging courts in the EFTA States to request an advisory opinion.[25]

The principle of homogeneity embedded in the EEA Agreement provides that the provisions of that agreement shall be interpreted in line with the provisions of EU law which they mirror. However, as only the ECJ has the power to decide the interpretation of these EU law provisions, we have two international courts with parallel jurisdiction, one of which also has jurisdiction over the provisions mirrored in the EEA Agreement. It is quite clear that this may cause problems where the EFTA Court has to rule on a question upon which the ECJ has not yet ruled. Illustrative in this respect is the decision of the EFTA Court in joined cases E-9/07 and E-10/07 *L'Oréal*, where the court deviated from its decision in case E-2/97 *Maglite* in order to maintain homogeneity between EEA law and EU law. Here the EFTA Court found that the principle of homogeneity implies that unless there are compelling grounds for diverging interpretations, EEA law shall be interpreted in line with new case law of the ECJ on EU law, regardless of whether the EFTA Court has previously ruled on the question in its

[25] There are suggestions, both in the case law of the EFTA Court and in legal writings, that they are nevertheless obliged to do so in certain situations, see case E-18/11, Irish Bank Resolution Corporation Ltd., at paragraph 64 and *Skuli Magnusson*, On the Authority of Advisory Opinions, Europarättslig Tidskrift 2010 page 528 et seq., respectively.

EEA law guise. Having two courts on the international level interpreting a common set of rules is definitely not twice as good as having one, but still better than having none.

The Norwegian Supreme Court stated in the first *Finanger* case that although advisory opinions of the EFTA Court shall be accorded great weight, the Norwegian Supreme Court has both the power and the obligation to independently assess whether, and to what extent, an advisory opinion shall be followed.[26] This is in accord with the principle of homogeneity embedded in the EEA Agreement, and has a later parallel in the EFTA Court's decision in *L'Oréal*, where the EFTA Court found that EEA law shall be interpreted in line with new case law from the ECJ. However, the ruling in *Finanger* has wider implications, as it also opens the door to departures from EFTA Court decisions in other situations. This was clearly demonstrated in *STX*, where the Norwegian Supreme Court went far in suggesting that the EFTA Court's interpretation of directive 96/71/EC in case E-2/11, *STX*, was not in accord with pre-existing case law from the ECJ. This situation is quite different from the one in *L'Oréal*, and the Supreme Court seemed prepared to depart from the EFTA Court's opinion on the point.[27] The statements obiter dictum found in case E-3/12, *Jonsson*, may be seen as a response from the EFTA Court.[28] Another response is the ESA's decision to initiate proceedings against Norway, submitting that the law as established by the Norwegian Supreme Court in *STX* violates the EEA Agreement.[29]

The authority of an advisory opinion of the EFTA Court may again be brought into question as the so-called Jabbi-case makes its way through the Norwegian court system. In this case, upon request for an advisory opinion from Oslo district Court, the EFTA Court found that Article 7 of directive 2004/38/EC applies "by analogy" where an EEA national returns to his home State.[30] This finding is at odds with the wording of that provision and with consistent case law from the ECJ. This was acknowledged by the EFTA Court, but the court found that the considerations pertaining to substantial homogeneity – married to a EU citizen, Jabbi would have had a derived right to residence in his spouse's home country by virtue of Articles 20 and 21 TFEU – mandated the Court's interpretation.[31] One consequence of the Court's ruling is that where a third country national marries an EU citizen residing in an EFTA-EEA State, this third country national will have derived rights under directive 2004/38/EC, which the directive does not provide when applied in an EU-context. Hence, the authority of the ruling in this case may not only be called into question by Norwegian courts, but also by national courts within the EU and even by the ECJ.

In the context of European Union Law, the mechanism established by Article 267 TFEU provided for rulings pronouncing seminal principles such as primacy, direct effect and state liability. Not all of these principles were received with great enthusiasm by all national

[26] Rt. 2005 page 1811, on page 1820.

[27] Rt. 2013 page 258, para 76 to 103.

[28] See case E-3/12, para 55 to 61.

[29] See ESA Decision 191/16/COL, 25th October 2016, Letter of formal notice to Norway concerning posting of workers.

[30] The case is at the time of writing – February 2017 – still pending.

[31] See case E-28/15, para 68 et seq.

courts,[32] but the judicial dialogue which Article 267 TFEU facilitates has, over the years, honed these principles in a way that has allowed them to be accepted and applied by the courts of the Member States.[33] The key elements in this dialogue are the option, and in some cases duty, for Member State Courts to refer questions concerning the interpretation of EU Law to the ECJ, and the binding effect of the ECJ's ruling on the issue. Through its binding effect on the court requesting the ruling, a preliminary ruling of the ECJ also becomes an order backed by public authorities. These characteristics are not present in the advisory opinion procedure according to Article 34 SCA. Thus, in order for the EFTA Courts' rulings to derive authority from the national legal system, the national court must find it worthwhile to refer questions to the EFTA Court. This is in turn dependent on the degree of goodwill which the EFTA Court enjoys in the national courts of the EFTA States.[34] Finally, the EFTA court's ruling on the questions referred has to be convincing. This, again, will depend on the quality of the reasoning.

2.5 Effect within the legal order of the signatories

The EEA Agreement is an agreement under international law. There are no express provisions in the Agreement providing that the law flowing from the agreement shall have legal effects within the legal orders of the signatories, regardless of what those legal orders provide. On the contrary, Article 7 EEA presupposes that the regulations and directives included in the EEA Agreement may have to be transposed into domestic, law in order to take effect within the legal orders of the contracting parties. The preamble to the Agreement is also quite unequivocal when it states that the Agreement "does not restrict the decision-making autonomy or the treaty-making power of the Contracting Parties", and Protocol 35 to the Agreement has, as its starting point, that the EEA Agreement does not require any of the contracting parties to transfer legislative powers to any of the EEA Institutions.

The case law of the EFTA Court is also unambiguous on this point: EEA law has neither direct applicability, nor direct effect, by virtue of EEA law.[35]A dissonant note is however found in the ECJ's decision in case C-431/11, UK v Council, in which it held that regulations adopted by the EEA Joint Committee have, by virtue of EEA law, direct applicability within the legal orders of the EFTA States. This dissonance should be treated as exactly that: a dissonance. The EFTA Court has made clear that it does not share the view of the ECJ on this issue. Thus, the EFTA Court has found it necessary to make it absolutely clear that neither direct effect nor direct applicability are features of EEA law:

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[32] For an account of national responses to these principles, see *TC Hartley*, The Foundations of European Union Law, 7th ed., Oxford 2010 chapter 8.

[33] The development in the rationale for direct effect of directives from van Duyn to Ratti, Becker and Marshall, may serve as an example, as may the ECJ's «Solange-jurisprudence».

[34] As Mancini has emphasised, goodwill is also an important element in the mechanism established through Article 267 TFEU, cf. *G.F. Mancini*, The Constitutional Challenges Facing the European Court of Justice, in Democracy & Constitutionalism in the European Union. Collected Essays, Oxford Portland, Oregon 2000, page 17.

[35] See to this effect case E-4/01, Karlsson, pargraph 28.

> "Under Article 7 EEA, the Contracting Parties are obliged to implement into their legal order all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. The Court points out that the lack of direct legal effect in Iceland of acts referred to in decisions from the EEA Joint Committee, makes timely implementation crucial for the proper functioning also in Iceland of the EEA Agreement."[36]

In its seminal advisory opinion in Sveinbjörnsdóttir,[37] the EFTA Court found that the EEA Agreement requires that an EEA State –whether an EU member state or an EFTA state – is obliged to provide compensation for loss and damage caused to individuals as a result of breaches of obligations under the EEA Agreement that are deemed sufficiently serious. The EFTA Court also held that this principle must be seen as an integral part of the main part of the EEA Agreement, and that "it is natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of State liability".[38] We see that while the principle is maintained that the EEA Agreement has to be implemented into domestic law in order to take effect there, principles based on quite innovative interpretations of the agreement are held as having been implemented through the implementation of the Agreement in the domestic legal order, thus blurring the edges of the principle that obligations under the EEA Agreement only take effect in the domestic legal orders of the parties to the agreement subject to the provisions of those legal orders.

Still, the principle remains that it is a matter for the legal orders of the parties to the EEA Agreement to decide how EEA law is to take effect in those legal orders.

Treaties concluded by the European Union are, by virtue of Article 216(2) TFEU, binding upon the institutions of the Union and on its Member States. It is established case law that individuals may rely on provisions in such agreements, on the condition that those provisions must «appear as regards their content to be unconditional and sufficiently precise and their nature and broad logic must not preclude their being so relied on».[39] Thus, it is fair to assume that provisions of EEA law that mirror provisions found in the TFEU or EU secondary legislation will have the same effect in the legal orders of the EU member states as have the legislative acts which they mirror.

Turning to the EFTA-pillar, the effect of EEA law in the legal orders of the EEA-EFTA states depends on those legal orders, i.e. Icelandic, Liechtenstein and Norwegian law respectively. Thus, in respect of the effect within the legal orders of the EEA states, we will have four doctrines: one with regard to the EU-pillar, and one for each of the EFTA states party to the EEA Agreement.

3 The EEA – a distinct legal order, but not of its own

I have tried do demonstrate that the EEA legal order, distinct as it may be, is not a legal order of its own in the sense that that it exists more or less independently of other legal orders. The

[36]Case E-11/14, ESA v Iceland, paragraph 17. Judgment 28. January 2015. See also the other judgments delivered that date.

[37]Case E-9/97, Sveinbjörnsdóttir.

[38] Case E-9/97, Sveinbjörnsdóttir, paragraph 63.

[39] Cited from case C-135/10, SCF, paragraph 43.

raison d'etre of the EEA legal order is to reproduce and extend outcomes of another legal order – the EU legal order. Moreover, the effects of the EEA legal order are totally dependent on characteristics of the legal orders of the signatories to the agreement which constitutes it.

If the EEA legal order, distinct as it may be, is to be given any label, it should probably be that of a reflective community of law: reflective both because it reflects the substantial provisions of another legal order, the EU legal order, and because its effect within the legal orders of the signatories is a reflection of those legal orders.

Thus, the EEA may be a distinct legal order, but it is not a legal order of its own.