In two judgments, the European Court of Justice has stated that regulations are directly applicable under the EEA Agreement and automatically become part of the internal legal order of the EEA EFTA States, without any implementing measures being required for that purpose. The EFTA Court has taken the opposite position. In legal literature, the ECJ’s interpretation of Article 7 EEA has been dismissed as a plain misunderstanding. This paper sides with the ECJ. It shows that a principle of direct applicability is consistent with the wording of Article 7 EEA and that the principles of homogeneity and loyalty underpin the Court’s reasoning. Formally, the ECJ’s interpretation of Article 7 EEA is binding neither upon the EFTA Court, nor upon the EEA EFTA States. The EFTA Court should however consider whether legal and factual developments justify a revision of its current position. It would serve the interests of the dualist EEA EFTA States to embrace the position of the ECJ.

Understanding the nature of the EEA Agreement – on the direct applicability of regulations

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1. Introduction

In two judgments, UK v. Council and Fonnship, the European Court of Justice has concluded that pursuant to Article 7 of the Agreement on the European Economic Area (EEA), regulations are directly applicable, also as a matter of EEA Law. According to the ECJ, regulations automatically become part of the internal legal order of the EEA EFTA States, without any implementing measures being required for that purpose. Previously, the EFTA Court had suggested the opposite position: «EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts.» In a series of judgments delivered in 2015, the EFTA Court confirmed and clarified its interpretation of Article 7 EEA: As a matter of EEA Law, regulations are not directly applicable. It goes without saying that this is a fundamental question. The disagreement between the two courts is awkward and not sustainable in the long term.

It would have been possible for the EFTA Court to adapt to the findings of the ECJ. The previous case law of the EFTA Court did not address regulations specifically. Its observation that «EEA rules» lack direct applicability is general and does not exclude specific modifications. Instead, the EFTA Court chose to cement its previous understanding of the nature of the EEA Agreement, without even commenting upon the conflicting judgments.

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1 Case C-431/11, UK v. Council, EU:C:2013:589 and Case C-83/13, Fonnship (Grand Chamber), EU:C:2014:2053. Pursuant to Article 288 TFEU regulations are of course directly applicable within EU Law. Further, EEA regulations are directly applicable as a matter of EU law, cf. Case T-115/94, Opel Austria, EU:T:1997:3.
2 Norway, Iceland and Liechtenstein.
enacted by the ECJ a year earlier. One reason is perhaps that leading legal scholars sided with the EFTA Court and dismissed the ECJ’s interpretation of Article 7 EEA as a «misunderstanding».5

This paper argues that the interpretation of the ECJ is consistent with the wording of Article 7 EEA, that it reflects fundamental principles of EU- and EEA Law and that it is supported by highly important systemic concerns and practical considerations. The decisions in UK v. Council and Fonnship confirm the sui generis nature of the EEA Agreement in a manner that shows why it provides for a «privileged relationship» as an alternative to full membership.6

One could ask why direct applicability suddenly matters, 25 years after the entry into force of the EEA Agreement and 5 years after the disagreement between the two Courts became manifest. A main reason is simply that regulations are being used much more frequently than before. While the rationale on which the principle of direct applicability rests has been ignored within EEA Law, it is of no less importance than within EU Law. A basic fact, and a starting point is that the internal market comprises the whole EEA.

At the outset, let us revisit the emphatic rhetoric that encouraged the EU Member States to accept the fundamental principles of the European legal order. I.e., in 1984 the Conseil D’Etat was told that

«it is quite shocking, this time with reference specifically to European Law, that citizens cannot rely, before French administrative courts, on a regulation which they would have been allowed to rely on in other countries of the Community».7

The same year, we could read in this journal that

«the decision in Granital … as well as earlier decisions by the [Italian] Constitutional Court emphatically assert that directly applicable rules of Community law are to be applied as such and that no incorporation in a municipal statute may be legitimately undertaken.»8

Direct applicability is one of the principles that «establish and ensure equality among Member States and among their nationals with regard to the way in which the Common Market rules and organization operate».9 Still, within EEA Law, the moment of acceptance has not yet occurred. Instead, it has been emphatically argued that the EEA agreement, which entered into force in 1994, was far more encompassing and dynamic than anyone would ever have expected10 and that

6 Cf. consideration 2 of the preamble to the EEA Agreement.
9 Ibid., at 763.
10 For the opposite perspective, cf. the account provided by Weiler, «A Quiet Revolution», 26 Comparative Political Studies (1994), 510–534.
Due to the alleged «misunderstanding» of the ECJ, the dualist EEA EFTA States have deliberately disregarded the requirements that, according to the ECJ, flow from Article 7 EEA. The current social security scandal in Norway makes it proper to reconsider both the position and the attitude. UK v. Council concerned the incorporation of regulation 883/2004 on the coordination of social security systems into the EEA Agreement.12 Ironically, in November 2019 the Norwegian Government publically apologized for the fact that Norwegian authorities and courts had overlooked and ignored regulation 883/2004 from the time of its enactment. Article 21 of the regulation confirms the right to free movement: an insured citizen of an EU / EEA EFTA State is entitled to receive cash benefits in accordance with the legislation in the competent State when he resides or stays in another EU / EEA EFTA State.13 In stark contrast, Norwegian law considers it a crime to receive Norwegian welfare benefits outside the kingdom’s border. More than 50 citizens who i.e. were on holiday in an EU /EEA EFTA state, or for other reasons temporarily stayed within the EEA but outside Norway, have wrongfully been accused of welfare fraud and have been convicted and imprisoned, the longest sentence being eight months.14 For the same reason, thousands of citizens both from Norway and from the rest of Europe who could legitimately claim cash benefits have had to reimburse huge amounts, have had their claims rejected and their lives ruined.15

The way forward is not only a matter of EEA law, but of European Law. Currently, European Law is unable to provide an answer to the most fundamental question in any legal order founded upon the rule of law: What is the law? Can an EU-citizen rely on what the ECJ has said and invoke an EEA regulation directly in the EEA EFTA States,16 or is he or she, as suggested by the EFTA Court, dependent on the (non-)existence of national implementing measures, and if so, on their rank, their content and their legal context?

2. Outline
The EEA agreement is an international treaty, that «essentially, merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights

13 Confirmed in i.e. Case, C-430/15, Secretary of State for Work and Pensions v. Tolley, EU:C:2017:74, para 89, a case in which the Norwegian Government intervened and was thus well aware of.
14 The Norwegian Supreme Court clarified that due to «considerations of enforcement» a strict approach was necessary (HR-2017-560). While, in the specific case, the Appeal Court had sentenced the offender to 45 hours of community service, the Supreme Court considered 75 days imprisonment to be correct. The crime was that the offender resided in Italy for 50 weeks during a period of 2 ½ year. The offender received, and was otherwise entitled to receive, cash benefits within this period. According to his own explanation, the offender had to sell his home in Norway and chose to reside temporarily in Italy because he found affordable housing there.
to the inter-governmental institutions which it sets up.»

According to the common orthodoxy, there are two stages before a legal act adopted by the EU, i.e. a regulation, takes effect within the internal legal order of the dualist EEA EFTA States (Norway and Iceland). First, the act must be incorporated into the EEA Agreement by decision of the EEA Joint Committee. It then becomes binding upon the EEA EFTA states qua public international law. Secondly, the dualist EEA EFTA States must implement the decision of the EEA Joint Committee into their respective national legal orders.

It is not possible to eliminate both stages. In that case, legislative competences would be transferred directly to the EU, an organization of which the EEA EFTA States are not members. The direct transfer of competences to the EU is incompatible with Norwegian and Icelandic constitutional requirements. It is also at odds with the purpose of the EEA Agreement, which is to provide for homogeneity within the whole EEA while avoiding any transfer of sovereign powers. What I discuss in this paper is only whether a regulation that has been incorporated into the EEA Agreement by decision of the EEA Committee is directly applicable in the dualist EEA EFTA States, even in the absence of an implementing measure enacted at the national level. The answer to this question contributes to the understanding of the nature of the EEA Agreement. In Sveinbjörnsdóttir, the EFTA Court noted that:

«the EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own. (...) The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.»

The paper shows that, somewhat paradoxically, the ECJ’s understanding of Article 7 EEA, the finding that regulations are directly applicable, confirms the EFTA Court’s understanding of the nature of EEA Law. If, to the contrary, the applicability of regulations is dependent on a national implementing measure, it can hardly be argued that the EEA agreement is a «distinct legal order of its own».

The paper proceeds as follows. Section 3 presents the incompatible interpretations of Article 7 EEA delivered by the ECJ and the EFTA Court respectively. It shows that a straight-forward literal reading of the provision provides support to the finding of the ECJ: that regulations are directly applicable. Section 4 examines protocol 35 to the EEA Agreement. The protocol declares that the agreement does not require any Contracting Party to «transfer legislative powers to any institution of the European Economic Area». While this axiom must be respected, Section 4 shows that a principle of direct applicability does not equate to transfer of legislative competence. The ECJs interpretation of Article 7 EEA is in full conformity with the protocol. Section 5 assesses the principles of homogeneity and loyalty, first from the perspective of the EU, then from an EEA perspective. The two fundamental principles provide strong support to the way in which the ECJ has interpreted Article 7 EEA. Section 6

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18 Cf. in particular Articles 98, 102.1 and 93.2 EEA.
19 Protocol 35 to the EEA agreement, cf. section 4 below.
20 Pursuant to Articles 102 and 93 EEA.
argues that Article 110 EEA presupposes that regulations are directly applicable. Arguably, the principle has been part and parcel of the EEA agreement from its enactment. Section 7 presents the most important practical effects of a principle of direct applicability: it will improve the functioning of the EEA Agreement, foster homogeneity and provide better foreseeability to private parties. Section 8 summarizes the main findings in the paper and argues that the EFTA Court should seriously consider whether legal and factual developments justify a revision of its current understanding of Article 7 EEA.

3. Article 7 EEA

3.1 Presentation

Article 7 EEA is worded as follows:

«Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;
(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.»

Article 288 TFEU constitutes the EU legal counterpart. The relevant paragraphs of the provision are worded as follows:

«A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.»

Article 7 EEA refers to acts that correspond to an EEC regulation or an EEC directive respectively. The wording reflects that the EEA Joint Committee is not equipped with creative, legislative authority; its decisions merely incorporates («copies») existing legal acts, such as EU-regulations and directives into the EEA Agreement. For the sake of simplicity, the paper refers to Committee decisions that incorporate «an act corresponding to an EEC regulation» into the EEA Agreement as EEA-regulations.

Article 7 stipulates that acts that have been incorporated into the EEA Agreement by decision of the EEA Joint Committee, such as regulations, «shall …be, or be made, part» of the internal legal order of the Contracting Parties. The prevailing explanation of this passage in legal literature is that decisions enacted by the EEA Joint Committee, including EEA regulations, must «be made part» of the internal legal order of the dualist EEA EFTA States to become effective.22 According to this account, which will be referred to as the «traditional view», Article 7 EEA prescribes the opposite solution of Article 288 TFEU. As is well known, the notion «directly applicable» entails that with regard to regulations, national implementing measures are not required nor allowed.23 For the sake of clarity it should be

mentioned that measures that are «directly applicable» are not necessarily always «directly effective». Individual provisions still need to satisfy the test of being clear, precise and unconditional in order to create legally cognizable rights.\(^\text{24}\)

In stark contrast to the traditional view, the ECJ has interpreted Article 7(a) EEA in a way that mirrors the interpretation of Article 288 TFEU.\(^\text{25}\) In *UK v. Council* the Court stated:

«53 It should also be noted that, pursuant to Article 7 of the EEA Agreement, acts referred to in the annexes to the EEA Agreement or in the decisions of the EEA Joint Committee are to be binding on all the Contracting Parties and made part of their internal legal order.

54 In particular, as regards an EU regulation, Article 7(a) of the EEA Agreement expressly provides that such an act is ‘as such’ to be made part of the internal legal order of the Contracting Parties, that is to say, *without any implementing measures being required for that purpose.*»\(^\text{26}\)

The following year, in its Grand Chamber decision in *Fonnship*, the ECJ noted that:

«24 The provisions of Regulation No 4055/86 are an integral part of the legal order of all of the States that are parties to the EEA Agreement by virtue of Article 7(a) of the EEA Agreement and Annex XIII thereto. That regulation and those provisions of the EEA Agreement contain rules relating to the applicability of the freedom to provide services in the shipping industry between States that are parties to the EEA Agreement and between those States and third countries…»\(^\text{27}\)

In neither of the two judgments did the ECJ provide an elaborate analysis, even though, as shown in the introduction, the matter is quite delicate. The scarce reasoning has probably contributed to the dismissal of the ECJ’s interpretation of Article 7(a) EEA as a «misunderstanding».\(^\text{28}\) The paper proceeds more modestly by arguing that the ECJ’s interpretation of Article 7 EEA is an *understanding* of the provision.

**3.2 Understanding Article 7 EEA**

**3.2.1 The distinction between regulations and directives**

The first paragraph of Article 7 EEA states that EU legal measures that have been implemented into the EEA agreement by decision of the EEA Joint Committee shall be binding upon the Contracting Parties «and be, or be made, part of» their internal legal order. According to the traditional view, the alternatives refer to the different constitutional systems in the EEA EFTA States. In countries with a monistic constitutional system, such as Liechtenstein, the term «shall be» applies. The alternative «or be made, part of» addresses dualist states such as Norway and Iceland.\(^\text{29}\)


\(^{26}\) Case C-431/11, *UK v. Council*, EU:C:2013:589 (emphasis added).

\(^{27}\) Case C-83/13, *Fonnship*, EU:C:2014:2053 (emphasis added).

\(^{28}\) Supra note 5 above.

References to, and dependence on internal matters are unusual in international law in general and in EU law in particular. A different understanding of Article 7 EEA is possible. If the provision is read as a whole, the alternatives could also refer to the remainder of the provision: EEA-regulations are mentioned in Article 7(a) EEA-directives in Article 7(b). The corresponding literal interpretation is that EEA-regulations shall be part of the internal legal order of the EEA EFTA states, while, to the opposite, EEA directives shall be made part of the internal legal order of the EEA EFTA states. The latter interpretation is supported by the fact that Article 7 EEA applies the notions of «regulations» and «directives» and maintains a clear distinction between the two.

In the absence of direct applicability, an EEA regulation would no longer be a regulation, but a directive, or at least something for itself, and so, the traditionalists argue, is the EEA Agreement. While this is correct in some respects, one should be careful not to overstate the differences between EU Law and EEA law with regard to the matter here discussed. Consideration eight of the preamble to the EEA agreement reads:

«CONVINCED of the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights.»

In the EEA Commentary, Haukeland Fredriksen and Arnesen argues that «the eighth recital’s reference to individual rights ...simply cannot be overestimated». They note that «[t]he striking resemblance to the ECJ’s reasoning in Case 26/62 van Gend en Loos was recognised by leading commentators from the outset». The similarity supports an understanding of Article 7 EEA that preserves the legal nature and integrity of regulations in way that make them distinctly different from directives

3.2.2 «As such»

Article 7(a) EEA states more specifically that an EEA Regulation «shall, as such, be made part of the internal legal order of the Contracting Parties». According to the traditional view, the notion «as such» is an autonomous creature of EEA Law that substitutes the principle of direct applicability for something else. The notion «as such» requires that EEA regulations are implemented unchanged, i.e. that they must be reproduced word by word, but allows implementation dualist-style, e.g. one by one. According to this understanding of Article 7 EEA, the absence of direct applicability is a «fundamental principle of EEA law».

Again, a different understanding is possible. A fundamental question is whether the notion «as such» refers only to the substantive content of regulations, or also to the nature and character

30 Compare in this respect Case C-6/64, Costa v. Enel, EU:C:1964:66, «Wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions».
32 Case 26/62, van Gend & Loos, EU:C:1963:1: «This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples».
34 Bull (2014) p. 206 maintains that the notion «as such» is «quite different from the requirement found in Article 288 TFEU of regulations being ‘directly applicable’ in the Member States.»
of regulations qua legal instruments. The wording of Article 7(a), «an EEC regulation shall as such...», points in the latter direction. Further, the notion «as such» is actually derived from the case law of the ECJ. Many years before the adoption of the EEA agreement, the ECJ established that «[r]egulations are, as such, directly applicable in all Member States».37

In the case law of the ECJ, the notion «as such» is a clarification of the notion «directly applicable». On the one hand, the latter expression makes clear that the entry into force and application of a regulation «are independent of any measure of reception into national law...»38 On the other hand, the words «directly applicable» does not make it self-evident why national measures of reception are prohibited. National law is of course directly applicable. One could argue that national implementing measures cannot hamper the applicability of a regulation to which it refers. In this respect, the notion «as such» is the more precise. It catches an important rationale on which the doctrine of direct applicability rests: that the integrity and nature of European law must not be obscured or concealed.39 Copying is not the same as applicability «as such». Replication may affect the legal integrity of EU regulations in the negative, because national implementing measures belong to a larger whole, the national context. Put simply, the reproduction of «Mona Lisa» is not Mona Lisa.

In UK v. Council, quoted above, the ECJ chose to emphasize two words by the use of quotation marks: «as such». These very specific words were highlighted to make sense of Article 7 EEA. The Court’s understanding was straight-forward: «as such» means as such. The Norwegian social security scandal demonstrates the wisdom on which the ECJ’s literal interpretation rests. Contrary to the judgment, but in conformity with the traditional view, regulation 883/2004 on the coordination of social security systems was implemented into the legal order by the enactment of an administrative act, the legal basis of which was a provision in the national Insurance Law. The Insurance Law stipulated a requirement of residence and presence in Norway. For several years, the Norwegian legal community overlooked the opposite rule in Article 21 of the regulation. The administrative act was difficult to find. Further, according to basic legal method, statutory law is in any case superior to an administrative act. It is a truism to say that the method of implementation concealed the regulation and affected its integrity in the negative. Although formally the regulation was made part of the internal legal order, thousands of qualified lawyers, judges and civil servants overlooked it in thousands of cases.

While the scandal unfolded in the welfare sector, its cause is of a general character. For practical reasons, implementation of EEA regulations in a dualist fashion will almost always be carried out at the administrative level, by the enactment of an administrative act, the legal basis of which is a provision in the relevant national law. In other words, implementation in a dualist fashion will systematically affect the integrity of EEA regulations in the negative. Generally, EEA regulations are placed at the bottom of the national legal hierarchy.

Implementation word by word, one by one, creates a mass of reference decisions enacted at the subordinate, administrative level. The legislation, however, is not necessarily changed, as, of course, this is difficult to do in a way that complies with the word by word straight-jacket. Again the Norwegian social security scandal provides a good example. The Insurance Law contains numerous provisions that concern issues on which the EEA EFTA States remain competent: it is impossible to implement regulation 883/2004 and other regulations into

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38 Cf. i.e. case C-283/16, MS. v. PS., EU:C:2017:104, para 48.
existing national statutory law word by word. Paradoxically, therefore, in respect of Article 7 (a) of the EEA Agreement, and its alleged requirement of implementation word by word, Norway did not repeal legislation that violated regulation 883/2004 and that bluntly disregarded the fundamental right to free movement.

3.2.3 «be made»
Article 7(a) EEA requires that an EEC regulation «shall as such be made part» of the internal legal order. This is where confusion sets in. Seemingly, the monist «as such» and the dualist «be made» are irreconcilable. One way of explaining the judgments in UK v. Council and Fonnship is simply that the ECJ made a choice. It is however not obvious that the monist – dualist dichotomy is the correct reference to make sense of the wording. The dichotomy is actually absent from paragraph (a): there is no «be or be made». The French language version is even clearer: «un acte correspondant à un règlement CEE est intégré en tant que tel dans l’ordre juridique interne des parties contractantes.»

The only clear dichotomy within the provision is that between regulations and directives. With this in mind, a comparison between Article 7 EEA paragraphs (a) and (b) provides clarity. Paragraph (b) stipulates that «an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation». Conversely, paragraph (a) does not give the EEA EFTA States any freedom of choice on how to make EEA regulations applicable at the domestic level. Compared to Article 7(b) EEA, it is striking that Article 7(a) does not make any reference to the «method of implementation». Arguably, no such method exists.

According to the traditional view, the straight-jacket one by one, word by word implementation of EEA regulations respects the absence of choice with regard «to form and method of implementation». I respectfully disagree. As noted by Haukeland Fredriksen, the bulk of EEA regulations is implemented into the internal legal order by means of administrative act, while regulations that are regarded as highly important are implemented by statutory law. It goes without saying that these are different methods of implementation and that conscious choices are being made, that characterizes some EEA regulations as important, some as less important.

The argument can be summarized very short: Any method of implementation requires a choice to be made: it does not happen by itself, «as such». In contrast, if the ECJ’s interpretation of Article 7 EEA in UK v Council and Fonnship is being accepted, EEA regulations will as such be made part of the internal legal order of the EEA EFTA States. That simple. It is possible to complicate matters, but the reasons for doing so are not obvious, and shall not be further pursued here.

3.3 An understanding not a «misunderstanding»
The traditional view presents its narrative about different constitutional traditions and the preservation of sovereignty as a deeper understanding of Article 7 EEA, in the absence of which it is impossible to make sense of the provision. For example, one of the most influential and distinguished legal scholars, former judge in the EFTA Court, Henrik Bull, explains that his account of Article 7 EEA is based on insights from the drafting of the EEA agreement:

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«The author took part in the EEA negotiations as an official of the Norwegian Ministry of Justice. Statements in this chapter as to the intention behind certain provisions of the EEA Agreement are based on this experience.» 41

Obviously, the judges of the ECJ do not have similar insights. This is probably why Bull boldly states that «[paragraph 54 of the judgment in case C-431/11 UK v European Commission [sic.] is thus based on a misunderstanding». 42 The Vienna Convention on Treaty Interpretation (VCTI) shows that a more cautious approach is required. Article 31.1 sets out the main rule of interpretation:

«A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.»

In comparison, the traditional presents its narrative in a manner that seems to rely on the exception expressed in Article 31.4:

«A special meaning shall be given to a term if it is established that the parties so intended.»

There is no reason to doubt that Bull's analysis of Article 7 EEA provides an adequate account of the intentions of the EEA EFTA States, as they stood clear to him as a delegate of one of the Contracting Parties. Although the account is interesting, it would however be wrong to regard it as an important source of law. On such a subjective and timid basis one cannot establish that «the parties so intended». It is probable that the other Contracting Parties did not act with the same awareness as the EEA EFTA States on the matter here discussed. While they might have both listened to and understood the arguments voiced by the EEA EFTA States that does not imply that they were accepted, at least not to the fullest extent.

A more modest approach is to accept that the wording of Article 7 EEA is not clear, and that different understandings are possible. Haukeland Fredriksen and Mathisen maintains that the question

«about the status of EEA-rules that have not (yet) been implemented on the national level was a controversial issue during the EEA negotiations. The outcome was a text that only partly clarifies the issue, and which otherwise contains fragments that go in slightly different directions. For this reason, the existence of an EEA legal principle of direct applicability was a strongly debated issue in the early days after the entry into force of the agreement.» 43

The incompatible positions taken by the ECJ and the EFTA Court, marks that the matter is still not settled; rather the «strong debate» has reached its climax. If we accept that the ECJ's interpretation of Article 7 EEA is an understanding, not a «misunderstanding», the best way to proceed is to frame the debate within the main rule of Article 31.1 VCTI. The disagreement concerns the «context…object and purpose» of the provision, or, in short, the nature of EEA law. This is subject to analysis in the remainder of the paper.

41 Bull (2014) p. 205, footnote 6 (emphasis added).
42 Bull (2014) p. 211, footnote 29. In the same vein former judge Bjørgvinsson (2014) p. 263–280 (p. 265) who states that «the CJEU has simply misunderstood the words ‘as such’ in Art 7 EEA».
43 Haukeland Fredriksen and Mathisen, EØS-retr, Fagbokforlaget, 2018 p. 414 (author’s translation).
4. Protocol 35 to the EEA Agreement

Protocol 35 to the EEA Agreement «on the implementation of EEA rules» is the most important expression of the shared intentions of the Contracting Parties with regard to the nature of the EEA Agreement. The protocol reads:

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

Sole Article

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

The EFTA Court has regarded Protocol 35 as decisive to the interpretation of Article 7 EEA:

«It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that EEA law does not entail a transfer of legislative powers. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts.»

The postulate quoted above did not relate to the issue of the direct applicability of EEA regulations, but formed part of an analysis of whether EEA Law contains a principle of State liability. Subsequently, in Criminal Proceedings against A, the EFTA Court clarified that its finding «applies to all EEA Law», Following the decisions of the ECJ in UK v. Council and Fonnship the EFTA Court upheld its position and clarified that it also applies to EEA-regulations. Apart from its statement that «EEA law does not entail a transfer of legislative powers», the EFTA Court has not provided any reasons to justify its interpretation of Article 7 EEA. The sweeping reference to «EEA rules» is unsatisfactory. It obviates that Article 7 EEA introduces a clear distinction between «regulations» and «directives». The words of Article 7 EEA paragraphs (a) and (b) that further define these instruments are both nuanced and different, presumably for a reason. In contrast, in UK. v. Council the ECJ put great emphasis on the wording of the provision.

The observation of the EFTA Court that «EEA law does not entail a transfer of legislative powers» corresponds to the observation of the ECJ in opinion 1/91: that the EEA Agreement «provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up.» Contrary to the finding of the EFTA Court, the axiom does not exclude a principle of direct applicability of EEA regulations. As the ECJ carefully noted, the EEA Agreement is designed to avoid the transfer of any sovereign powers, including the power to bind the EEA EFTA States qua states, pursuant to public international law. The decision-making procedures of the EEA Joint Committee are constructed accordingly: the Committee cannot act autonomously in any regard. The enactment of decisions, i.e. to incorporate novel EU

44 Case E-4/01, Karlsson, para 28.
45 Case E-1/07, Criminal Proceedings against A, para 40.
46 Case E-15/14, ESA v. Iceland, para 32.
47 Cf. Section 3.2, supra.
regulations into the EEA Agreement, requires unanimity among the contracting parties.\textsuperscript{49} The EFTA Court has described the nature of the EEA Joint Committee as follows:

«The EEA Joint Committee is designed to function as an institution working in the pursuit of the common interest of the Community side and the EFTA side. As pointed out by the Commission of the European Communities at the oral hearing, a decision of the EEA Joint Committee may constitute a simplified form of an international agreement between the Community and its Member States on the one hand, and the EFTA States party to the EEA Agreement on the other.»\textsuperscript{50}

The EEA EFTA States cannot be bound by decisions of the EEA Joint Committee unless they vote «yes». In the opposite case, a decision will not be made. Consequently, a principle of direct applicability of EEA regulations does not equate to a transfer of powers. It only grants effectiveness to the individual decisions made by the EEA EFTA states themselves within the procedural framework of the EEA Agreement. The point can be made very simply: A principle of direct applicability entails no transfer of legislative competences, simply because there exists no legislator at the receiving end. Not only does the EEA Joint Committee lack autonomous legislative competence, it lacks any autonomous competence.

A careful reading of Protocol 35 shows that it accounts for the nuances above. The preamble is not normative, but descriptive: The EEA Agreement is constructed so as to avoid any transfer of competences. This is a truism no matter how Article 7 (a) EEA is interpreted. Remember, even according to the traditional view Article 7 EEA is to be applied both ways: The alternative «shall be part of» applies to monist countries.\textsuperscript{51} No one has ever argued that the monism Article 7 EEA introduces is a modification of the descriptive statement in the preamble of Protocol 35 – and it is not.

5. Homogeneity and loyalty
5.1 From the perspective of EU Law
Section 4 above showed why a principle of direct applicability does not correspond to a transfer of legislative competence. When this fundamental issue has been dealt with, other fundamental principles come into play: homogeneity and loyalty. These principles provide strong support to the ECJ’s interpretation of Article 7 EEA.

The principle of homogeneity has different facets. First, if the effect of EEA regulations is dependent on the enactment of an implementing measure at the national level in the dualist EEA EFTA States, it will produce an imbalance, a lack of reciprocity. As soon as an EEA regulation has been incorporated into the EEA agreement by decision of the EEA Committee, Norwegians and Icelanders may invoke the regulation in the EU Member States (and in Liechtenstein). On the contrary, citizens from the other contracting parties will not be able to invoke the regulation in Norway and Iceland unless it has been implemented into their respective national legal orders. The observation challenges the traditional view, that EEA regulations are not directly applicable. In fact, EEA regulations are directly applicable in 27 EU Member States and one EEA EFTA State, but not, according to the traditionalists, in Norway and Iceland.

\textsuperscript{49} Article 93.2 EEA.
\textsuperscript{51} Cf. Section 3.2 \textit{supra}. 
Secondly, when the EU legislator adopts regulations instead of more flexible regulatory instruments, it is justified by reference to the need to pursue homogeneity with regard to substance, entry into force and enforcement. The ECJ has noted that «regulations are, as such, directly applicable ... All methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Community regulations and of jeopardizing their simultaneous and uniform application in the whole of the Community». If it were otherwise, the concerns that made the adoption of a regulation necessary in the first place would be disregarded. The intimate connection between the term «as such» and the principle of homogeneity provides further explanation as to why the ECJ chose to emphasize these two words in *UK v. Council*.

The close link between the principle of homogeneity and the principle of loyalty completes the picture. The judgment in *UK v. Council* concerned the incorporation of the revised EU regulations on the coordination of social security systems into the EEA Agreement. The UK asked the Court to annul the Council Decision on the position to be taken by the European Union within the EEA Joint Committee. The main issue in the case was whether the Treaty rules on the internal market, or, instead, the Treaty rules on EU cooperation with third countries, was the correct legal basis for the Council decision. The UK argued that Article 79(2)(b) TFEU was the correct legal basis, which would allow it to invoke a specifically designed opt-out clause. Although, formally speaking, the EEA EFTA States are non-members and thus undoubtedly third-states, the ECJ found that the extension of the social security scheme concerned the organization of the internal market. Article 48 TFEU was the correct legal basis, and in that regard the UK’s opt-out clause was not available.

The Court’s ruling is constructed upon two main arguments. First, in paragraph 52, the Court referred to the duty of loyalty as enshrined in Article 3 EEA:

«It is in that context that the association established by the EEA Agreement covers, in accordance with Article 1(2)(f) thereof, closer cooperation in the field of social policy and requires, pursuant to its Article 3, the parties not only to facilitate cooperation within the framework of that agreement but also to abstain from any measure which is liable to jeopardise the attainment of the objectives pursued by that agreement.»

Next, as a second argument, the Court introduced its interpretation of Article 7(a) EEA (paragraph 53 and 54 of the judgment, quoted in full in Section 3.1 above). This led the Court to its conclusion (paragraph 55 of the judgment, emphasis added):

«Consequently, as the Commission has correctly pointed out, the contested decision does not seek only to regulate the social rights of nationals of the three EFTA States concerned, but also, and in the same manner, to regulate the social rights of EU citizens in those EFTA States. In other words, the amendment to the EEA Agreement contemplated by the contested decision not only enables, in essence, nationals of Iceland, Liechtenstein and Norway to invoke the rights conferred by Regulations Nos 883/2004 and 987/2009 within the European...»

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Union, but also enables nationals of the Member States to rely on those rights in Iceland, Liechtenstein and Norway.»

Rennuy and Van Elsuwege provide a precise account of the essence of the judgment: «In contrast to the Advocate General and the UK, who regarded the EFTA States as third countries excluded from the scope of Article 48 TFEU, the ECJ places those States on the same level as the EU Member States.»\(^5^4\) The combined application of the principles of homogeneity and loyalty, as manifested through the Court’s interpretation of Article 7(a) EEA, was decisive to the outcome.

For the sake of completeness, the Court added in paragraph 65 that

«the possibility cannot be discounted that recourse to Article 79(2) TFEU, entailing an opt-out clause for the United Kingdom and/or Ireland, would in practice be liable, in breach of Article 3 of the EEA Agreement referred to in paragraph 52 above, to undermine the realisation of the objectives pursued by that agreement.»

In other words, an interpretation of the Treaty that would open the possibility for the UK to invoke the opt-out clause could be in breach of the duty of loyalty. To put this into perspective: the EFTA Court's interpretation of Article 7(a) requires the dualist EEA EFTA States to actively “opt-in”, in the sense that they must enact implementing measures to make EEA regulations applicable in their territories. Article 7(a) EEA is not an opt-out clause in the true sense, as the requirement to enact implementing measures is unconditional and absolute. Still, the interpretation of the EFTA Court preserves the possibility to act disloyally, and in breach of the EEA Agreement. It is hard to see the justification of this interpretation.

It has been contended that ECJ’s reasoning in *UK v. Council* and *Fonnship* is scarce.\(^5^5\) The analysis above shows that, apart from the wording of Article 7(a) EEA, the principles of homogeneity and loyalty underpin the Court’s reasoning. It would be wrong to require the ECJ to elaborate upon its interpretative approach in the academic sense. From a practical point of view the Court’s understanding of Article 7(a) EEA appears well founded.

### 5.2 From the perspective of EEA Law

Inspired by the ECJ’s application of the principles of homogeneity and loyalty, this Section assesses the same principles from a purely internal EEA EFTA perspective.

A key expression of the principle of homogeneity is found in Article 93.2 EEA, which states that the EEA EFTA States must speak with one voice in the EEA Joint Committee. The incorporation of novel EU legislative measures into the EEA agreement requires unanimity. The decision-making mechanism guards the principle of homogeneity: it bars the creation of different legal regimes within the EFTA-pillar. If one EEA EFTA State votes «no» (in popular terms often referred to as a «veto»), it will affect all. A decision in the negative will trigger the reciprocity mechanism in article 102.5 EEA. Affected annexes in the EEA Agreement will provisionally be suspended throughout the whole EEA.


If Article 7(a) EEA is interpreted so as to provide a kind of additional possibility to opt-out, in the form of not enacting national implementing measures, the fundamental principles of the Agreement will be adversely affected. First, non-homogeneity may occur, if the dualist EEA EFTA States enact implementing measures at different times, or in the worst case, do not enact such measures at all. Secondly, the reciprocity-mechanism in Article 102.5 will be circumvented. Legally speaking, non-incorporation at the national level is not a «veto», only a breach of the EEA agreement committed by an EEA EFTA State acting in its own capacity. Third, it would be a flagrant breach of the duty of loyalty if, first, an EEA EFTA state votes «yes» to the incorporation of an EEA regulation into the EEA agreement in the EEA Joint Committee, and then, nonetheless, does not enact the necessary implementing measures. The EFTA Court has stated that it follows from its interpretation of Article 7 EEA that:

«In cases of conflict between national law and non-implemented EEA law, the Contracting Parties may decide whether, under their national legal order, national administrative and judicial organs can apply the relevant EEA rule directly, and thereby avoid violation of EEA law in a particular case. It also follows that the Contracting Parties may decide on which administrative and judicial organs they confer such a power.»

Descriptively, the observation is correct. Normatively, the statement makes it hard to accept the EFTA Court’s interpretation of Article 7 EEA. In stark contrast to the ECJ, the EFTA Court declares that the EEA EFTA States are not subject to a duty of loyalty, but may choose to act in a manner that violates the obligations stemming from the agreement. The judgments in UK v. Council and Fonnship provide an opportunity to reconsider this position.

6. Article 110 EEA

It may be argued that the EEA Agreement has contained a clear expression of the principle of direct applicability from the time of its enactment, but that is has been searched for only where there is light. The analyses above make sense of the subtle provision in Article 110 EEA. Its first and fourth paragraphs read:

«Decisions under this Agreement by the EFTA Surveillance Authority and the EC Commission which impose a pecuniary obligation on persons other than States, shall be enforceable. The same shall apply to such judgments under this Agreement by the Court of Justice of the European Communities, the Court of First Instance of the European Communities and the EFTA Court.

Enforcement may be suspended only by a decision of the Court of Justice of the European Communities, as far as decisions by the EC Commission, the Court of First Instance of the European Communities or the Court of Justice of the European Communities are concerned, or by a decision of the EFTA Court as far as decisions by the EFTA Surveillance Authority or the EFTA Court are concerned. However, the courts of the States concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.»

57 Case E-1/07, Criminal Proceedings against A, para 41.
The provision establishes that certain decisions enacted by the EFTA Surveillance Authority are binding *sui generis*, and shall be directly enforceable at the national level, as such. A dualist model, which prescribes that the EFTA Surveillance Authority must act on the basis of internal «copy-legislation» is impossible to reconcile with the provision. A dualist model would imply that private parties could challenge decisions enacted by the EFTA Surveillance Authority on the basis of national law or that private parties could bar the effects of such decisions if, for some reason, the EEA legal basis on which the EFTA Surveillance Authority operates has not (yet) been implemented into national law. This would be contrary to the basic premise set out in Article 110 EEA, first paragraph. Further, if national Courts were to review the national implementation act, it would violate Article 110 EEA fourth paragraph, which establishes that the competence of national courts is limited to checking whether national rules of enforcement are complied with.\(^{58}\)

When the EEA agreement was adopted, the powers to which Article 110 EEA refers only existed in the field of competition law. It is clear, however, that because of its general wording, the provision covers all areas. Presumably, its importance will increase. The bulk of technical-administrative regulation in the EU is growing, due to the agencification of EU law. Administrative sanctions are introduced more often than before. In the EEA Commentary Dora Sif Tynes forecasts that the trend will only continue. She notes that the EU no longer seems to accept special schemes for the EEA EFTA States and that the EFTA Surveillance Authority will be vested with powers that mirror those of the Commission.\(^{59}\) If her assumption is correct, Article 110 EEA will become more important, irrespective of the extent to which the power to enact sanctions is actually being used. The law guides the behaviour of private parties. It must exist before the enactment of sanctions. If decisions that impose administrative sanctions are to be directly binding, it implies that *any* EEA regulation which potentially can lead to the enactment of administrative sanctions by the EFTA Surveillance Authority, must be directly applicable as well.

The declarations that were exchanged on the application on Article 110 EEA when the EEA Agreement was enacted contribute to the understanding of the nature of EEA Law. The first paragraph of the provision refers to the direct enforceability of decisions enacted both by the EFTA Surveillance Authority and the European Commission. The latter is highly problematic as the EFTA pillar is constructed to preserve the formal sovereignty of the EEA EFTA States within that very pillar. The EEA EFTA states cannot exert influence or control over the way in which powers are being exercised within the EU pillar. If decisions enacted by EU bodies such as the European Commission have direct effect within the EFTA pillar, it corresponds to the transfer of competences. Thus, in a unilateral declaration to the EEA agreement, Norway declared that «the present constitution of Norway does not provide for direct enforceability of decisions by the EC institutions regarding pecuniary obligations addressed to enterprises located in Norway».\(^{60}\) The EU responded: «The Commission will keep the situation referred to in Norway’s unilateral declaration under constant review. It may at any time initiate consultations with Norway with a view to finding satisfactory solutions to such problems as may arise.»


\(^{59}\) Tynes (2018) p. 862.

\(^{60}\) Final Act, 27.3.1998.
When the lights are turned on, two important insights become visible. First, none of the (then) EEA EFTA States made reservations against the powers that Article 110 EEA vests to the bodies of the EFTA pillar, even though these powers presupposes the principle of direct applicability within that pillar. Secondly, the transfer of competences to the institutions of the EU, which the reservation quoted above addresses, is definitely problematic. It is notable that even in this regard the EU’s response was reserved. Against this background, it seems impossible to identify a shared intention to establish that a special meaning shall be given to the term «as such». Instead Article 7(a) EEA must be «interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose». As proven by the judgments of the ECJ in UK v. Council and Fonnship this will lead to the conclusion that EEA regulations are directly applicable.

7. Practical consequences
The social security scandal in Norway proves the great practical importance of the principle of direct applicability. Section 3 above showed that the ECJs interpretation of the notion «as such» is motivated by concerns the respect for which could have prevented the scandal. However, I will be careful not to take a specific situation as the main argument in favour of a general proposition. Instead I shall argue that the acceptance of a principle of direct applicability will improve the functioning of the EEA Agreement in general (Section 7.1) and that it will provide better predictability to private parties (Section 7.2).

7.1 Improve the functioning of the EEA agreement
The EEA review notes that:

«In practice, it usually takes some time before novel EU legislation is implemented into the EEA Agreement by decision of the EEA Committee. Thereafter, the dualist EEA EFTA States will need additional time to incorporate the amendments into their national legal orders. In practice therefore, EU legislation of relevance to the EEA Agreement will enter into force somewhat later in the EEA than in the EU. The time-lag is inherent in the construction of the EEA Agreement.»

Bull observes that the decision making process in the EEA Joint Committee lags behind to the extent that, in many cases, by the time the Committee enacts its decision, the relevant legal acts have already entered into force in the EU. He notes that:

«In most cases, no special time limit for implementation is indicated in the decisions of the EEA Joint Committee. This has the consequence that the time limit for implementation for the EFTA States in fact is identical to the time for entry into force of the Joint Committee decision. It must be assumed that in many cases, full and correct implementation is not in place by then.»

The dualist interpretation of Article 7 EEA assumes that its consequences are a huge amount of temporary violations of the EEA Agreement. While this is correct, it is far from

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61 Article 31.4 of the Vienna Convention, cf. the discussion in Section 3.3 above.
62 Article 31.1 of the Vienna Convention, cf. Section 3.3. above.
63 NOU 2012:2, Innenfor og utenfor, p. 95 (Norwegian public report, the author’s translation).
satisfactory. In the foregoing, we have seen that the purpose of «simultaneous and uniform application in the whole of the Community» is an important reason why EU law does not allow mechanisms seeking to implement EU regulations into the national legal orders of the Member States. The weight of this consideration is actually stronger within the EEA framework, due to the inherent delay caused by the process in the EEA Committee. In some areas, the time-lag has caused huge problems, to the extent that they challenge the basic functioning of the EEA Agreement. One example is found in the financial sector, where as of April 2018, there were about 300 financial acts – mainly regulations – that were adopted in the EU, but not yet incorporated into the EEA Agreement by decision of the EEA Committee. Today’s practice is founded upon pragmatism. Minor delays are being accepted or ignored. The only way in which the problem can be solved in a principled manner, e.g. in accordance with the law, is to accept the ECJ’s interpretation of Article 7 EEA.

7.2 Improved predictability
A principle of direct applicability for EEA regulations will provide better legal predictability for private parties. At the outset, EEA regulations are the least accessible components of EEA Law, due to their complex structure and technical content. Incorporation at the national level, in a dualist fashion, adds to the complexities. A regulation can have legal effects, at many different stages. Regulations are adopted in the EU and then enter into force; they are incorporated into the EEA Agreement and then enter into force as part of EEA law; they are implemented into the legal orders of the dualist EEA EFTA States and then enter into force at the national level. From a practical point of view, the question a private actor in the dualist EEA EFTA States will have to ask is at which of the six stages mentioned above he should start to take account of a new regulation that is in the pipeline, and at which stage the regulation becomes decisive to his legal position. Today, the latter question is impossible to answer. Some regulations have an overarching and general character, and may achieve some effect, perhaps also full effect, through the existing principles of EEA law, even in the absence of implementation at the national level in the dualist EEA EFTA States. The argument would be that harmonizing measures in secondary law affect and guide the interpretation of primary law. Other regulations have a much more detailed and positive legal content and form. Until they enter into force at the national level, they cannot be made effective through conform interpretation of other existing norms and principles.

The time-lag between the entering into force of new EEA regulations as part of EEA Law and as part of the national legal order of the dualist EEA EFTA States exposes EEA EFTA citizens to different and even opposite legal requirements stemming from two different legal orders: the EEA legal order and the national legal order. Situations may even occur where an existing EEA regulation is repealed at the level of EEA law and substituted by a new EEA regulation, while, due to the time-lag, the old EEA regulation continues to be part of the national legal order in the EEA EFTA States.

65 Case 39/72, Commission v. Italy, EU:C:1973:13, para 17, cf. Section 5.1 above.
67 Compare the reasoning of the ECJ in Case C-144/04, Mangold, ECLI:EU:C:2005:709; Case C-555/07, Küçükdeveçi, EU:C:2010:21; Case C-176/12, Association de médiation sociale, EU:C:2014:2; and case C-414/16, Egenberger, EU:C:2018:257. These cases concern directives, but in the absence of a principle of direct applicability, the difference between EEA regulations and EEA directives vanish, see section 3.2 supra.
The nature of the problem is systemic: (1) Regulations are being used much more frequently than before. They are the preferred regulatory instrument in areas where the EU sets up an administrative apparatus. Such areas have become far more numerous. (2) If an EEA regulation enters into force at different times as part of the EEA agreement and as part of the internal law of the dualist EEA EFTA States, a discrepancy may arise between the rights and obligations arising from the two different legal systems. This weakens the predictability of private parties. (3) It is impossible to develop a general theory of how to deal with this challenge at the interpretative level. Instead, a systemic approach is needed. If EEA regulations are directly applicable, the risk of discrepancies between the EEA legal order and the national legal order of the dualist EEA EFTA States is eliminated.

8. Conclusion
In two decisions, the ECJ has concluded that pursuant to Article 7 EEA, regulations are directly applicable also as a matter of EEA Law. The EFTA Court has taken the opposite view. Legal scholars have rejected the finding of the ECJ as a “misunderstanding”. This paper has shown that the ECJ’s interpretation of Article 7 EEA is in conformity with the wording of the provision and is underpinned by the principles of homogeneity and loyalty. Article 110 EEA presupposes the existence of a principle of direct applicability. The said principle will improve the functioning of the EEA Agreement, promote homogeneity and provide better predictability to private parties.

One of the EEA EFTA States, Norway, is currently experiencing its worst legal scandal since World War II. Due to the oversight of regulation 883/2004 on the coordination of social security systems more than 50 citizens who legitimately received cash benefits have been sentenced to prison, hundreds of citizens have had to reimburse cash benefits that they received legitimately and thousands of citizens have had their legitimate claims rejected. The principle of direct applicability does not in itself provide a guarantee that EEA regulations are correctly interpreted and applied. However, the root of the Norwegian scandal is not misinterpretation, but systemic failure. I will not add to the misery, but instead point to the positive fact that the way forward is clear: it was identified by the ECJ in UK v. Council before the scandal occurred.

The decisions of the ECJ in UK v. Council and Fonnship recognize the privileged position of the EEA EFTA states in the EU internal market. They confirm the difference between the EEA Agreement and ordinary association agreements, such as the EU agreement with Turkey. While the ECJ and the EFTA Court have interpreted Article 7 EEA differently, the ECJ’s understanding is the only one that fits the EFTA Court’s conception of the nature of the EEA legal order. Unless «as such» means «as such», the fundamental principle of Article 7 EEA would be that the EEA legal order is dependent on the national legal order in the EEA EFTA States. In the latter case the EEA Agreement would not aspire to be «an international treaty sui generis which contains a distinct legal order of its own». The principle of direct applicability defines the special nature of the EEA agreement. The agreement is not supranational, it does not require the transfer of legislative competence. Still it reaches a little further than ordinary international agreements.

Nothing can be special while at the same time remaining ordinary. One can, of course, be pro or against the EU, and pro or against the EEA Agreement, but that is subject of another paper (to say the least!). Within the framework of the current agreement, it is in the interests of the EEA EFTA States that it works as well as possible. It is in the interest of the EEA EFTA States that their privileged position is recognized. In short, this is what the ECJ has done. The EEA EFTA States should not contest the findings of the ECJ in *UK v. Council* and *Fonnship*, but embrace them. The EFTA Court should be invited to reconsider its interpretation of Article 7 EEA. The question is not whether the EFTA Court has misinterpreted the provision on previous occasions, but rather whether legal and factual developments justify an adjustment of the Court’s position. The conclusion is that they do.

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