

# Influence of EEA Law in Iceland and Norway

*The principle of consistent interpretation in the  
national courts of Iceland and Norway*

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# List of contents

List of contents .....	2
1 Introduction .....	4
1.1 Focus of the paper .....	4
1.2 Methodology .....	5
1.3 Outline .....	6
2 The Dualist Approach .....	7
3 The Courts' Loyalty to the Constitution .....	9
4 The Principle of Consistent Interpretation .....	10
4.1 Definition and general remarks .....	10
4.2 EU principle of consistent interpretation .....	10
4.3 EEA perspective on consistent interpretation .....	12
5 The Principle of Consistent Interpretation in the National Courts of Iceland and Norway	14
5.1 The Norwegian Experience .....	14
5.1.1 Introduction .....	14
5.1.2 The principle of presumption .....	14
5.1.3 The Norwegian EEA Act .....	15
5.1.4 Finanger I .....	16
5.1.5 Other case law .....	18
5.1.6 Concluding remarks on the Norwegian experience .....	19
5.2 The Icelandic Experience .....	21
5.2.1 Introduction .....	21
5.2.2 The rule of interpretation – <i>skýringarreglan</i> .....	21
5.2.3 Article 3 of the Icelandic EEA Act – is it an implementation of Protocol 35? ....	22
5.2.4 Case law .....	25
5.2.4.1 Interpreting wording of law in line with EEA law .....	25
5.2.4.2 Leaving precedent case law .....	28
5.2.4.3 Clear and precise wording of law as limitation to consistent interpretation ....	29
5.2.4.4 Loyalty to the Constitution as limitation to consistent interpretation .....	30
5.2.4.5 Unwillingness to conduct EEA consistent interpretation .....	31
5.2.4.6 EEA conform interpretation to avoid state liability .....	33
5.2.5 Concluding remarks on the Icelandic experience .....	34

6 Summarizing the two Countries' Experience.....	36
Literature .....	38
Other sources.....	40

# 1 Introduction

## 1.1 Focus of the paper

According to the EEA Agreement, EFTA States who are part of the Agreement are obliged to implement and apply EU legal acts that have been incorporated into the Agreement by the EEA Joint Committee. The EFTA Surveillance Authority (ESA) has, on several occasions, confronted the EFTA States on issues where they have failed to live up to this obligation. In addition, the last published ESA Scoreboard shows that Iceland currently has the highest transposition deficit of the three EFTA States, as well as the most infringement proceedings directed towards them from ESA.<sup>1</sup> In addition to this, a letter from ESA addressed to Iceland last summer implies that Iceland has difficulties in fulfilling obligations of the EEA Agreement.<sup>2</sup> As I will suggest in this study, it seems as Iceland has even more difficulties than Norway in this regard.

The subject of this study is how Iceland and Norway ensure effectiveness and influence of EEA law. National courts can play an important part where other institutions have not managed to abide by international obligations, by being an important «institutional force» in safeguarding international rule of law.<sup>3</sup> For that reason, when analysing the influence of EEA law in Iceland and Norway, it is interesting to look at the role of the national courts in ensuring effectiveness of EEA law. Thus, the objective of the study is to conduct a comparison between Icelandic and Norwegian court practice.

The principle of consistent interpretation can contribute to ensure full effectiveness of EEA law. In Norway this method of interpretation is practiced through the principle of presumption (*presumsjonsprinsippet*), and in Iceland it is described as a rule of interpretation (*skýringarreglan*). How these principles are defined and practiced in the two countries will be analysed and discussed in this paper. This is to answer the question of how the national courts of Iceland and Norway act when domestic law appears not to be in line with EEA law because of non-implemented or wrongly implemented EEA rules. The objective is both to identify which rules apply in such a situation, as well as to show how they are practiced.

Three Icelandic cases<sup>4</sup> stand out as good examples of situations where Icelandic provisions seemed to be in conflict with EEA law. The *Gunnarsson* case concerned Mr. Gunnarsson's claim to deem a taxation decision by the Icelandic authorities invalid and a breach of EEA law, as he had been denied

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<sup>1</sup> ESA Scoreboard July 2016.

<sup>2</sup> ESA Letter 2016.

<sup>3</sup> Nollkaemper 2011 p. 1.

<sup>4</sup> Hrd. 2 October 2014 (92/2013) *Gunnarsson*, Hrd. 28 October 2013 (552/2013) *Commerzbank* and Hrd. 8 May 2014 (120/2014) *Nederlandsche Bank*.

tax relief due to him residing in Denmark. *Commerzbank* and *Nederlandsche Bank* both dealt with foreign banks' claims to set-offs against Icelandic banks in the aftermath of the financial crisis. In all three cases the Icelandic Supreme Court concluded that they could not interpret domestic provisions in line with Iceland's EEA obligations, and, therefore; none of the cases ended with an EEA conform result. The decisions have been widely criticised, including by ESA. In the previously mentioned ESA letter, ESA argued that the Icelandic Supreme Court showed reluctance to give effect to implemented EEA law in the cases of *Commerzbank* and *Nederlandsche Bank*. In ESA's opinion, the Court could have ensured full effectiveness of EEA law if they had applied the Sole Article of Protocol 35 of the EEA Agreement and the principle of consistent interpretation.

The Sole Article of Protocol 35 obliges judges of the national courts to ensure that domestic provisions in line with EEA law prevail over other provisions of domestic law. The rule was implemented in Article 2 of the Norwegian EEA Act and Article 3 of the Icelandic EEA Act.<sup>5</sup> In an Icelandic assessment report from 1998 Article 3 is described as a rule of interpretation (*skýringarreglan*) that already follows from unwritten interpretation rules.<sup>6</sup> The report brings to our attention that Article 3 does not implement the full contents of Protocol 35, which this study also will show. In addition, the report explains that implementation of the full contents of Protocol 35 was not possible due to the Icelandic dualist approach.<sup>7</sup>

My analysis will show similarities and differences in the Norwegian and Icelandic practice of consistent interpretation. I will suggest that the Icelandic version and practice of consistent interpretation is somehow problematic. I dedicate the supposed unwillingness of the Icelandic Supreme Court to ensure effectiveness of EEA law, to a somewhat confusing legal basis of the Icelandic rule of interpretation, as well as to the Icelandic practice of the dualist principle of letting domestic law prevail over international law and lack of a domestic provision ensuring primacy of implemented EEA law.

## 1.2 Methodology

This is an analytical study of Icelandic and Norwegian courts' approaches when interpreting domestic and EEA law. The analysis contains a presentation of case law and elements of the analysis will be used to conduct a comparative study of the two countries' legal tradition concerning EEA relevant cases. Some of the points made are drawn from few cases, this means that they cannot be treated as

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<sup>5</sup> Act No 23/1992 Om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (Norwegian EEA Act) and Act No 2/1993 Um Evrópska efnahagssvæðið (Icelandic EEA Act).

<sup>6</sup> Gunnlaugsson, Kolbeinsson and Stefánsson 1998 p. 68.

<sup>7</sup> Gunnlaugsson, Kolbeinsson and Stefánsson 1998 p. 64-65 and 68.

manifested rules, but in my opinion they are still relevant as they are important examples and represent a certain tendency in the judges' practice.

When isolating the rule of consistent interpretation in Icelandic and Norwegian legal tradition, the focus is on Supreme Court Decisions, as decisions of both countries' Supreme Courts are given precedent status.<sup>8</sup> To find out how the rule functions in practice, the scope should be broader and therefore, include rulings from lower courts and decisions of administrative authorities. To conduct such an analysis would be too demanding in a small study as this. This study is thus limited to Supreme Court cases, to give a normative description of the situation.

It has been a challenge to find relevant Icelandic case law; legal literature and ESA documents have been helpful in this regard. Another challenge is the variety of details in the judges' reasonings in published decisions. This makes it difficult to connect judgments with the principle of consistent interpretation. In addition to this, it is not always easy to isolate whether EEA law has been an influential factor in a specific case, because both Iceland and Norway incorporate EEA law in a way that makes it domestic law.

### **1.3 Outline**

Before turning to the analysis of the situation in Iceland and Norway, there are some basic principles that need to be discussed. This is done in section 2 and 3, where the doctrine of dualism and the Courts' loyalty to the Constitution is discussed. In section 4, a definition of the principle of consistent interpretation is presented, as well as presentations on how it is defined and practiced in the EU (section 4.2) and the EEA (section 4.3). The analysis of the Norwegian and Icelandic versions of the principle is presented in section 5. It starts by a presentation of the Norwegian experience (section 5.1), before turning to the Icelandic experience (section 5.2). When presenting case law under the Icelandic experience (section 5.2.4), reference will be made to the Norwegian experience where relevant. A summary on the two countries' experiences follows in section 6.

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<sup>8</sup> This is a consequence of the Supreme Court being the last judicial instance, following Articles 88 and 90 of the Norwegian Constitution and Article 1 of Icelandic Act No 15/1998 Um dómstóla (Act on the courts). See also Andenæs 2009 p. 82-83, Lindal 1995 p. 65 and Nygaard 2004 p. 75.

## 2 The Dualist Approach

When discussing how countries implement and apply international law, it is normal to divide them into dualist and monist traditions. A necessary consequence of a dualist approach, which is based on the concept of domestic and international law being two distinct legal orders,<sup>9</sup> is that domestic law prevail over international law in case of conflict.<sup>10</sup> The monist approach, on the other hand, follows a fundamental thinking of unity as provisions deriving from international law are considered part of the national legal system.<sup>11</sup> Following this approach, international law usually prevails over domestic provisions in case of conflict.<sup>12</sup> The transformation of international legislation into domestic law following the dualist doctrine, leads to a result where international provisions no longer are considered international law in the judges' application of the legislation on domestic level.<sup>13</sup> Both Iceland and Norway are considered to be dualist countries; if legislation is decided on international level and ratified, it also needs to pass through a legislative procedure of implementation to make it binding law. This approach has been taken into consideration in the EEA cooperation with Article 7 of the EEA Agreement.

To divide countries into monist and dualist does not always give a true picture of how things really function, as the distinction between them is not always clear-cut.<sup>14</sup> One could argue that many states practice a hybrid approach, with elements from both dualism and monism. An example is the strong tradition of treaty friendly interpretation in Iceland and Norway.<sup>15</sup> A consequence of this is that the Courts allow influence of international law on the national legal system. By treaty friendly interpretation, the Court can correct possible wrongful implementation of EEA law. In result, this resembles the EU principle of direct effect,<sup>16</sup> as in both situations one ends up with a result in conformity with EEA law. But although the result is similar, the method leading up to it is different.<sup>17</sup>

One could argue that a too liberal application of treaty friendly interpretation could jeopardise a state's belonging to the dualist doctrine and the elements on which it is based. This would be the case if the Court by this method would give unincorporated international legislation direct effect.<sup>18</sup> In such a situation, the Court would contribute to water down the difference between dualism and monism. As pointed out by Ruud and Ulfstein, the Norwegian principle of presumption can lead to a relaxed

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<sup>9</sup> Andenæs 2009 p. 58, Björgvinsson 2015 p. 31 and Ruud and Ulfstein 2011 p. 52.

<sup>10</sup> Andenæs 2009 p. 58, Arnesen and Stenvik 2015 p. 52 and Ruud and Ulfstein 2011 p. 56.

<sup>11</sup> Andenæs 2009 p. 58, Björgvinsson, 2015 p. 20, Ruud and Ulfstein 2011 p. 52 and Stefánsson 2000 p. 75.

<sup>12</sup> Björgvinsson 2015 p. 20 and Stefánsson 2000 p.75.

<sup>13</sup> Björgvinsson 2015 p. 33.

<sup>14</sup> Bull 2014 p. 203 and Ruud and Ulfstein, 2011 p. 53.

<sup>15</sup> Bull 2014 p. 211 and Franklin and Fredriksen 2015 p. 665.

<sup>16</sup> Franklin and Fredriksen 2015 p. 665 and Stefánsson 2000 p. 81.

<sup>17</sup> Franklin 2012 p. 298 and Stefánsson 2000 p. 81.

<sup>18</sup> Björgvinsson 2015 p. 112.



relationship to the dualist tradition of transformation, where one no longer is obliged to rely on detailed transformed provisions.<sup>19</sup> This suggests that through a strong tradition of treaty friendly interpretation one might end up reducing the need for direct incorporation and transformation of international provisions into domestic law.<sup>20</sup> Which would make them right, those who argue that the impact of international legal systems on the nation states' legal system drives dualist states towards monism.<sup>21</sup>

Franklin and Fredriksen suggest that the Icelandic Supreme Court can «come across as a more principled defender of dualism and thus less willing to remedy deficient implementation of EEA obligations through dynamic interpretation of national law than its Norwegian counterpart».<sup>22</sup> The analysis of the two countries' case law in section 5 will hopefully show whether this is true.

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<sup>19</sup> Ruud and Ulfstein 2011 p. 63.

<sup>20</sup> This is also suggested by Björgvinsson 2015 p. 109.

<sup>21</sup> See Hannesson 2011 p. 455-456.

<sup>22</sup> Franklin and Fredriksen 2015 p. 667.

### 3 The Courts' Loyalty to the Constitution

The rule on separation of powers is manifested in Article 2 of the Icelandic Constitution and Articles 3, 49 and 88 of the Norwegian Constitution.<sup>23</sup> According to this rule, national courts should be loyal to legislation passed and decisions made by the legislative power. This gives a main rule of letting domestic law passed by the legislature prevail if it were in conflict with non-implemented EEA law. In which degree the rule on the separation of powers is coherent with monism and dualism depends on the legislature's involvement in the process of treaty making and ratification.<sup>24</sup>

The principles of legality and legal predictability are also important following the two countries' legal tradition.<sup>25</sup> A rule that puts obligations on private parties should not be applied unless it has been made law by the legislature, otherwise this would conflict with the principle of legality. In addition to this, it is easier for a private party to predict its rights and obligations from written law. In this point of view one could argue that it would not be right towards individuals to let unimplemented international law determine their legal position. As pointed out by Björgvinsson: «individuals would normally be inclined to rely on domestic law».<sup>26</sup> This last point pictures differently if you look at legal certainty from an EU/EEA perspective, as one can argue EU/EEA law as starting point to an individual's legitimate expectations. In this aspect, the European Court of Justice (ECJ) and the EFTA Court might have a different standing point than national courts.<sup>27</sup>

The elements discussed in this section follow from Icelandic and Norwegian constitutional requirements, and can thus be seen as constitutional obligations put on the national courts. They can also prove to be important in the courts' arguments on whether to give EEA law effect or not, in situations where domestic law is not in apparent conformity with EEA legislation. By conducting consistent interpretation, the courts could in some cases end up bypassing the rule of separation of powers because the Court in such situations gives force to an international rule even though the legislature has not. The Court's loyalty to the legislature can thus be an important limitation to consistent interpretation.<sup>28</sup> Whether this is true would depend on how the courts practice the principle of consistent interpretation and if applying the principle appears to water down their loyalty to the Constitution.

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<sup>23</sup> Act No 33/1944 Stjórnarskrá Lýðveldisins Íslands (Icelandic Constitution), and Act of 17 May 1814 Kongeriket Norges Grunnlov (Norwegian Constitution).

<sup>24</sup> Björgvinsson 2015 p. 37.

<sup>25</sup> The principle of legality is manifested in Articles 94 and 96 of the Norwegian Constitution, and in Articles 69 to 78 of the Icelandic Constitution. See also Andenæs and Fliflet 2006 p. 226 and 229, and Nygaard 2004 p. 60-65 and 164.

<sup>26</sup> Björgvinsson 2015 p. 35.

<sup>27</sup> See for example ECJ Judgement in C-441/14 (*Ajos*) and the response of the Danish Supreme Court in Case No 15/2014 delivered 6 December 2016.

<sup>28</sup> Björgvinsson 2015 p. 109, Nollkaemper 2011 p. 161 and 164.

# 4 The Principle of Consistent Interpretation

## 4.1 Definition and general remarks

It follows from the principle of consistent interpretation that one must read domestic law in a way that does not conflict with international law, and this is true whether the international rule is incorporated into domestic law or not.<sup>29</sup> In this way, national courts can ensure effectiveness and performance of international obligations.<sup>30</sup> For a reasoning to qualify as consistent interpretation, the Court has to consider international law when interpreting and/or applying a domestic provision. In addition, this conclusion must be «consistent with both national and international law».<sup>31</sup> The principle is thus not about letting international law prevail over domestic law, but about ensuring effectiveness of international obligations by interpreting domestic law in a way that conforms with international law. There are different driving forces behind application of the principle of consistent interpretation. As for EU and EEA relevant cases, the judicial power has a responsibility to ensure that the state complies with agreed upon obligations.<sup>32</sup>

Even though it may lead to similar results, the principle of consistent interpretation must not be confused with the principle of direct effect. However, one could argue that consistent interpretation in some situations functions as a substitute for direct effect where this cannot be achieved.<sup>33</sup> It is clear that the principle of consistency indeed is a valuable instrument to give international law effect on a domestic level, and that it can act as a substitute for incorporation.<sup>34</sup> But, this must be done within limitations of the principle: the courts must respect the fundamental principles discussed in section 3; and they are bound by the wording of national provisions.<sup>35</sup>

## 4.2 EU principle of consistent interpretation

At EU level, the principle of consistent interpretation is a principle on how national courts should read domestic legislation where it apparently is not in conformity with EU law. The European Court of Justice has set precedent for situations, through several judgements, where consistent interpretation is

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<sup>29</sup> Björgvinsson 2015 p. 104-105.

<sup>30</sup> Nollkaemper 2011 p. 139.

<sup>31</sup> Nollkaemper 2011 p. 140.

<sup>32</sup> This follows from Article 4 fourth paragraph TEU and Article 3 EEA. See also Hannesson 2012 p. 242-243, Hreinsson 2016 p. 354 and 376-377, Nollkaemper 2011 p. 147-149 and Sejersted et al. 2011 p. 206.

<sup>33</sup> Björgvinsson 2015 p. 105, Nollkaemper 2011 p. 140-141 and Stefánsson 2000 p. 81.

<sup>34</sup> Björgvinsson 2015 p. 109 and Ruud and Ulfstein 2011 p. 63.

<sup>35</sup> Björgvinsson 2015 p. 109-111.

demanding of the national courts.<sup>36</sup> As put down by the ECJ in *Dominguez*, it is expected of national courts to interpret domestic law «so far as possible» to achieve a result consistent with the objectives of the directive, as long as the judges keep within the wording of the national provision and purpose of the directive concerned.<sup>37</sup> In *Marleasing*, the ECJ referred the obligation of consistent interpretation to Article 5 of the Treaty<sup>38</sup> which stated that the Member States should «take all appropriate measures (...) to ensure the fulfilment of» the obligation following a directive to achieve its desired results.<sup>39</sup> The objective is to interpret domestic provisions in line with goals of the specific EU legislation in question.<sup>40</sup> This objective also puts obligations on the national courts of the Member States, and their methods of interpretation, as they are to ensure full effectiveness of EU provisions.<sup>41</sup>

As for the principle's limitations, the ECJ has made it clear that one cannot apply this method of interpretation in a way that contradicts domestic law (*contra legem*).<sup>42</sup> Thus, the courts must keep within the wording of the law, and interpret the domestic provisions *so far as possible* in line with EU law.<sup>43</sup> It is also clear that the principle, in the ECJ's opinion, obliges national courts to leave precedent case law where necessary.<sup>44</sup> As a tool in its application of the principle, the ECJ has made it clear that national courts should take the whole body of law into consideration.<sup>45</sup>

As mentioned in section 4.1, the principles of legality and legal predictability are seen as limitations to conducting consistent interpretation. Following the recent judgement in *Ajos*, this must be elaborated in an EU perspective, as the ECJ in this case puts emphasis on individuals' legal predictability following EU legislation. The Danish Supreme Court had asked the ECJ how to balance the general EU principle prohibiting discrimination with the principles of legal certainty and protection of legitimate expectations in cases with two private parties. The European Court of Justice concluded that the mentioned principles could not alter the obligation of national courts to conduct EU consistent interpretations and refrain from applying national provisions that were inconsistent with the general principle prohibiting discrimination.

Under EU law, some legislation is given direct effect, e.g. that it can be applied in Member States in the absence of implementation into domestic law, this follows from Article 288 TFEU and ECJ case

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<sup>36</sup> The obligation to interpret national law in conformity with EU law was manifested in 14/83 (*Von Colson*) and later in C-106/89 (*Marleasing*). See also later judgments: C-441/14 (*Ajos*); C-282/10 (*Dominguez*); C-397/01 (*Pfeiffer*) and C-91/92 (*Dori*).

<sup>37</sup> *Dominguez* paragraph 24.

<sup>38</sup> Today Article 4 fourth paragraph TEU.

<sup>39</sup> *Marleasing* paragraph 8.

<sup>40</sup> *Dominguez* paragraph 24.

<sup>41</sup> *Ajos* paragraphs 29 and 30.

<sup>42</sup> *Ajos* paragraph 32 and *Dominguez* paragraph 25.

<sup>43</sup> *Ajos* paragraph 31 and *Dominguez* paragraph 24.

<sup>44</sup> *Ajos* paragraphs 33 and 34.

<sup>45</sup> *Ajos* paragraph 31 and *Dominguez* paragraphs 26-31.

law.<sup>46</sup> The use of direct effect is often limited which can make the principle of consistent interpretation a convenient method to arrive at EU conform conclusions.<sup>47</sup> Franklin and Fredriksen argue that the ECJ not always manages to keep a clear distinction between consistent interpretation, direct effect and primacy.<sup>48</sup> It is true that they can be difficult to distinguish from one another as they all strive to reach an EU conform result. Even though this is the case, the principle of consistent interpretation appears to be an alternative procedure in cases which do not fall into the scope of direct effect.

### 4.3 EEA perspective on consistent interpretation

According to the EFTA Court, it follows from the EEA Agreement that national courts have a duty to interpret domestic legislation in line with EEA law.<sup>49</sup> In *Criminal proceedings against A*, the Court stated that the agreement obliges national courts «to interpret national law (...) as far as possible in conformity with EEA law».<sup>50</sup> The EFTA Court has thus established that the principle of consistent interpretation also applies to the EEA countries of Iceland, Liechtenstein and Norway.

By obliging national courts to practice consistent interpretation, the courts contribute to ensure effectiveness of EEA law as well as acting in line with the objective of uniformity.<sup>51</sup> However, national courts must step carefully, as no transfer of legislative power, and no principle of direct effect follow from the EEA Agreement.<sup>52</sup> In this regard, the EFTA Court has emphasised that there is no requirement of direct applicability under the EEA Agreement in situations where the legislature has failed to transpose relevant EEA law correctly into domestic law.<sup>53</sup> This is an example of how the EFTA Court, differently from the ECJ, makes and upholds a distinction between the principles of consistent interpretation, direct effect and primacy of EEA law.<sup>54</sup>

The EFTA Court has stated that rules which are liable to jeopardise the achievement of objectives pursued by EEA directives may not be applied, as that would deprive EEA law of its effectiveness.<sup>55</sup> The Court also wants national courts to apply interpretive methods recognised by national law in order

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<sup>46</sup> Case 26/62 (*Van Gend en Loos*) pages 12-13.

<sup>47</sup> As also emphasized by among other Björgvinsson 2015 p. 105, Franklin 2012 p. 298, Nollkaemper 2011 p. 140-141 and Stefánsson 2000 p. 81.

<sup>48</sup> Franklin and Fredriksen 2015 p. 668.

<sup>49</sup> E-4/01 (*Karlsson*) paragraph 28. See also Arnesen and Stenvik 2015 p. 65, Björgvinsson 2006 p. 139, Fredriksen and Mathisen 2014 p. 288 and Hreinsson 2016 p. 354.

<sup>50</sup> E-1/07 paragraph 39.

<sup>51</sup> Björgvinsson 2006 p. 97, Hannesson 2012 p. 242-243, Hreinsson 2016 p. 377 and Sejersted et al. 2011 p. 206.

<sup>52</sup> E-1/07 paragraph 40.

<sup>53</sup> E-18/11 (*Irish Bank*) paragraph 126.

<sup>54</sup> Franklin and Fredriksen have argued this distinction made by the EFTA Court: Franklin and Fredriksen 2015 p. 668.

<sup>55</sup> E-15/12 (*Wahl*) paragraph 54, E-12/13 (*ESA v. Iceland*) paragraph 73 and Joined Cases E-15 and 16/15 (*Hagedorn*) paragraph 96.

to achieve EEA conformity of a domestic provision.<sup>56</sup> Like in the ECJ cases, the EFTA Court urges an interpretation that ensures results sought by EEA legislation.<sup>57</sup> As also encouraged by the ECJ, the EFTA Court has stated that national courts must take the whole body of law into consideration when interpreting domestic provisions, as well as all relevant EEA law whether implemented or not.<sup>58</sup> The Court has also emphasised that in doing this, national courts cannot only rely on their language version of a translated EEA provision as sole basis, as they consider such an approach to be «incompatible with the principle of homogeneity and the [obligation of] uniform application of EEA law».<sup>59</sup> As specified by the EFTA Court in *Hagedorn*, obligations following EEA legislation «arise on the day the respective legal act is made part of the EEA Agreement»,<sup>60</sup> and domestic law must therefore be interpreted in accordance with them from that point on, not only from the moment they are incorporated into domestic legislation.

When national courts are to decide on the applicability of EEA legislation, it is of relevance which subjects it refers to, and if it contains positive rights or negative obligations. The EFTA Court has manifested that private parties can rely rights on implemented provisions of the EEA Agreement if they are unconditional and sufficiently precise.<sup>61</sup> If the rules commit the state and the judicial power, it means that private subjects may apply this rule without having to wait for the legislative power to implement it at national level.<sup>62</sup> This is where it is important to make a distinction between *horizontal* and *vertical* cases. A horizontal case concerns competing rights between private parties, whereas a vertical case is between a private party and the state. According to the principles discussed in section 3, a rule must be implemented in domestic law to be applicable in a horizontal case. As the state already has agreed to the rule, even before it is transformed into domestic law, obligations following the international rule can be put on the state even before the legislature has implemented the rule. This is why the principle of state liability ends up as an alternative solution where it is not possible to achieve an EEA conform result by consistent interpretation.<sup>63</sup>

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<sup>56</sup> E-1/07 paragraph 39, *ESA v. Iceland* paragraph 73, *Wahl* paragraph 54, E-28/13 (*Merill Lynch*) paragraph 44 and E-25/13 (*Engilbertsson*) paragraphs 159 and 163.

<sup>57</sup> E-1/07 paragraph 39, *Irish Bank* paragraphs 123 and 126 and *Merill Lynch* paragraph 43.

<sup>58</sup> *Irish Bank* paragraph 124, E-12/13 paragraph 74, *Wahl* paragraph 55, *Merill Lynch* paragraph 43, *Engilbertsson* paragraph 163 and *Hagedorn* paragraph 97.

<sup>59</sup> *Irish Bank* paragraph 88.

<sup>60</sup> *Hagedorn* paragraph 97.

<sup>61</sup> E-1/94 (*Restamark*) paragraph 77 and 80, *Karlsson* paragraph 37 and E-2/12 (*HOB Vin*) paragraph 122.

<sup>62</sup> Arnesen and Stenvik 2015 p. 53.

<sup>63</sup> The principle of state liability was manifested in E-9/97 (*Sveinbjörnsdóttir*).

# 5 The Principle of Consistent Interpretation in the National Courts of Iceland and Norway

## 5.1 The Norwegian Experience

### 5.1.1 Introduction

To interpret domestic law in line with implemented international law, e.g. the principle of presumption, is an established interpretation rule in Norwegian legal methodology.<sup>64</sup> Earlier case law from the Norwegian Supreme Court shows that judges have applied the principle of presumption to make Norwegian law in line with law following the European Charter of Human Rights (ECHR) and Conventions on International Labour Organization (ILO).<sup>65</sup> Due to Norway's obligations following the EEA cooperation, the principle should also be applied in EEA relevant cases.<sup>66</sup> The main case to show how to apply the principle of presumption on EEA law is *Finanger I*,<sup>67</sup> which is discussed below. Further, this part of the paper will look at other case law that can contribute to describe how the principle is practiced in Norwegian courts. Before turning to case law, this part starts with a presentation of the Norwegian principle of presumption and the Norwegian EEA Act.

### 5.1.2 The principle of presumption

Following the principle of presumption, domestic provisions shall be interpreted so far as possible in line with Norway's international obligations.<sup>68</sup> Here it is presumed that the international rule is well known and the courts should identify the international rule before applying it when reading domestic provisions.<sup>69</sup> To arrive at a result in line with Norway's international obligations, the judges have to use other tools and methods of interpretation, such as *lex specialis* and *lex posterior*.<sup>70</sup> Case law shows that the courts also make use of *travaux préparatoires* in this regard;<sup>71</sup> to find out whether the legislature meant for domestic provisions to breach international obligations. This is in line with the courts' loyalty to the Constitution. The principle of presumption will not be applied if the conflict

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<sup>64</sup> Arnesen and Stenvik 2015 p. 64 and Nygaard 2004 p. 146.

<sup>65</sup> Rt. 1997 p. 580 and Rt. 1997 p. 1019.

<sup>66</sup> Rt. 2000 p. 1811 (*Finanger I*) p. 1826, Ot.prp. No 79 1991-92 p. 4 and Arnesen and Stenvik 2015 p. 64.

<sup>67</sup> Rt. 2000 p. 1811.

<sup>68</sup> *Finanger I* p. 1826, St.prp. No 100 1991-92 p. 319 and Arnesen and Stenvik 2015 p. 64.

<sup>69</sup> Arnesen and Stenvik 2015 p. 64.

<sup>70</sup> St.prp. No 100 1991-92 p. 319.

<sup>71</sup> *Finanger I* p. 1827.

between the domestic provision and international obligations is so clear that an interpretation in line with the international obligation is not possible, then the Norwegian provision will prevail.<sup>72</sup>

### 5.1.3 The Norwegian EEA Act

According to Article 1 of the Norwegian EEA Act, the main part of the EEA Agreement is given status as Norwegian law. Further, in Article 2, the courts are given instructions on how to act if two domestic provisions are in conflict: the one in line with EEA law shall prevail. This is in line with the Sole Article of Protocol 35 of the EEA Agreement, which aim is to help achieve a homogeneous EEA without requiring the states «to transfer legislative powers to any institution of the [EEA]».<sup>73</sup> Protocol 35 cannot be described as a clear primacy rule as it only is effective in situations where EEA legislation already is correctly implemented in domestic law and as it does not ensure that EEA friendly regulation prevail over provisions of the Constitution.<sup>74</sup> In addition, the rule does not prevent later legislation from setting it aside. Moreover, the Protocol expects national courts to achieve this quasi primacy by «national procedures»,<sup>75</sup> which means that the rule does not necessary prevent later enacted statutory provisions from prevailing even though they are inconsistent with earlier enacted EEA friendly provisions in line with the collision rule of *lex posterior*.

National courts have full jurisdiction to treat cases where EEA law is relevant, and implemented EEA legislation is considered national law in accordance with the dualist approach. This is also the case where it seems like the legislative power has failed to implement EEA law (correctly). In the *travaux préparatoires* to the EEA Act and the EEA Agreement, the legislature contributes with some guidance on how the courts should deal with these types of cases. Mentioning the principle of presumption, it is stated that the courts are expected to make use of all tools and known principles of interpretation to make sure they do not conclude in a way that would be in conflict with international obligations.<sup>76</sup> Different principles and methods of interpretation are mentioned, as well as a rule that states that only law specifically said to be applied a certain way by the legislature can set other provisions aside.<sup>77</sup> It is emphasised that only implemented law can be given legal effect, and that this means that there is no direct effect under the EEA Agreement,<sup>78</sup> which is in line with Article 7 of the Agreement.

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<sup>72</sup> Franklin 2012 p. 270, Ruud and Ulfstein 2011 p. 63-64 and Sejersted et al. 2011 p. 265-267.

<sup>73</sup> Preamble to Protocol 35 to the EEA Agreement.

<sup>74</sup> Bull 2014 p. 207, Franklin and Fredriksen 2015 p. 662, Fredriksen and Mathisen 2014 p. 299, Hreinsson 2016 p. 383 and Sejersted et al. 2011 p. 204.

<sup>75</sup> Preamble to Protocol 35.

<sup>76</sup> St.prp. No 100 1991-92 p. 319.

<sup>77</sup> Ot.prp. No 79 1991-92 p. 4.

<sup>78</sup> St.prp. No 100 1991-92 p. 318.



The rules here mentioned, give Norwegian courts guidelines on how to act when dealing with EEA cases where the domestic legislation is not in apparent conformity with EEA law. In which way the courts do practice the rules remains to be seen in the following sections on Norwegian case law.

### 5.1.4 Finanger I

At the age of 17, Miss Finanger was badly injured in a car crash and because she knew that the driver was intoxicated by alcohol, she was refused an insurance payment in line with Article 7 third paragraph letter b of the Norwegian Automobile Liability Act.<sup>79</sup> Article 7 was an exception to the main provision in Article 4, which stated that an injured person could claim insurance from the insurance company of the vehicle he or she was injured in/by. Miss Finanger's lawyer argued that Article 7 breached EEA law,<sup>80</sup> which was also the opinion of the EFTA Court.<sup>81</sup> The majority of the Supreme Court (ten judges) concluded that the domestic provision could not be set aside due to the EEA Directives and ended up applying Article 7 to limit Miss Finanger's insurance payment. Five judges dissented on the decision not to interpret Norwegian law in line with EEA legislation.

The representative of the Court's majority presented a thorough reasoning on how EEA law can be used as a tool of interpretation. After having concluded the meaning of the domestic provision and its conflict with EEA law, the judge discussed the EEA Directives' impact on the interpretation of it. It was stated that non-implemented EEA law cannot prevail over national law,<sup>82</sup> e.g. be given direct effect, but that it can be useful when interpreting Norwegian law in line with the principle of presumption.<sup>83</sup> Turning to the EU principle of consistent interpretation, the judge stated that it could not be stretched as far as to allow EU law prevail where there is a clear conflict. It was also stated that this has to be the situation when the legislature has assumed a correct implementation of EU law,<sup>84</sup> as was the situation in this case.<sup>85</sup> The majority of the Court did not let overall views of *travaux préparatoires* set aside the clear wording of Article 7. This shows that even though *travaux préparatoires* are an important tool in interpreting legal texts, it is only an element, and cannot be too heavily weighted.

In the majority's reasoning, it is stated that the use of the principle of presumption depends on the international commitment and which area of law the domestic provision applies to.<sup>86</sup> Elaborating on this, it is stated that a national provision will show little resistance against an international rule which

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<sup>79</sup> Act of 3 February 1961 Om ansvar for skade som motorvogner gjer (Automobile Liability Act)

<sup>80</sup> Directives on Motor Vehicle Insurance: 72/166/EEC; 84/5/EEC; and 90/232/EEC.

<sup>81</sup> E-1/99.

<sup>82</sup> *Finanger I* p. 1826.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* p. 1829.

<sup>85</sup> *Ibid.* p. 1827.

<sup>86</sup> *Ibid.* p. 1829.

provides individuals protection from the state, but greater resistance if the case concerns private parties on both sides.<sup>87</sup> According to this reasoning, the principle of presumption has weaker impact in horizontal cases.<sup>88</sup> This is in line with the intent of not transferring too much state supremacy to EEA institutions.<sup>89</sup> To make a difference between vertical and horizontal cases is in line with the principle of legal predictability, as the state is already aware of its obligations when it agrees on the legislation at international level. This differentiation makes a rule that in horizontal cases more is demanded of the domestic rule when it comes to lack of precision and clarity to be able to interpret it in line with EEA law.

In the Court's reasoning, emphasis was put on the principle of legal predictability.<sup>90</sup> When the wording of a domestic provision is clear, private parties must be able to rely on both the obligations put on them and the rights they are entitled according to the specific provision. From this, it is possible to conclude that according to the Supreme Court, one cannot expect private parties to be fully updated on all rules that should apply to them according to Norway's international obligations. Another situation would give uncertainty of which legislation one could rely on, and that could be unfortunate for both professional parties as well as private citizens. This thus makes the principle of legal predictability an important element in the argument of how domestic provisions should be interpreted.

Even though the principle of presumption did not lead to an EEA conform conclusion, this case can be considered a manifestation of the principle to be applied where suitable. It was the limitations represented by a clear provision that prevented an EEA conform result, and the Court emphasized that it is up to the legislature to make domestic law in line with EEA obligations.<sup>91</sup> From this, it is easy to agree with Björgvinsson who argues that the judgement «reaffirms the principle of dualism and the doctrine of transformation, as well as the principle of primacy of national law over unincorporated international law».<sup>92</sup>

Franklin, on the other side, is critical to the Court's reasoning and its understanding of the EU principle of consistent interpretation.<sup>93</sup> In his opinion, this misunderstanding can be a result of there being few ECJ cases where the limits and obligations under the EU principle are outlined at the time of the *Finanger I* judgement. It is true that ECJ case law has contributed to a different understanding of EU consistent interpretation after *Finanger I*. This makes it important to look at later Norwegian case law when outlining the Norwegian experience with EEA conform interpretation.

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<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* p. 1832.

<sup>89</sup> In line with Protocol 35.

<sup>90</sup> *Finanger I* p. 1831.

<sup>91</sup> The legislature had actually changed the domestic legislation in question, to make it in line with EEA law, before the case was debated in the Supreme Court.

<sup>92</sup> Björgvinsson 2015 p. 111.

<sup>93</sup> Franklin 2012 p. 272-273.

Another element that must be devoted some attention is the Court's lack of taking into consideration other domestic legislation. As suggested by Franklin,<sup>94</sup> the Court could have applied the main rule in Article 4 instead of applying the exception in Article 7 to ensure EEA conformity. This would be in line with the EU/EEA criteria of taking the whole body of law into consideration when conducting consistent interpretation. From the case of *Finanger I*, it seems that this criterion is not present in the Norwegian experience with consistent interpretation. Or at least, that it is undermined by the collision rule of *lex specialis*.

### 5.1.5 Other case law

*Finanger I* is an example of a detailed reasoning on the principle of presumption applied in an EEA relevant case. By 2016, there are a few other examples where the Supreme Court has applied the principle of consistent interpretation in interpreting law that appears not to be in conformity with EEA law.<sup>95</sup>

In *Norwegian Dental Depot*,<sup>96</sup> the Court decided to set aside rules developed in earlier case law due to legislation following an EEA Directive.<sup>97</sup> This was done to make the decision in line with EEA obligations. The judge argued that a rule developed in earlier case law, on attributing strict liability to similar types of cases, breached the specific directive and could therefore not be applied.<sup>98</sup> Even though precedent from earlier case law is considered part of domestic law, these types of rules are not binding in the same way as written law, and the Supreme Court may disregard them if they find it necessary.<sup>99</sup> This makes it less dramatic for the Supreme Court to go in a new direction. If the same law that had been practiced earlier came from a clear and precise written legal text, it would be more likely for the Court to end up with the same result as in *Finanger I*.

In another case, *Hydro Aluminium*,<sup>100</sup> the Court had to decide on the base for a time limit for demanding reimbursement of illegal state aid. The Court presented different alternatives as to what should be the starting point for when the state could demand reimbursement and landed on a conclusion that was in line with EEA law.<sup>101</sup> This was a case of an ambiguous wording of domestic law which was open to interpretation. The arguments leading to the conclusion entailed a variety of

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<sup>94</sup> Franklin 2012 p. 303.

<sup>95</sup> To find relevant cases I have done a web search on lovdata.no, searching for "presumsjonsprinsippet" and "direktivkonform fortolkning". Some of the cases are also found in legal literature: Fredriksen 2011 p. 70-73; and Fredriksen and Mathisen 2014 p. 292.

<sup>96</sup> Rt. 2004 p. 122.

<sup>97</sup> Council Directive 85/374/EEC on Product Liability.

<sup>98</sup> *Norwegian Dental Depot* paragraph 31.

<sup>99</sup> Andenæs 2009 p. 87-90 and Nygaard 2004 p. 329-330.

<sup>100</sup> Rt. 2013 p. 1665.

<sup>101</sup> Protocol 3 part II Article 14 No 3 in the EEA Surveillance and Court Agreement (SCA). Referred in paragraph 50 of the judgment.

applying other domestic provisions, earlier case law, *travaux préparatoires*, and EEA obligations, to interpret the specific provision in conformity with EEA obligations.

A number of cases deal with trademark legislation.<sup>102</sup> Four of the cases are examples where wording of the domestic provision needed further explanation and the judges applied EU law to outline or confirm the meaning of the wording or legal criteria. The case of *Vesta* was different in the way that the Court based a narrow interpretation of the domestic provision<sup>103</sup> on ECJ practice. This interpretation was not in line with the immediate natural understanding of the wording of the provision. This was done to make the decision in line with EEA obligations and an implemented directive.<sup>104</sup> In this case, the Court also deviated from earlier Supreme Court understanding of the provision.<sup>105</sup> The case does not represent an example of setting aside domestic written law; it is an example of how the judges apply EEA law in the interpretation of domestic provisions to make sure they coincide. If there had been a more precise and clear wording in the Norwegian legal text, which did not coincide with the rules of the Directive, the result might have been different.

There are also a few cases that concern transfer of enterprise and the question of which obligations the new business has towards the employees of the previous business.<sup>106</sup> In all four cases, the Court interprets domestic legal criteria in line with EEA obligations. This seems unproblematic as the wording of the domestic legislation needed further explanation. The same goes for the case of *Fjellkraft AS*,<sup>107</sup> which concerned demerging of a company. In this case, the Court conducted a wide interpretation of a domestic provision and based it on EU legislation.<sup>108</sup>

### 5.1.6 Concluding remarks on the Norwegian experience

The Norwegian experience shows that in cases where the domestic provision in question appears not to be in line with EEA obligations, Norwegian judges are left with traditional rules of interpretation to decide the outcome of the case. In these types of cases the principle of presumption as well as the principles of efficiency and loyalty to the legislature are important elements. Through different methods of interpretation of law, the Court makes sure that Norway's international obligations are not breached, which can prevent cases of state liability against Norway. In this way, the Court contributes

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<sup>102</sup> Rt. 2002 p. 391 (*God Morgen*), Rt. 2004 p. 1474 (*Volvo*), Rt. 2006 p. 1473 (*Vesta*), Rt. 2008 p. 1268 (*Søtt+Salt*) and HR-2016-1993-A (*Pangea AS*).

<sup>103</sup> Article 14 No 7 of Act No 4 of 3 march 1961 Om varemerker (now repealed and replaced) (Norwegian Trade Mark Act).

<sup>104</sup> Directive 89/104/EC on Trade Mark.

<sup>105</sup> *Vesta* paragraphs 44 and 45.

<sup>106</sup> Rt. 1997 p. 1954 (*SFO*), Rt. 2001 p. 248 (*Olderdalen Ambulanse*), Rt. 2006 p. 71 (*SAS Braathens*) and Rt. 2010 p. 330 (*Bardufoss Flyservice*).

<sup>107</sup> Rt. 2011 p. 181.

<sup>108</sup> *Ibid.* paragraph 70.

to enhance the principle of efficiency, which says domestic law should be interpreted in a way that ensures effectiveness of international obligations.<sup>109</sup>

Case law shows that the Supreme Court tends to interpret domestic legislation in accordance with EEA law. When it comes to the case of *Finanger I*, another result might have made the line between the Court's role as a law interpreter and as a lawmaker unclear. Therefore, this could compromise the Court's loyalty to the Constitution. As emphasised by the majority vote, this would not be the same if the case concerned a private party versus the state. If international law puts the private party in a better position vis-à-vis the state, the rule of consistent interpretation should be applied.<sup>110</sup> In these cases the principles of legality and legal predictability do not prevent EEA conform conclusions because they are not applicable in the state's defence.<sup>111</sup> Another outcome could result in states' profiting from not implementing EEA law (correctly).

Norwegian case law shows that judges, in their reasoning, do think of principles such as loyalty to the legislature and legal predictability. It also shows that they tend to practice a line of argument that respects the objective of uniform interpretation and effectiveness of EEA law. Another tendency is that the quality of domestic legislation is of relevance, in terms of value of legal sources and clear and precise wording. It was easier for the Court to deviate from domestic law that followed from legal precedent in *Norwegian Dental Depot*, than it was in *Finanger I*, where there was a clear and precise written rule.

Fredriksen suggests that from previous case law one can conclude, «that the Supreme Court will disregard even clear assumptions in the *travaux préparatoires* and overrule its own precedents if deemed necessary in order to interpret Norwegian law in conformity with underlying EEA obligations».<sup>112</sup> Similar remarks were made by Fredriksen and Franklin, when they argue that Supreme Court case law show that the judges are ready «to go beyond» what they consider to be the natural understanding of a provision.<sup>113</sup> In my opinion, this is a result of the quality and value the judges entitle different legal sources. This method is in accordance with the overriding objective of effectiveness and the obligations put on the national courts to achieve it, in accordance with the Norwegian EEA Act and the EEA Agreement.

From the experience of *Finanger I*, I drew the conclusion that under the Norwegian practice of consistent interpretation one does not take the whole body of law into consideration to ensure an EEA conform result. Later case law suggests a change in practice. Two examples are the cases of *Hydro*

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<sup>109</sup> Arnesen and Stenvik 2015 p. 58, Hreinsson 2016 p. 376 and Nollkaemper 2011 p. 139.

<sup>110</sup> *Finanger I* p. 1829.

<sup>111</sup> Arnesen and Stenvik 2015 p. 144.

<sup>112</sup> Fredriksen 2012 p. 191.

<sup>113</sup> Franklin and Fredriksen 2015 p. 665.

*Aluminium* and *Pangea AS*, which show that the Supreme Court actively applies other relevant law and end up with an EEA conform result. It is difficult to draw a conclusion from this, as the later case law does not show a similar conflict as the one in *Finanger I* and as the later cases did not concern an unambiguous provision. From this I will conclude that the *so far as possible* rule within the principle of presumption meets its limit in an unambiguous wording of written law as well as in other traditional rules of interpretation such as *lex specialis*, *lex posterior* and *lex superior*.

## 5.2 The Icelandic Experience

### 5.2.1 Introduction

As in Norway, the main part of the EEA Agreement is implemented in Icelandic law.<sup>114</sup> Even though there may be many other similarities, the focus of this study is on how the Supreme Court gives effect to EEA law. This is demonstrated by the existence and practice of the principle of consistent interpretation, and therefore, the Icelandic rule of interpretation (*skýringarreglan*) is a good place to start. It is clear from Icelandic case law, *travaux préparatoires* and legal theory that the interpretation rule in Article 3 of the Icelandic EEA Act is highly relevant regarding the rule of interpretation; this will therefore be discussed in section 5.2.3. Then, in section 5.2.4, the paper turns to look at case law with the intention to outline the rules that follow from the Icelandic experience with consistent interpretation, and draw a line to similarities and differences with the Norwegian experience. The objective is to point out how the interpretation rule is practiced in Iceland, and whether this is different from the Norwegian experience with the principle of presumption.

### 5.2.2 The rule of interpretation – *skýringarreglan*

According to Icelandic legal tradition, judges should interpret domestic law in line with Iceland's international obligations to the extent possible.<sup>115</sup> This is called the rule of interpretation, *skýringarreglan*, and it is understood as an obligation put on judges to conduct such interpretation.<sup>116</sup> Previous judgements show that in case of collision between different provisions, where one follows from international obligations and the other derives from purely national legislative procedures, the domestic provision shall be interpreted in line with international law so far as possible.<sup>117</sup> The *so far as possible* wording is the same as in the Norwegian experience with the principle of presumption, but

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<sup>114</sup> Article 2 first paragraph of the Icelandic EEA Act.

<sup>115</sup> 1. Frumvarp til laga 1992 p. 194, Björgvinsson 2015 p. 116, Björgvinsson 2006 p. 129 and 175, Hannesson 2011 p. 430 and Stefánsson 2000 p. 81.

<sup>116</sup> Hannesson 2011 p. 430 and Hreinsson 2014 p. 290.

<sup>117</sup> 1. Frumvarp til laga 1992 p. 194.

though the wording is similar, the practice of the rule may vary. This will be discussed further in the section on case law.

From explanatory notes to the EEA Act, one can read that the Icelandic Supreme Court previously has gone far to interpret domestic law in line with Iceland's international obligations.<sup>118</sup> In addition, Björgvinsson states that there are many examples of cases where Icelandic judges have applied the principle of consistent interpretation.<sup>119</sup> As an example, in *Criminal proceedings against Ægisson*,<sup>120</sup> the Supreme Court concluded differently from similar previous cases in order to land on a result in line with ECHR legislation.<sup>121</sup> The case concerned wrongful criminal proceeding, as the same person who gave judgement before the Criminal Court also worked for the police. In another judgement,<sup>122</sup> which concerned rights deriving from ECHR ensuring a blind girl's right to equal opportunity in regards to education, the Supreme Court described the principle of consistent interpretation as a recognized one in Nordic legal tradition.<sup>123</sup>

Together with previous case law, the explanatory notes confirm the existence of a rule of interpretation. Hence, is it possible to conclude that according to Icelandic legal tradition there is a rule of interpretation, which resembles the EU/EEA principle of consistent interpretation. The Icelandic rule does seemingly follow from an unwritten principle of conducting legal interpretation, as is also the case with the similar principle of presumption practiced in Norway.

After establishing the existence of the Icelandic rule of interpretation, then comes the question of how this rule fits into the Icelandic legal tradition concerning EEA law. The explanatory notes give a point of direction to Article 3 of the EEA Act, so that will be the next step on the way to understanding the Icelandic version and practice of the principle of consistent interpretation in EEA relevant cases.

### **5.2.3 Article 3 of the Icelandic EEA Act – is it an implementation of Protocol 35?**

In Icelandic case law, legal theory and in comments from ESA, it is possible to find arguments stating that the Icelandic EEA Act contains an incomplete implementation of the Sole Article of Protocol 35.<sup>124</sup> According to Icelandic case law and explanatory notes to the Icelandic EEA Act, Article 3 of the Act meant to implement the rule.<sup>125</sup> Article 3 states that «[s]tatutes and regulations shall be interpreted,

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<sup>118</sup> 1. Frumvarp til laga 1992 p. 194.

<sup>119</sup> Björgvinsson 2015 p. 113.

<sup>120</sup> Hrd. 1990 bls. 2 (Hrd. 9 January 1990 (120/1989)).

<sup>121</sup> 1. Frumvarp til laga 1992 p. 194.

<sup>122</sup> Hrd. 4 February 1999 (177/1998).

<sup>123</sup> Section I of the Judgment. See also Björgvinsson 2015 p. 116.

<sup>124</sup> Hrd. 24 January 2013 (10/2013) *Flugastraumi*, ESA letter 2016 p. 11-13 and Björgvinsson 2006 p. 100.

<sup>125</sup> Hrd. 15 May 2003 (477/2002) *Einarsson* and 1. Frumvarp til laga 1992 p. 194-195.

in so far as appropriate, to accord with the EEA Agreement and the rules based thereon».<sup>126</sup> A literal understanding gives a rule that all Icelandic law should at all time, if possible, be interpreted in line with the Agreement and domestic law that follows from the EEA cooperation. Different from Protocol 35, Article 3 is not limited to implemented EEA legislation.<sup>127</sup> This understanding is similar to the interpretation rule discussed in the previous section. Following this, one could argue that Article 3 is a codification of the rule of interpretation in Icelandic law, only specifically directed to EEA relevant cases.

The Icelandic Supreme Court explained its interpretation of Article 3 in *Einarsson*.<sup>128</sup> Mr Einarsson claimed that the State breached Article 14 of the EEA Agreement by demanding higher taxes on books in foreign languages (24.5 %) than for Icelandic books (14 %). The Court referred to the explanatory notes previously mentioned and interpreted Article 14 of the EEA Agreement to be *lex specialis* that should prevail over the older tax rules in question. The reasoning of the Supreme Court is not very elaborate, but it refers to the reasoning of the District Court of Reykjavik. In the District Court judgment, it was emphasized that the rule in Protocol 35 only deals with national rules that are meant to implement EEA law,<sup>129</sup> and the judge referred to the EFTA Court's understanding of Protocol 35 in *Restamark*.<sup>130</sup> In accordance with this understanding of Article 3, it is a rule that allows implemented EEA law to prevail over other domestic law, in line with the wording of the Sole Article of Protocol 35. From this judgement, one could argue that the Court does not treat Article 3 as a codification of the rule of interpretation, but rather as a codification of Protocol 35.

The explanatory notes explain Article 3 as a rule that provides implemented EEA law status of *lex specialis*.<sup>131</sup> Similar remarks to the principle of presumption exists in the Norwegian *travaux préparatoires* to the EEA Agreement; that national rules of interpretation such as *lex specialis* and *lex posterior* are important tools of interpretation.<sup>132</sup> Hreinsson suggests that the Supreme Court judgement in *Einarsson* shows that Article 3 is indeed an implementation of Protocol 35.<sup>133</sup> Guðmundsdóttir seems to agree, when she interprets Article 3 as a rule of letting domestic law in line with EEA law prevail over other domestic law.<sup>134</sup> She argues that the interpretation rule (*skýringarreglan*) goes further than the one referred to in the explanatory notes.<sup>135</sup>

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<sup>126</sup> Icelandic EEA Act Article 3: «Skýra skal lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur sem á honum byggja». Translation from E-15/12 (*Wahl*) paragraph 18.

<sup>127</sup> As also emphasized by Björgvinsson 2006 p. 115 and Bull 2014 p. 212.

<sup>128</sup> Hrd. 15 May 2003 (477/2002).

<sup>129</sup> District Court Judgment referred in *Einarsson*.

<sup>130</sup> E-1/94.

<sup>131</sup> I. Frumvarp til laga 1992 p. 194.

<sup>132</sup> St.prp. No 100 1991-92 p. 319.

<sup>133</sup> Hreinsson 2014 p. 283.

<sup>134</sup> Guðmundsdóttir 2000 p. 136.

<sup>135</sup> *Ibid.*



At first glance, Article 3 seems like an implementation in Icelandic law of the principle of consistent interpretation. But from the case of *Einarsson* and explanatory notes in the *travaux préparatoires*, it appears that the interpretation of the rule in Article 3 is closer to the Norwegian implementation of Protocol 35 in Article 2 of the Norwegian EEA Act.

The Supreme Court has treated the contents of the rule in Article 3 in many cases. They all describe the rule as an obligation for the judges to stick to the wording of written law, and within the limits of the wording interpret domestic law in line with EEA law.<sup>136</sup> From this, one could argue an understanding of Article 3 as a codification of the rule of interpretation.

The case of *Candy Spray*<sup>137</sup> is a good example of the Icelandic Supreme Court considering the rule of interpretation as it is manifested in Article 3 of the Icelandic EEA Act. The case concerned a vendor's and an importer's liability for damages caused by candy they sold and/or imported and the Court concluded that the companies had to pay the injured party compensation for the damages. Concerning possibilities to interpret domestic provisions in line with non-implemented EEA rules, the Court referred to Article 3. The Court explained that according to this rule of interpretation, one should, if possible, interpret the wording of domestic law to be in line with rules that apply in the EEA. The Article is thus not treated as a rule that gives implemented EEA legislation primacy over other domestic provisions. In this case, the Court seems ready to interpret the wording of domestic law in line with non-implemented EEA law, but it was not possible because of clear and precise wording of domestic provisions.

The Supreme Court repeated the understanding of Article 3 from *Candy Spray* in *Flugastraumur* and *Gunnarsson*.<sup>138</sup> Moreover, in *Flugastraumur*, the plaintiff had specifically questioned whether Article 3 is a sufficient implementation of Protocol 35, but the Court refrained from answering this question.<sup>139</sup> The case concerned financial leasing and whether the Supreme Court should agree to a request to ask the EFTA Court for a reasoned opinion, which they did not.

Later case law suggest that Article 3 has not successfully incorporated the rule in Protocol 35, of letting EEA friendly domestic provisions prevail over other domestic provisions. It thus excludes a primacy effect following Article 3 of the Icelandic EEA Act. This understanding was supported by an

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<sup>136</sup> This sentence is referred to in several cases. See for example Hrd. 18 August 2014 (527/2014) *Wow Air I* section II: «Tekur slið lögskýring eðli máls samkvæmt til þess að orðum í íslenskum lögum verði svo sem framast er unnt gefin merking, sem rúmast innan þeirra og næst kemst því að svara til sameiginlegra reglna sem gilda eiga á Evrópska efnahagssvæðinu».

<sup>137</sup> Hrd. 9 Desember 2010 (79/2010).

<sup>138</sup> Hrd. 24 January 2013 (10/2013) *Flugastraumur* section III and Hrd. 2 October 2014 (92/2013) *Gunnarsson* section VII.

<sup>139</sup> *Flugastraumur* section IV.

Icelandic assessment report on EEA law in 1998.<sup>140</sup> It means that under Icelandic law there is no obligation to let EEA friendly domestic provisions prevail over other domestic law if there were to be conflict between them. Such a conclusion would mean that the contents of the implementation of Protocol 35 in Icelandic and Norwegian law differ.<sup>141</sup>

Following this, I will argue that it can become a problem that implemented EEA law is not given primacy in situations where the interpretation rule does not ensure an EEA conform result.<sup>142</sup> Hannesson is quite critical of Article 3; he claims that the Article does not give Icelandic courts authority to set aside domestic provisions in benefit of EEA conform domestic provisions,<sup>143</sup> as is also the opinion of ESA.<sup>144</sup> In Hannesson's opinion, the legislature grants the courts the power that Protocol 35 calls for in the *travaux préparatoires* rather than in legislation.<sup>145</sup> He also describes Article 3 as a codification of the rule of interpretation (*skýringarreglan*).<sup>146</sup> Björgvinsson has elaborated this, and explained that Article 3 goes further than Protocol 35 by also giving non-implemented EEA rules status as *lex specialis*.<sup>147</sup>

From the arguments above, it is clear that Article 3 is an insufficient implementation of the Sole Article of Protocol 35. The consequence of this is that according to Icelandic law one is not obliged to let implemented EEA law prevail over other domestic provisions. This can only be done by applying the Icelandic rule of interpretation, as Article 3 allows EEA conform results *so far as appropriate*. It is therefore necessary to outline the contents and limitations of this rule of interpretation by a study of Icelandic case law.

## 5.2.4 Case law

### 5.2.4.1 Interpreting wording of law in line with EEA law

The case of *Aresbank*<sup>148</sup> is a good example of how the Icelandic Supreme Court may conduct EEA consistent interpretation. In this horizontal case, a Spanish bank demanded reimbursement of deposit guarantee from Landsbanki, and the Court ended up rejecting this claim. The Court interpreted the meaning of 'deposit' in line with the EFTA Court's opinion<sup>149</sup> and relevant presumed implemented

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<sup>140</sup> Gunnlaugsson, Kolbeinsson and Stefánsson 1998 p. 68.

<sup>141</sup> As has been the opinion of among other Björgvinsson 2006 p. 124.

<sup>142</sup> See also similar line of argument in Hannesson 2012 p. 270.

<sup>143</sup> Hannesson 2012 p. 170.

<sup>144</sup> ESA letter 2016 p. 11-13.

<sup>145</sup> Hannesson 2012 p. 170.

<sup>146</sup> Hannesson 2011 p. 430-431.

<sup>147</sup> Björgvinsson 2006 p. 115.

<sup>148</sup> Hrd. 17 January 2013 (169/2011).

<sup>149</sup> E-17/11.

EEA legislation.<sup>150</sup> As the Supreme Court explained, this is in line with Article 3 of the EEA Act, which lets the meaning of ‘deposit’ according to the directive, be influential to whether the funds that the Spanish bank had paid Landsbanki could be considered ‘deposit’ according to domestic law.<sup>151</sup> It is thus an example of the Court interpreting a domestic provision in line with EEA law.

A similar example is found in *Foss*.<sup>152</sup> In this case Flugstodir wanted to deem Foss’ right to the trademark ICEAVIA invalid, and the Court ruled in favour of Flugstodir. The Court stated that changes were made to the domestic act on trademark due to EEA obligations; the five-year rule in Article 25 of the domestic legal act<sup>153</sup> was similar to Article 10 of the EEA directive.<sup>154</sup> In this case, the Supreme Court interpreted ‘use’ as to mean ‘genuine use’, in line with EEA law. The situation in *Foss* is similar to the one in *Aresbank*, as they are examples of horizontal cases and they both concern interpretation of domestic provisions open to interpretation.

Another example is the case of *Kaupthing Isle of Man*.<sup>155</sup> This case concerned bankruptcy and fixing of estates in the aftermath of the 2008 financial crisis. The question was whether the CEO of Kaupþing held satisfactory authorization so that parental guarantee given by him should be deemed valid. The Court answered affirmative to this question. The Court presented EEA legislation on company law,<sup>156</sup> which was presumed implemented as legal background, which one has to have in mind when interpreting domestic legislation. It then interpreted the domestic legislation in line with EEA obligations.<sup>157</sup>

Yet another example is found in *Wow Air II*.<sup>158</sup> The case concerned allocation of time slots at Keflavik Airport, as Wow Air claimed Icelandair was given a competitive advantage in this aspect. The Court repeated the interpretation rule in Article 3, and referred to the decision of the District Court, who had interpreted domestic legislation<sup>159</sup> in line with EEA law on grandfather rights, and ruled in favour of the Icelandic Competition Authority, Isavia and Icelandair.

As the aforementioned case law show, EEA conform interpretation is possible when the legal text in question is open to interpretation. Other good examples are the cases of *Jón Ásgeir* and *Sainz Maza*,<sup>160</sup> where the Supreme Court found support in EEA law for their preferably narrow and wide

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<sup>150</sup> Directive 94/19/EC of the European Parliament and of the Council on deposit-guarantee schemes.

<sup>151</sup> *Aresbank* section VI.

<sup>152</sup> Hrd. 6 May 2009 (437/2008).

<sup>153</sup> Act No 45/1997 Um vörumerki (Trade Mark Act).

<sup>154</sup> First Council Directive 89/104/EEC on Trade Mark. Referred in section II of *Foss*.

<sup>155</sup> Hrd. 10 June 2011 (201/2011).

<sup>156</sup> Directive 68/151/EEC. Referred in section IV of *Kaupthing Isle of Man*.

<sup>157</sup> The case is discussed more thorough in Hannesson 2012 p. 182-183.

<sup>158</sup> Hrd. 18 February 2015 (95/2015).

<sup>159</sup> Regulation No 1050/2008 Um úthlutun afgreiðslutíma flugvalla (Allocation of time slots at airports).

<sup>160</sup> Hrd. 25 January 2007 (181/2006) *Jón Ásgeir* and Hrd. 18 October 2007 (107/2007) *Sainz Maza*.

interpretation of domestic provisions. Both cases concerned criminal proceedings against individuals, and are thus examples of vertical cases. In the case of *Jón Ásgeir*, who was accused of having violated Icelandic law on reporting of business loans in annual accounts, the Court concluded that they could not allow a wider interpretation of ‘loans’ and therefore Jón Ásgeir was acquitted. The Court based its narrow interpretation of loans on that such an understanding would be in line with EEA obligations and Council Directive 78/660/EEC.

In the case of *Sainz Maza*, the Supreme Court upheld the verdict of the District Court, sentencing Mr Sainz Maza to six months in prison for having downloaded information from the company where he worked (data-theft). According to *travaux préparatoires* to the domestic law in question,<sup>161</sup> it was meant to implement the Database directive.<sup>162</sup> The Court stated that one should have this in mind when interpreting Article 50 of the domestic act on copyright,<sup>163</sup> which they dedicated to the obligation in Article 3 of the EEA Agreement. Then the Court went on and interpreted Article 50 in light of the Directive, and argued that a wide interpretation of ‘database’ was in line with ECJ practice.

Another example of a vertical case, where the wording of a domestic provision was open to interpretation is *Wahl*.<sup>164</sup> In this case, a Norwegian citizen was denied entry to Iceland because of his affiliation with Hells Angels. The article of domestic law in question allowed for denying access to the country on essential grounds for public policy and public security. The Court explained that the Icelandic legislation was based on EEA law and therefore one had to take the rules of the Citizens’ Directive<sup>165</sup> into account when interpreting the domestic law.<sup>166</sup> This was not a problematic interpretation, as the wording of the domestic legislation needed further explanation as to what type of cases it applied to.

All the aforementioned cases are examples where the domestic provisions in question were open to interpretation. It is clear from these examples that the Icelandic Supreme Court in these situations turns to EEA legislation and ECJ and EFTA Court practice to make sure that Icelandic provisions are interpreted in conformity with EEA obligations. This is similar to the approach of the Norwegian Supreme Court in the cases of *Vesta* and *Hydro Aluminium*. It appears that as a starting point, the two countries’ Supreme Courts do apply a similar approach to interpret their national provisions consistent with EEA law. It can be drawn from this that the interpretation rule in Iceland and the Norwegian principle of presumption are helpful tools in achieving EEA conformity where the wording of domestic provisions allows different readings.

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<sup>161</sup> Act No 60/2000 um breyting á höfundalögum (Changes in law on copyright).

<sup>162</sup> Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases.

<sup>163</sup> Act No 73/1972 Höfundarlög (Copyright Act)

<sup>164</sup> Hrd. 17 October 2013 (191/2012).

<sup>165</sup> Directive 2004/38/EC of the European Parliament and of the Council on the rights of citizens.

<sup>166</sup> *Wahl* section V.

In many cases, EEA law is not the tipping point of the interpretation conformed by the judges but it plays a part in the interpretation. The cases, which will be shortly mentioned below, show a similar Icelandic practice to cases briefly mentioned in the Norwegian experience.

One example is the case of *Vigfúsdóttir*.<sup>167</sup> This case concerned equal treatment and payment of men and women in employment cases. The Court stated that the legislation on equal pay<sup>168</sup> was in line with other obligations of Icelandic law such as the Constitution, Icelandic regulations, as well as obligations following the EEA cooperation.<sup>169</sup> Then the Court concluded that the difference in payment between two posts breached Icelandic legislation on equality between men and women.

In *Blaðamannafélag*,<sup>170</sup> which concerned transfer of enterprise, the Supreme Court applied EEA law to support their argument but still concluded that the domestic legislation did not entitle the journalist right to pay. In this case, the judges did not refer to any principle of interpretation nor Article 3 of the EEA Act, but they clearly applied EEA law as a tool in their interpretation of domestic legislation.<sup>171</sup> In other cases, the Supreme Court simply states that domestic legislation is in line with EEA law also without referring to any rule of interpretation. This was the case in *Bilabúð Benna*,<sup>172</sup> which concerned criminal proceedings against a company and the owner for not complying with legislation on annual accounts.

#### 5.2.4.2 Leaving precedent case law

I have not found examples of the Icelandic Supreme Court leaving earlier precedent practice in favour of reaching an EEA conform conclusion. As shown in the case of *Norwegian Dental Depot*, the Norwegian Supreme Court follows such practice. The Icelandic Supreme Court did leave earlier precedent practice in the case of *Arnardóttir*,<sup>173</sup> a case with similar facts as the ones' in *Finanger I*, but this was entitled to later changes in Icelandic law. As for the conclusion, the Court had a clear wording in domestic law<sup>174</sup> that did not allow an EEA conform result. From this it is not possible to conclude whether both countries follow a tradition of setting aside precedent case law to achieve a result in conformity with EEA law.

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<sup>167</sup> Hrd. 2000 bls. 2104 (Hrd. 31 May 2000 (11/2000)).

<sup>168</sup> Article 4 of Act No 28/1991 Um jafna stöðu og jafnan rétt kvenna og karla (Act on equal rights of men and women).

<sup>169</sup> Article 69 EEA and Council Directive 75/117/EEC.

<sup>170</sup> Hrd. 24 February 2005 (375/2004). The association for journalists sued the company of Frétt for not paying an employer what the newspaper they had just bought owed him.

<sup>171</sup> It can be worth mentioning that ESA concluded that the Supreme Court in this case interpreted law not entirely in accordance with the purpose of the implemented directive and relevant case law of the ECJ and EFTA Court. See ESA Reasoned Opinion 2010. Referred to in Hreinsson 2012 p. 96.

<sup>172</sup> Hrd. 21 November (265/2013).

<sup>173</sup> Hrd. 25 October 2001 (129/2001).

<sup>174</sup> Article 88 second paragraph of Act No 50/1987 Umferðalög (Traffic Act).

### 5.2.4.3 Clear and precise wording of law as limitation to consistent interpretation

There are several examples of cases where clear and precise wording of domestic legislation prevents EEA consistent interpretation. The aforementioned case of *Candy Spray*,<sup>175</sup> where a child had gotten injured from sour-blast-candy and the vendor and importer were held liable even though this conflicted with EEA law, is one example. This was the case where the Court was open to interpret the domestic legislation in line with non-implemented EEA law<sup>176</sup> and it referred this to Article 3 of the EEA Act. The Court clearly stated that this rule of interpretation could not set the wording of Icelandic provisions aside, and that the specific provision in question did not allow for another interpretation even though it would make it consistent with EEA law. A different conclusion would result in giving EEA rules on liability for defective products horizontal direct effect. It is thus an example of the Icelandic Supreme Court rejecting EEA consistent interpretation of domestic provisions in a case with two private parties because it would be *contra legem*.<sup>177</sup>

Another example of clear and precise wording of law as limitation to EEA conformity is the case of *Gunnarsson*.<sup>178</sup> In this case, Mr Gunnarsson wanted a tax decision deemed invalid and in conflict with EEA law because the Icelandic State did not entitle him tax relief that he would have received if he domiciled in Iceland when he lived in Denmark. The Court found that Iceland had not implemented EEA law correctly, so therefore the Icelandic tax authorities could solely rely on the domestic legislation in their decision. The Court stated that the interpretation rule did not help the authorities to make a decision in line with EEA obligations<sup>179</sup> because the domestic law was clear and precise and not in line with EEA law.

The cases of *Engilbertsson* and *Irish Bank*<sup>180</sup> are also examples of clear and precise wording as limitation to EEA conform results. The first case dealt with consumers' rights concerning indexation of mortgage loans and the Court concluded that the loan agreement between Mr Engilbertsson and his bank did not breach domestic law. The relevant EEA legislation<sup>181</sup> was not implemented in Iceland and the Court referred to the rule from *Candy Spray* that one cannot go away from wording of law. The Court considered the domestic provision<sup>182</sup> to be sufficiently precise and not open to a different reading.<sup>183</sup> The second case concerned an Irish bank's right to lodge claims under the winding-up procedure of Kaupþing. The EFTA Court had considered the Icelandic legislation to be in conflict

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<sup>175</sup> Hrd. 9 Desember 2010 (79/2010).

<sup>176</sup> Council Directive 85/374/EEC on product liability.

<sup>177</sup> Hannesson 2012 p. 186.

<sup>178</sup> Hrd. 2 Oktober 2014 (92/2013).

<sup>179</sup> Article 28 EEA and Directives 90/365/EEC and 2004/38/EC

<sup>180</sup> Hrd. 13 may 2015 (160/2015) *Engilbertsson* and Hrd. 27 February 2013 (89/2013) *Irish Bank*.

<sup>181</sup> Council Directive 87/102/EEC.

<sup>182</sup> Article 12 of Act No 121/1994 Um neytendalán (Act on Consumer Loans).

<sup>183</sup> *Engilbertsson* section IV.

with EEA legislation and encouraged the national court to interpret Icelandic legislation in a way that undermined this difference.<sup>184</sup> The Supreme Court concluded that domestic legislation<sup>185</sup> did not allow the bank to submit its demands later than the time limit set, even though this would violate EEA law.<sup>186</sup>

*Finanger I* showed that according to the Norwegian experience, one cannot interpret national law consistent with EEA law if the domestic provision is sufficiently clear and precise. The same appears to be the rule according to Icelandic case law.

#### **5.2.4.4 Loyalty to the Constitution as limitation to consistent interpretation**

Supreme Courts are often careful not to overstep its jurisdiction and into the power of the legislature. An example of this cautious behaviour of the Icelandic Supreme Court is the case of *Stjórnugrís*.<sup>187</sup> This is an example of a vertical case, where a pig farmer wanted a decision by the Minister of environment repealed. The Minister had decided that the building and operation of a pig farm, by the company of *Stjórnugrís*, would be subject to an environmental assessment. The Supreme Court ruled the decision to be unlawful because it should have had better foundation in written law. Even though the decision was in line with EEA law,<sup>188</sup> it lacked legal basis in domestic law, and was thus in conflict with the principle of legality. The Court emphasized that it is up to the legislature to decide how a provision of EEA law shall be practiced.<sup>189</sup>

In another vertical case, which concerned criminal proceedings against a driver who had not followed legal obligations on resting between driving,<sup>190</sup> the Supreme Court ruled that the domestic provision in question was not sufficiently clear and precise to entitle a sentencing of the driver. An Icelandic regulation<sup>191</sup> implemented the EEA legislation<sup>192</sup> that allowed for such conviction, but it lacked a written provision to allow punishment. Even though a consistent interpretation allowed for sentencing the driver, such a conclusion would have breached the principle of legality.

There is agreement on that the separation of powers and principle of legality are important limitations to the rule of interpretation, which is also the case in the Norwegian experience. Hreinsson has, among

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<sup>184</sup> E-18/11.

<sup>185</sup> Article 118 of Act No 21/1991 Um gjaldþrotaskipti o.fl. (Act on Bankruptcy etc.).

<sup>186</sup> Article 14 first paragraph of Directive 2001/24/EC of the European Parliament and of the Council.

<sup>187</sup> Hrd. 13 April 2000 (15/2000).

<sup>188</sup> Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.

<sup>189</sup> *Stjórnugrís* section III.

<sup>190</sup> Hrd. 28 October 2004 (251/2004) *Driving and Resting*.

<sup>191</sup> Regulation No 136/1995 Um aksturs- og hvíldartíma ökumanna o.fl. (Driving and Resting)

<sup>192</sup> Council Regulation No 3820/85.

others, emphasized that there is no legislative power within the Court's jurisdiction.<sup>193</sup> These two cases show that the principle of legality plays a limiting role to the application of the rule of interpretation in Iceland. As Hannesson argues, they show that the Supreme Court seems to uphold a strict practice of legal predictability and the principle of legality.<sup>194</sup>

The cases of *Stjörnugrís* and *Driving and Resting*, concern situations where an EEA conform result would allow putting negative obligations on private parties. If an EEA conform result would benefit the private party against the state, one could expect a different conclusion, as suggested in the Norwegian experience. As previously stated, the principles of legality and legal predictability are not applicable in the state's defence.<sup>195</sup> Case law show that this is not practiced consistently in the Icelandic experience. If one is to look at the case of *Gunnarsson* the criteria for state liability was not considered fulfilled.<sup>196</sup> The case of *Sainz Maza* is also an example of an individual having to accept negative effects of the Court's EEA conform interpretation.<sup>197</sup>

The Court also found support for its outcome in *Stjörnugrís* in the Icelandic Constitution on rights to ownership and occupation.<sup>198</sup> This shows how the constitution can play a limiting role to whether judges can let EEA consistent domestic legislation prevail over other domestic legislation. Another example is the case of *Tobacco Marketing*<sup>199</sup> where the Court concluded in favour of visibility of tobacco products in a specific shop but not in favour of advertising such products. In this case, the Court bypassed EEA law by simply stating that they concern matters of the Icelandic Constitution. There are no similar examples in the Norwegian experience, but it follows from the principle of *lex superior* that constitutional law will prevail over other domestic legislation even though these were in line with EEA obligations.

#### **5.2.4.5 Unwillingness to conduct EEA consistent interpretation**

In the previously discussed ESA letter,<sup>200</sup> the Supreme Court of Iceland is accused of not being willing to conform EEA consistent interpretation even though it is possible. In two cases referred to in the letter,<sup>201</sup> the Supreme Court does not apply a method of consistent interpretation, nor do they take an active stand on what effect EEA law could have on domestic law, even though they, in ESA's opinion,

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<sup>193</sup> Hreinsson 2014 p. 290.

<sup>194</sup> Hannesson 2012 p. 192.

<sup>195</sup> Arnesen and Stenvik 2015 p. 144.

<sup>196</sup> *Gunnarsson* section VIII.

<sup>197</sup> As specified by Hannesson 2012 p. 193.

<sup>198</sup> Articles 72 and 75 of the Icelandic Constitution.

<sup>199</sup> Hrd. 6 April (220/2005).

<sup>200</sup> ESA letter 2016.

<sup>201</sup> Hrd. 28 October 2013 (552/2013) *Commerzbank* and Hrd. 8 May 2014 (120/2014) *Nederlandsche Bank*.



should have done so. The question is whether the Supreme Court, in these cases, shows unwillingness to conduct EEA consistent interpretations.

The *Commerzbank* case concerned Commerzbank's right to set-off against counterclaims from Kaupping. The Court referred to its previous rulings regarding whether this specific legal dispute should be solved by applying Icelandic or English law, and its decision that it should be solved under Icelandic legislation on rights to set-offs. Then, the Court concluded by confirming the conclusion of the District Court, that the conditions for conducting a set-off as put down in Article 100 first paragraph of Act No 21/1991,<sup>202</sup> had not been met. In her reasoning, the District Court Judge did not seem to involve elements of EEA law when she considered whether the criteria of the Icelandic provision were met.<sup>203</sup>

*Nederlandsche Bank* concerned the Central Bank of Holland's demand to set-off against Landsbanki Íslands' (LBI) account in the Central Bank, after the Central Bank had paid deposit holders of Icesave accounts in the Netherlands. The Court concluded in favour of the Icelandic bank. As done in *Commerzbank*, the Court decided to apply Article 100 first paragraph of the Act on Bankruptcy.<sup>204</sup>

The conclusions of the Supreme Court in the two cases are due to special rules on winding-up proceedings, as the Icelandic counterpart in both cases had been subject to such proceedings. It is because of these rules that the Supreme Court ended up applying Article 100 first paragraph, instead of giving effect to Article 99 second paragraph letter j of Act No 161/2002,<sup>205</sup> which would have allowed for application of British/Dutch law. The EFTA Surveillance Authority has stated that the Court, in these two cases, did not ensure creditors' rights to set-off according to provisions of EEA legislation.<sup>206</sup> Additionally, the Authority argues that since Article 99 second paragraph letter j is an implementation of EEA law, Protocol 35 of the EEA Agreement obligates the Court to let this rule prevail over other domestic legislation.<sup>207</sup> In addition to this, ESA reminds Iceland of obligations of the Courts to interpret national law as far as possible in conformity with EEA legislation in line with the principle of conform interpretation.<sup>208</sup> These cases represent specific examples of the incomplete implementation of Protocol 35 becoming a problem, as Article 3 of the Icelandic EEA Act does not ensure that implemented EEA law prevails over other domestic provisions.

As previously explained in this study, the national courts of Iceland and Norway are obliged to interpret domestic law in line with EEA law where possible. This is in accordance with their national

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<sup>202</sup> Um gjaldþrotaskipti o.fl. (Act on Bankruptcy etc.).

<sup>203</sup> Section V of the District Court Judgment referred to in *Commerzbank*.

<sup>204</sup> *Nederlandsche Bank* section V.

<sup>205</sup> Um fjármálafyrirtæki (Act on Financial Undertakings).

<sup>206</sup> ESA letter 2016 p. 11.

<sup>207</sup> *Ibid.* p. 12.

<sup>208</sup> *Ibid.*

legal tradition, e.g. the principle of presumption and the interpretation rule, as well as in accordance with EEA obligations. As pointed out above, the judges could have interpreted and practiced Icelandic provisions in line with EEA law in the cases of *Commerzbank* and *Nederlandsche Bank*. The judgements thus show that in the Icelandic experience one does not practice an interpretation rule in line with the EU/EEA criteria on taking the whole body of law into consideration. I have suggested that this also might be the case in the Norwegian experience.

One last example to the Court's unwillingness to ensure effectiveness of EEA law through consistent interpretation is shown in the cases of *Kolbeinsson*.<sup>209</sup> The first case concerned Mr Kolbeinsson's claim to insurance for injury following a work related accident. His claim was refused because of his own negligence. The Court did not interpret domestic law<sup>210</sup> in line with EEA legislation; in fact EEA law is not even mentioned in the judgement. Because of this decision, Mr Kolbeinsson claimed Iceland for state liability in the second case. He claimed that he was denied insurance due to incorrect implementation of EEA law<sup>211</sup> and this claim was denied. Even though the Supreme Court in *Candy Spray* seemed open to let non-implemented and not correctly implemented EEA law influence interpretation of domestic legislation, the example of *Kolbeinsson I* and *II* shows that this is not practiced. It is thus an example of the Supreme Court being less willing to conduct an EEA conform interpretation where EEA legislation is not (correctly) implemented in Icelandic law.<sup>212</sup>

#### **5.2.4.6 EEA conform interpretation to avoid state liability**

The case of *Sveinbjörnsdóttir*<sup>213</sup> suggests that the responsibility to follow EEA obligations relies on the states. The case concerned state liability after Ms Sveinbjörnsdóttir's was denied pay from the payment guarantee fund in the winding-up process of the business where she worked in line with Icelandic law.<sup>214</sup> The Court decided that the state had to pay Ms Sveinbjörnsdóttir compensation due to its incorrect implementation of EEA law.<sup>215</sup> The Court stated that the conflict between the regulation and the domestic law would clearly benefit the state if the interpretation rule laid down in Article 3 of the EEA Act did not allow for a different interpretation.<sup>216</sup> From this, one can conclude that the Supreme Court of Iceland considers the interpretation rule as a tool to avoid state liability where possible. By this, that state liability is considered an alternative to reach an EEA conform result. Such

<sup>209</sup> Hrd. 20 Desember 2005 (246/2005) *Kolbeinsson I* and Hrd. 21 February 2012 (532/2012) *Kolbeinsson II*.

<sup>210</sup> Article 26 first paragraph of Act No 46/1980 Um aðbúnað, hollustuhætti og öryggi á vinnustöðum (Act on Conditions at Work)

<sup>211</sup> Directives 89/391/EEC and 92/57/EEC.

<sup>212</sup> As has previously been argued by Hannesson: Hannesson 2012 p. 190.

<sup>213</sup> Hrd. 16 Desember 1999 (236/1999).

<sup>214</sup> Act No 53/1993 Um ábyrgðasjóð launa vegna gjaldþrota (Payment Guarantee Fund).

<sup>215</sup> A dissenting judge interprets the domestic law differently, and seemingly without involving EEA regulation. He concludes that the state was wrong in denying Ms Sveinbjörnsdóttir payment from the Guarantee Fund and considered the decision to be in breach with domestic law.

<sup>216</sup> *Sveinbjörnsdóttir* section IV.

an argument is not found in cases from the Norwegian experience, but in this regard, it is worth mentioning that Miss Finanger got compensation for her loss in a later case on state liability.<sup>217</sup>

This line of thought must not be stretched too far, as one cannot always rely on state liability where EEA consistent interpretation does not lead to an EEA conform result. As the cases of *Gunnarsson* and *Kolbeinsson II* both show. In both cases, the Supreme Court concluded that the incorrect implementation of EEA law did not entail a serious enough breach to qualify state liability.

## 5.2.5 Concluding remarks on the Icelandic experience

This study shows that the Icelandic Supreme Court, in most cases,<sup>218</sup> refers to Article 3 of the EEA Act as legal basis and explanation for interpreting domestic provisions in line with EEA law. In some cases, the Court does not refer to a specific rule of interpretation, but it is clear from the judges' reasoning that they are conducting an interpretation of domestic provisions in light of EEA obligations.<sup>219</sup> The study also shows that the judges keep within precise and clear wording of domestic provisions and that they conduct EEA conform interpretation if possible where the wording is ambiguous. Whether the Supreme Court would leave precedent practice to land on an EEA conform result is unclear.

Experience in Icelandic case law shows different results concerning loyalty to the Constitution and state liability as a way of ensuring individual's rights following EEA legislation. It is therefore difficult to conclude from the cases here referred to. But in my opinion, this shows that individual's rights following EEA law is not sufficiently preserved in the Icelandic practice of consistent interpretation. This is also shown in the Supreme Court's unwillingness to conduct EEA conform interpretation even though it could be possible. The case of *Candy Spray* presents interpretation tools to avoid this, but the Court does seemingly not practice these. The same goes for the EU/EEA rule of taking the whole body of law into consideration.

One explanation to this practice might be that the Icelandic Supreme Court often focuses on method instead of focusing on reaching an EEA conform result. The Court instead refers to the interpretation rule of Article 3 as well as the limitation to keep with wording of domestic provisions as outlined in *Candy Spray*. By this, the Court practices a strict relationship to the dualist principle of letting domestic provisions prevail over EEA law, instead of reading the domestic provision in a way that would ensure effectiveness of EEA law. These elements show that the *so far as possible* criteria, in the

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<sup>217</sup> Rt. 2005 p. 1365 (*Finanger II*).

<sup>218</sup> *Wow Air II, Aresbank, Gunnarsson, Wahl, Candy Spray, Foss, Sainz Maza, Arnardóttir* and *Vigfúsdóttir*.

<sup>219</sup> *Stjörnugris, Driving and Resting, Jón Ásgeir* and *Kaupthing Isle of Man*.

Icelandic experience, is strictly limited by the Court's loyalty to the legislature and the wording of domestic law.

## 6 Summarizing the two Countries' Experience

The principle of consistent interpretation is not about setting domestic law aside, but about interpreting EEA law into domestic legislation. The principle is neither about giving EEA law primacy, but about giving effect to EEA law within domestic legislation. Both Iceland and Norway practice interpretation rules which enables this *so far as possible*, but it seems there are limits within this criteria that prevent domestic provisions from giving effect to EEA law even though it should be possible. This practice is often explained as a consequence of the principle of legality and the dualist approach, which in my opinion shows a misunderstanding of the definition of consistent interpretation. If consistent interpretation is practiced correctly it should not lead to a conclusion that would breach with neither the principle of legality nor dualism. Only if the conflict is so clear that an EEA conform interpretation is not possible should the Court end up with a conclusion in conflict with EEA law.

Both Iceland and Norway have their own version of consistent interpretation following their legal traditions. Regarding EEA cases, the Icelandic Supreme Court seems to practice a written interpretation rule whereas the Norwegian Supreme Court follows the unwritten principle of presumption. The Icelandic Court tends to specifically refer to a rule of interpretation as well as an obligation to follow EEA law. Though this is not always the case, it at least seems like they do this more frequently than their Norwegian counterpart, who also leans on EEA obligations as basis for their unwritten interpretation rule. As for the *so far as possible* criteria, none of the Courts explicitly outline its limits, and the conclusion must therefore be based on case law results.

It seems like in Iceland one is more focused on method, different from the Norwegian Courts where the focus is on reaching an EEA conform result. The difference in the Courts' focus makes them practice different methods in ensuring individuals' rights following EEA legislation, as well as making them practice a different relationship of loyalty to the legislature in vertical cases. This gives the criteria of *so far as possible* a different meaning in the Icelandic and Norwegian experience with consistent interpretation.

The Icelandic and Norwegian Supreme Courts both seem to follow the limitation of not to rule inconsistent with clear and precise wording of domestic law. However, it is unclear whether the Icelandic Court would let EEA law prevail over precedent from earlier cases, like in the Norwegian experience. Case law also suggests that both Courts refrain from taking the whole body of law into consideration when conducting consistent interpretation, which shows a similar limitation to the *so far as possible* criteria.

The cases of *Kolbeinsson*, *Gunnarsson*, *Commerzbank* and *Nederlandsche Bank*, show that the Icelandic Supreme Court can find it difficult to mend wrongful implementations of EEA legislation. A

similar situation is not found in the Norwegian experience. This can be linked to a distinction in the countries' practice of loyalty to the legislature in vertical cases, as well as their different approach to the dualist principle of letting domestic law prevail over EEA law. I would therefore agree with Franklin and Fredriksen when they argue that the Icelandic Supreme Court seems «less willing to remedy deficient implementation (...) than its Norwegian counterpart».<sup>220</sup>

The cases on state liability suggest state liability as a substitute to EEA conform results through consistent interpretation. But it is important to bear in mind that the threshold to receive this compensation can be difficult to reach, as the cases of *Gunnarsson* and *Kolbeinsson II* show. The courts should therefore not consider state liability as an alternative solution where they are not ready to reach an EEA conform conclusion through interpretation. In addition to this, for some, compensation is just a small comfort for not getting what they are entitled to after EEA law.

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<sup>220</sup> Franklin and Fredriksen 2015 p. 667.

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