'The two EEA Courts' – a Norwegian perspective[1]

Dr. Halvard Haukeland Fredriksen, University of Bergen

A. Introduction – the notion of 'EEA Courts'

To most Norwegian lawyers, the term 'the two EEA Courts' would probably be understood as a reference to the EFTA Court and the Supreme Court of Norway rather than, as suggested here, to the EFTA Court and ECJ. The understanding of the ECJ as not only an EU but also an EEA Court of Justice has only slowly sunk in to the Norwegian legal community.[2] However, not least due to the somewhat troubling prospects to the free movement of capital in the EEA offered by the ECJ's application of Article 40 EEA in a recent string of cases,[3] appreciation of the ECJ as the gatekeeper for market operators from the EFTA States seeking judicial protection in the EU appears to gain ground: If the ECJ embarks on an interpretation of EEA law which differs from its own interpretation of corresponding provisions of EU law, the result will be gradual undermining of the Agreements overall goal to extend the internal market to include the EFTA States. Thus, the fate of the EEA Agreement at long last hangs on its continued acceptance by the ECJ.

Even acknowledging that the ECJ is to be understood as an EEA Court, most Norwegian lawyers would probably argue that this raises the number of EEA Courts to three – the Supreme Court of Norway, the EFTA Court and the ECJ.[4] A recent survey of the application of EEA law in Norwegian courts 1994-2010 has revealed that lower Norwegian courts indeed do appear to see the Supreme Court as an EEA Court proper, taking its decisions into

[1] Readers with command of Norwegian should be warned at the outset that this contribution draws heavily upon the more extensive account in the author's report 'EU/EØS-rett i norske domstoler' [EU/EEA law in Norwegian Courts], Report commissioned by the Norwegian EEA Review Committee, Oslo 2011. Still, the present context allows some additional comments de lege ferenda, see, in particular, *infra* section B.IV.

[2] See *Halvard Haukeland Fredriksen*, 'The EFTA Court 15 Years On' (2010) 59 International & Comparative Law Quarterly 731-760, at p. 734.

[3] See Cases C-540/07 *Commission v Italy* [2009] ECR I-10983; C-72/09 *Établissements Rimbaud*, judgment of 28 October 2010 (nyr); C-436/08 *Haribo and Salinen*, judgment of 10 February 2011 (nyr) and C-267/09 *Commission v Portugal*, judgment of 5 May 2011 (nyr) as well as the pending cases C-493/09 *Commission v Portugal* and C-48/11 *Veronsaajien oikeudenvalvontayksikkö v A Oy*.

[4] Obviously, this is a very Norwegian perspective, to which Icelandic and Liechtenstein lawyers would not approve. Acknowledging this, the national perspective would inevitably lead to an increase in number of EEA Courts to seven – the EFTA Court, the ECJ, the Supreme Court of Iceland, the Supreme Court of Norway and the three Liechtenstein courts of last instance (the Supreme Court, the Supreme Administrative Court and the Constitutional Court).

account when interpreting EEA rules.[5] Even though there do seem to be greatly diverging opinions amongst the judges of the lower courts as to the authority of Supreme Court precedents in the field of EEA law, EEA-related decisions of the Supreme Court are frequently cited and followed.

Some support for this approach may arguably be inferred from Article 106 EEA, where the Courts of last instance of the EFTA States are included together with the EFTA Court and the ECJ in the system of exchange of EEA relevant court decisions intended to achieve the objective of homogeneity.[6] The Norwegian Supreme Court may further invoke its constitutional role as the supreme judicial authority of Norway (Articles 88 and 90 of the Norwegian Constitution), which again is reflected in the fact that Article 34 SCA[7] entails no obligation to refer unresolved questions of EEA law to the EFTA Court and, further, makes sure that the answers received from the EFTA Court are, formally, only advisory in character. Presumably, the Supreme Court would prefer lower Norwegian courts to follow its precedents in the field of EEA law in much the same manner as in other fields of the law.[8]

Still, the overarching objective of homogeneity, together with the principle of loyal cooperation under Article 3 EEA, strongly suggests that the lower courts should interpret and apply EEA law in accordance with the legal sources and the methods recognised by the ECJ and the EFTA Court only, thereby effectively eliminating national sources of law such as, in the Norwegian legal tradition, precedents from national courts. Even though it is arguable that decisions from the highest courts of the Member States sometimes do influence the development of ECJ case law, the examples are few and far between. Suffice to note that whereas the EFTA Court and the ECJ frequently cite and, apparently, rely on each other's decisions,[9] one will look in vain for any reference to decisions of the Courts of last instance of the EFTA States.[10]

Thus, from a normative perspective, it appears appropriate to submit that there are two EEA Courts only – the EFTA Court and the ECJ. Off course, one should then immediately

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[5] See the survey cited *supra* note 1, pp. 83-85.
[6] Cf. the heading of chapter 3, section 1 of the Agreement, to which Article 106 belong. Note that the former Court of First Instance of the European Communities (now the General Court of the EU) too is included in Article 106, thereby, arguably, adding an eight EEA Court to the seven courts listed *supra*, note 4.
[7] Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
[8] See *Hans Petter Graver*, 'Dømmer Høyesterett i siste instans?' (2002) 37 Jussens Venner 263-281, 267.
[9] See the contribution of AG Sharpston in this book.
[10] For this reason, the talk of a 'judicial dialogue' between the national courts on the one hand and the EFTA Court/the ECJ on the other seem somewhat misguided, at least if the term is used in a manner indicating that this 'dialogue' is comparable to the one which indeed goes on between the EFTA Court and the ECJ, see further *Halvard Haukeland Fredriksen*, Europäische Vorlageverfahren und nationales Zivilprozessrecht, Tübingen 2009, at pp. 255 f.

add that from a functional perspective, *all* national courts, not only of the EFTA States but also of the EU Member States, are to be regarded as functional EEA Courts whenever handling EEA-related cases. The Supreme Court of Norway recognised this in the seminal *Finanger (No. 1)*-case of 2000 (full court), holding that the national courts as such are subjects to the duty of loyal cooperation under Article 3 EEA and thereby obliged to interpret national law as far as at all possible in conformity with EEA law.[11] This, however, does not undermine my view that the authority on the interpretation of EEA law rests with the EFTA Court and the ECJ.[12]

In the following, an attempt will be made to analyse the relationship between the two EEA Courts from a Norwegian perspective, first and foremost as it emerges through the jurisprudence of Norwegian courts.

B. Norwegian courts and the two EEA Courts

I. The reception of ECJ case law in Norwegian courts

Negotiating the EEA Agreement, it was a *conditio sine qua non* for the EFTA States that they would not have to relinquish judicial sovereignty to the 'foreign judges' of the ECJ. Indeed, following the defeat of the originally foreseen common EEA Court through the ECJ's (in)famous Opinion 1/91, this is the very reason for the EFTA Court's existence. As stated openly by the Commission, from the perspective of homogeneity the ideal solution would have been for the EFTA States to accept the jurisdiction of the ECJ.[13] At least from a Norwegian perspective, this was both politically and, arguably, constitutionally impossible. As is well known, a solution was then found through the establishment of an independent Court of Justice for the EFTA-pillar. Important from this perspective was also the temporal limitation on the obligation under Article 6 EEA to follow relevant ECJ case law to judgments rendered prior to the date of signature of the Agreement (2 May 1992). Further, as a result of the ECJ insisting on the formally binding character of its preliminary rulings also in the EEA setting,[14]

[11] Rt. 2000 p. 1811, at 1827. It was only two years later that the EFTA Court had the opportunity to follow suit in Case E-4/01 *Karlsson* [2002] EFTA Court Report, 240, paragraph 28 and only in the later Case E-1/07 *Criminal proceedings against A* [2007] EFTA Court Report 248, that this duty of consistent interpretation of national law was explicitly linked to Article 3 EEA (paragraph 39).

[12] As will be evident from the following discussion, my view is that the overarching goal of homogeneity inevitably implies that the *de facto* supreme authority on the interpretation of substantive EEA law rests with the ECJ, cf. *Halvard Haukeland Fredriksen*, 'One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area' (2010) 79 Nordic Journal of International Law 481-499. However, the fact that the ECJ takes the opinion of the EFTA Court into account when interpreting EEA rules alone justifies the view expressed here that a share of the authority on the interpretation of EEA law rests with the EFTA Court.

[13] Cf. the submissions of the Commission in Opinion 1/92, [1992] ECR I-2821, at p. 2833.

[14] Cf. Opinion 1/91, [1991] ECR I-6079, paragraph 61.

the EFTA States, determined not to allow their national courts to ask the ECJ to decide on the interpretation of EEA law in accordance with Article 107 EEA, entrusted the EFTA Court with jurisdiction to give advisory opinions upon requests from their national courts (Article 34 SCA).

From this background, one would probably expect a somewhat reluctant reception of ECJ case law in Norwegian courts, perhaps with the courts sticking to 'their' EFTA Court or even pursuing a more independent interpretation of EEA law on their own. However, this is not how things have turned out. Rather on the contrary, ECJ precedents are cited and followed by Norwegian courts, including the Supreme Court, in much the same manner as in the EU Member States.

As to the temporal limit of Article 6 EEA, a first test was the *VinCompagniet* case from 1996. However, the Supreme Court's Appeal Selection Committee in its interpretation of Article 11 EEA relied on the ECJ's 1993 judgment in *Keck* without any discussion of the relevance of this judgment in light of Article 6 EEA.[15] The Supreme Court followed suit the following year in two important judgments concerning the interpretation of Directive 77/187/EEC on employees' rights in the event of transfers of undertakings. In *Eidesund*, the Court held that ECJ judgments rendered after the date of signature of the Agreement still would have 'direct consequences' for the interpretation of the Norwegian legislation implementing the directive,[16] whereas the Court in *Løten* in so many words stated that the temporal limit in Article 6 EEA was of little interest for the case in question.[17] A later statement to the same effect is found in the 2002 judgment in the so-called *God Morgon*-case, where the Supreme Court referred to *Eidesund* as authority for the opinion that it was clear that more recent case law of the ECJ had to be taken into account.[18] After *God Morgon*, the Supreme Court has simply stopped referring to Article 6 EEA, clearly indicating that the temporal limit of that provision has lost any meaning it might have had.[19]

Further, and even more importantly, the jurisprudence of the Supreme Court shows that ECJ case law is not only taken into account when interpreting EEA law – it is *de facto* followed as binding authority. Evidence suggests that the Supreme Court will disregard even clear assumptions in the *travaux préparatoires* and overrule its own precedents if deemed

[15] Rt. 1996 p. 1569.
[16] Rt. 1997 p. 1954, at 1960.
[17] Rt. 1997 p. 1965, at 1970.
[18] Rt. 2002 p. 391, at 395-396.
[19] Cf. *Hans Petter Graver*, 'The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States', in: Baudenbacher/Tresselt/Örlygsson, The EFTA Court Ten Years On, Oxford and Portland, Oregon 2005, pp. 79-99, at 91.

necessary in order to interpret Norwegian law in conformity with underlying EEA obligations:

In the 2004 judgment in *Norsk Dental Depot* the Supreme Court simply referred to ECJ's interpretation of the Product Liability Directive (85/374/EEC) in its 2002 judgment in *Sánchez*[20] to the effect that established Norwegian jurisprudence on strict liability for dangerous products may no longer be relied on in addition to the liability regime established by Article 6 of the said directive.[21] The fact that the legislator in the *travaux préparatoires* to the act implementing the Directive into the 1988 Act on Product Liability clearly assumed that there would still be room for the established Norwegian regime of strict liability was not even mentioned.

Similarly, in the 2006 so-called *Livbøye* (lifebuoy)-case, concerning bad faith of the applicant as a condition for refusal to register a trademark, the Supreme Court openly overruled an earlier decision on the interpretation of Article 4 (4) litra g of the Trademark Directive (89/104/EEC).[22] Nothing in the judgment indicates that the Supreme Court accorded its own previous judgment any authority in this respect – the court simply stated that subsequent clarification through decisions of The Office of Harmonization for the Internal Market (OHIM) called for an interpretation deviating from the one previously held.

Importantly, both *Norsk Dental Depot* and the *Livbøye*-case concerned the application of EEA law in the horizontal relationship between private parties. Still, in neither were the principles of legitimate expectations and legal certainty nor the dualistic approach to EEA obligations stemming from Norwegian constitutional law even contemplated as a possible hindrance to consistent interpretation of the national legislation in question. Even though not explicitly limiting the scope of the statements of the full court in *Finanger (No I)* on recognised (Norwegian) methods of interpretation as a limit to the possibility to give effect to EEA law in Norwegian courts, the judgments in *Norsk Dental Depot* and in the *Livbøye*-case clearly show that the Supreme Court's adherence to the dualistic traditions of Norway is of greater significance in principle than in practice. Indeed, in the 17 years of existence of the EEA

[20] Case C-183/00 *Sánchez* [2002] ECR I-3901.
[21] Rt. 2004 p. 122, paragraph 31.
[22] Rt. 2006 p. 1473, overruling Rt. 1998 p. 1809 (*BUD*). It the earlier decision, the Supreme Court had held that mere knowledge of existing use of a similar mark by another meant that the trade mark could not be registered, whereas the Court in *Norsk Dental Depot* clarified that registration may only be refused if the applicant was acting in bad faith at the date of the application. The earlier decision may seem strange in the face of the clear wording of Article 4 (4) litra g of the Trademark Directive, but it was probably caused by the rather unfortunate wording of the corresponding Section 14 (7) of the 1961 Norwegian Trade Mark Act (now replaced by the 2010 Trade Mark Act). Actually, nothing in the 1998-judgment suggests that the Supreme Court was aware of the EEA-dimension of the case!

Agreement *Finanger (No 1)* remains the only case where it proved impossible to interpret Norwegian law in conformity with underlying EEA obligations. And further, in 17 years there is not a single case where the lack of EU style direct effect in the EEA setting has hindered the reception of ECJ case law in Norwegian courts.

The loyal reception of ECJ case law is perhaps particularly striking in cases where no clear precedent may be found. Avoiding any temptation it may have had to pursue its own interpretation of EEA law, the Supreme Court's approach in such cases is to analyse existing ECJ case law and try to deduce whatever guidelines it can from the reasoning of the ECJ in cases involving more or less similar questions.[23] In the two recent judgments *Nye Kystlink* and *Bottolvs* concerning alleged age discrimination, the Supreme Court stated that Norwegian courts should interpret the ban against age discrimination in Directive 2000/78/EC as would the ECJ if the case had been referred to it.[24] As directive 2000/78/EC is not part of the EEA Agreement, a reference to the EFTA Court was no alternative.[25] Even though the court was careful to tie its adherence to ECJ case law to the presumed intentions of the legislator when voluntarily implementing the Directive into Norwegian law, both judgments show that the reception of ECJ case law is extended even beyond the scope of EEA law.[26]

Striking is certainly too the decision of presiding justice Tjomsland in the age discrimination case *CHC Norway*, staying the proceedings before the Supreme Court in order to await the preliminary judgment of the ECJ in *Prigge*.[27] A better illustration of the Supreme Court's adherence to the ECJ than staying a pending case, quite possibly for as long as a full

[23] See, in particular, the following statements in *God Morgon*, cited *supra* note 17, at p. 396: '[There] exists in the EC an extensive case law on the conditions for registration of trademarks, but there is no decision from the ECJ which directly relates to the interpretative question that is to be decided in our case. It is therefore a question of what one can infer from the conclusions and the premises in cases involving more or less similar questions' (my translation). Tellingly, the lack of clarifying ECJ case law did not prompt the Supreme Court to request the EFTA Court to give an advisory opinion, see further *infra*, section III.

[24] Rt. 2010 p. 202, paragraph 56 and Rt. 2011 p. 609, paragraph 72.

[25] Still, in light of the ECJ's (controversial) finding in Case C-144/04 *Mangold* [2005] ECR I-9981 of the ban against age discrimination as a general principle of EU law, apparently independent from the Directive, one could have referred to the EFTA Court the highly interesting question whether this general principle nonetheless must be seen as an inherent part of EEA law. However, the judgments clearly show that the Supreme Court was not aware of this (possible) EEA dimension of the cases.

[26] In *Nye Kystlink*, cited *supra* note 24, justices Flock and Stabel dissented on this point, holding that they could not see that the legislator intended the implementation of the directive to impact on the interpretation of an established statutory provision establishing a pensionable age of 62 years for seamen. However, in *Bottolvs*, cited *supra* note 24, the Supreme Court unanimously cited *Nye Kystlink* as authority for the view that Norwegian courts should interpret the Directive in conformity with subsequent ECJ case law.

[27] Rt. 2010 p. 944, staying the proceedings in order to await the outcome of the pending case C-447/09 *Prigge*. Just as the cases *Nye Kystlink* and *Bottolvs*, *CHC Norway* concerns the interpretation of the ban against age discrimination in Directive 2000/78/EC and appears as such not to be a candidate for a reference to the EFTA Court (but see the reservation made *supra*, note 25).

year and against the will of one of the parties to the case, in order to make sure that Norwegian law is interpreted and applied in conformity with ECJ case law, is hard to imagine.

In conclusion, the reception of ECJ case law in Norwegian courts is of such a character and scope that it is barely possible to identify any substantive differences between the effect of ECJ case law in Norway and in the EU Member States.[28] This is not to say that the Supreme Court, and certainly not lower Norwegian courts, always gets it right. As will appear from the following, questions may be raised as to the interpretation and application of EEA law in quite a number of cases. This is, however, hardly different from the situation in the EU Member States. The main finding for our present purposes is that Norwegian courts certainly do seem to try to get it right – there is little evidence to support any suggestion of reluctance towards the reception of ECJ case law.

II. The reception of EFTA Court case law in Norwegian courts

As to the reception of EFTA Court case law in Norwegian Courts, *Finanger (No. 1)* is still the leading case. At the outset, the Supreme Court (full court) stressed that the opinions of the EFTA Court under Article 34 SCA are of an advisory character only and that it is for the Supreme Court to decide for itself whether and to what extent they are to be followed. Still, referring to the fact that the EFTA States had found it appropriate to establish a separate court of justice for the EFTA-pillar, to the EFTA Court's expert knowledge of EEA law, to the rules of procedure opening up for input from the Commission, the EFTA Surveillance Authority and the EEA Member States and to the clear intentions of the Norwegian parliament when approving the EEA Agreement, the Supreme Court held that the case law of the EFTA Court is to be accorded 'significant weight' by Norwegian courts when interpreting the EEA Agreement.[29] Subsequent approval of these statements is found in important judgments such as *Paranova*, *Finanger (No. 2)*, *Gaming Machines* and *Pedicel*.[30]

Further, in the *Gaming Machines* case, the Appeals Selection Committee decided to stay the proceedings before the Supreme Court in order to await the judgment of the EFTA Court in an infringement action brought by the EFTA Surveillance Authority on essentially the same legal matter (the compatibility of the Norwegian monopoly on the operation on gaming machines with Articles 31 and 36 EEA). The infringement case was clearly brought as a

[28] So the main conclusion of *Finn Arnesen and Are Stenvik*, 'Internasjonalisering og juridisk metode – særlig om EØS-rettens betydning i norsk rett', Oslo 2009, at p. 142.
[29] Rt. 2000 p. 1811 (*Finanger (No. I*), at p. 1820.
[30] Cf. Rt. 2004 p. 904, paragraph 67; Rt. 2005 p. 1365, paragraph 52; Rt. 2007 p. 1003, paragraph 79; Rt. 2009 p. 839, paragraph 7.

response to the refusal of the Supreme Court to request an advisory opinion from the EFTA Court. Given that the Appeals Selection Committee was faced with the delicate situation of parallel proceedings in the Supreme Court and the EFTA Court on the very same legal matter, its decision to stay the proceedings is not fully comparable to the abovementioned decision in *CHC Norway* to await the preliminary judgment of the ECJ in *Prigge*. Nonetheless, the reasons offered to stay the proceedings in *Gaming Machines* are of significant interest: In the opinion of majority of the Appeal Selection Committee (justices Tjomsland and Aasland), the EFTA Court was the judicial body which would decide 'with finality' on whether the contested Norwegian legislation was in breach of Norway's obligations under the EEA Agreement.[31] Thus, it fell to the EFTA Court to give 'the authoritative answer' to the question of EEA law present in the case before the Supreme Court.

The general acknowledgment of the authority of the EFTA Court is followed up by the Supreme Court in its interpretation and application of EEA law in concrete cases. Importantly, there are no examples of Norwegian courts, be it the Supreme Court or lower courts, deviating from advisory opinions obtained from the EFTA Court.[32]

Out of a total of 33 separate cases in which Norwegian courts have obtained advisory opinions from the EFTA Court,[33] as many as 16 were settled in the wake of the EFTA Court's answer. In most of these cases it seems that the EFTA Court's reply was of such a character that the claim in the main case before the Norwegian court was either accepted by the defendant or given up by the plaintiff. This applies to at least two out of the remaining 17 cases too – both in *Astra* and in *Fokus Bank* the proceedings before Norwegian courts continued only for reasons which had little do to with the EFTA Court's interpretation of EEA law.[34]

Out of the remaining 15 cases, there are several in which the party dissatisfied with the answer from the EFTA Court tried to persuade Norwegian courts not to follow it.[35] However, in no case have the objections to the EFTA Court's opinion been able to convince the receiv-

[31] Rt. 2005 p. 1598, paragraph 7 (my translation). As to the dissenting opinion of justice Skoghøy, se further *infra* section IV.
[32] See, in detail, the survey cited *supra* note 2, at pp. 88 ff.
[33] See the cases listed in the survey cited *supra* note 2, at p. 89, with the addition that the dispute giving rise to Case E-1/10 *Periscopus* too has now been settled out of court. Note further that the main proceedings in the cases E-16/10 *Philip Morris*, E-1/11 *Dr. A* and E-2/11 *STX Norway* are still pending before Norwegian courts (as of January 2012).
[34] In *Astra*, the plaintiff explicitly accepted the EFTA Court's interpretation of EEA law in Case E-1/98 *Astra* [1998] EFTA Court Report 140, but tried in vain to continue the proceedings before Borgarting Court of Appeal on other grounds. In *Fokus Bank*, the Norwegian government similarly accepted the EFTA Court's interpretation of Article 40 EEA in Case E-1/04 *Fokus Bank* [2004] EFTA Court Report 11, but held that it was still not applicable in Norwegian courts for reasons of Norwegian constitutional law! Frostating Court of Appeal was not convinced and the Government's appeal to the Supreme Court was later withdrawn.
[35] See, e.g., Rt. 1997 p. 1965 (*Eidesund*); RG 2000 p. 833 (*Ulstein*); RG 2000 p. 385 (*Nille*); Rt. 2000 p. 1811 (*Finanger No. 1*) and Rt. 2004 p. 904 (*Paranova*).

ing court. In some cases failed attempts to get the receiving court to deviate from the position of the EFTA Court have lead to an appeal, but with equally little success.[36]

The closest one gets to a case where some questions may be raised as to the loyal application of guidelines offered by the EFTA Court in an advisory opinion, is the judgment of Oslo District Court in *Ladbrokes*.[37] Arguably, the District Court's assessment of the proportionality of the Norwegian restrictions on gambling in this case appears somewhat more relaxed than suggested by the EFTA Court. The application of the proportionality principle is, however, so inextricably connected to the fact of the concrete case that it is difficult for outside observers to assess the District Court's judgment. And, further, the guidelines offered by the EFTA Court in *Ladbrokes* apparently suggested an even more thorough assessment of the proportionality of the national restrictions than did the ECJ in the subsequent case *Liga Portugesa*.[38]

Further, and of significant importance, Norwegian courts do not differentiate between advisory opinions obtained by themselves in the case at hand and other parts of EFTA Court case law, be it opinions given in other cases or judgments rendered in cases brought directly before the EFTA Court. The Supreme Court appears to be of the opinion that EFTA Court case law *in general* is to be accorded 'significant weight' by Norwegian courts.[39] In the seminal *Finanger (No. 2)* case, the Supreme Court (full court) in so many words accepted the EFTA Court's controversial finding of the principle of state liability as an inherent part of the EEA Agreement. Writing for a court which at this point was unanimous, justice Gussgard cited extensively from the EFTA Court's reasoning in *Sveinbjörnsdóttir*, repeated that the opinion of the EFTA Court was to be given 'significant weight' and simply added that she found the reasoning of the EFTA Court 'convincing'.[40]

As a result of this approach, even in cases where no reference is made to the EFTA Court, the abovementioned survey of the application of EEA law in Norwegian courts has revealed only one case in 17 years where a Norwegian court explicitly deviated from EFTA Court case law – the 2004 judgment from Oslo District Court in *KLM*.[41] Tellingly, this judg-

[36] See, e.g., Rt. 1997 p. 1965 (*Eidesund*); RG 2000 p. 833 (*Ulstein*); RG 2000 p. 385 (*Nille*).
[37] Judgment 3 October 2008 in Case No 04-091873TVI-OTIR/04.
[38] Case C-42/07 *Liga Portuguesa* [2009] ECR I-7633. Tellingly, Ladbrokes decided to withdraw its appeal to Borgarting Court of Appeal after the ECJ's judgment in *Liga Portuguesa*.
[39] See, in particular, Rt. 2007 p. 1003 (*Gaming Machines*), in which the previous assessment of the authority of advisory opinions of the EFTA Court was extended to the EFTA Court's judgment in an infringement case.
[40] Rt. 2005 p. 1365, paragraphs 46 ff.
[41] Judgment 2 July 2004 in Case No. 04-000806TVI-OTIR/07, in which Oslo District Court held the interpretation of Article 36 EEA in Case E-1/03 *EFTA Surveillance Authority v Iceland* [2003] EFTA Court Report 143 to be incompatible with the interpretation of what is now Articles 56 and 58 TFEU in Case C-92/01 *Stylianakis* [2003] ECR I-1291.

ment was appealed to Borgarting Court of Appeal, which decided to make a reference to the EFTA Court. This again prompted the Norwegian government to accept that the EEA law provision in question, Council Regulation 2408/92 on Access for Community carriers to intra-Community air routes, was indeed operative in Norwegian law, rendering the question on the relationship between the regulation and the main provision on free movement of services in Article 36 EEA void. Thus, no assessment equalling that of Oslo District Court is to be found in the subsequent judgments of the appellate courts.[42]

III. But: Persistent lack of referrals to the EFTA Court

Still, all is not well in the relationship between the EFTA Court and the Norwegian Supreme Court. In the 18 years of existence of the EEA Agreement, the Supreme Court has only decided to refer questions on the interpretation of EEA law to the EFTA Court on four occasions – *European Navigation*, *Finanger (No. 1)*, *Paranova* and the *Jet-ski* case. Out of these four, the Appeals Selection Committee withdrew its referral in *European Navigation* (as a consequence of the appellant withdrawing his appeal),[43] whereas the decision to refer in the *Jet-ski* case was reversed even before the request was sent to the EFTA Court (as it turned out that the jet-skies in question originated from outside the EEA).[44] Thus, in 18 years the EFTA Court has only twice been given the opportunity to answer questions on the interpretation of EEA law from the Supreme Court of Norway. It is cold comfort that the Supreme Court in both these cases, *Finanger (No. 1)* and *Paranova*, followed the opinions of the EFTA Court.[45]

Obviously, with only four requests in 17 years, there is no shortage of cases in which unresolved questions of EEA law has been raised before the Supreme Court without any such request beeing made. At first sight, some of these cases may be explained by the Supreme Court apparently applying its own, particularly lenient understanding of the notion of *acte clair*. The descision not to request an advisory opinion in the *Gaming Machines* case is illustrative: According to the Appeals Selection Committee, there was no reason to request an advisory opinion from the EFTA Court as the impact of EU/EEA law in the field of gaming

[42] See, ultimately, Rt. 2008 p. 738. In the wake of the government's admission before the Court of Appeal, the request for an advisory opinion from the EFTA Court was withdrawn. Thereafter, the case came to be one about repayment of unlawfully levied duties. Arguably, a second request to the EFTA Court concerning possible limitations of EEA law to the governments 'passing-on' defence would have been appropriate.
[43] Cf. the order of the president of the EFTA Court in Case E-5/97 *European Navigation* [1998] EFTA Court Report 59.
[44] Cf. the subsequent judgment of the Supreme Court reported in Rt. 2004 p. 834. It is noteworthy that one of the justices participating in the case, justice Lund, held that there was no reason to make a request to the EFTA Court even assuming that the case fell within the scope of the EEA Agreement, cf. his dissent in the decision to refer of 5 December 2003 (Case No. 2003/1094 and 2003/1095).
[45] Cf. Rt. 2000 p. 1811 and Rt. 2004 p. 904.

had to be considered 'largely resolved' through existing ECJ case law.[46] This assessment is impossible to reconcile with the ECJ's strict understanding of *acte clair* as established in *CILFIT* and subsequent case law.[47] Suffice to note that no less than nine EEA Member States found it apropriate to take part in the subsequent infringement case before the EFTA Court[48] and that the ECJ has referred later cases raising similar questions to its Grand Chamber.[49] Further, one is bound to ask why a case allegdly concerning already resolved legal questions was referred to the Supreme Court at all, not to mention the decision ot the Chief Justice to refer the case to the full court.[50] On top of everything, the Supreme Court itself later described the case as one involving 'difficult legal questions of major significance' in its descision to exempt the plaintiffs from liability for the government's costs.[51] Still, the reasons offered by the Appeals Selection Committee in *Gaming Machines* could be understood as implying that it would request an opinion from the EFTA Court in a case in which a question of EEA law even by its own very lenient standards could not be considered as *acte clair*.

However, other cases clearly show that the Supreme Court under no circumstance feel obliged to refer questions of EEA law to the EFTA Court. Particularly illustrating is the *Finanger (No. 2)* case from 2005, in which the Supreme Court (full court) split 9-4 not only over the concrete asessment of the case, but also over the fundamental question of the role of discretion in EEA law on State liability for defective implementation of directives.[52] The plaintiff had urged for a request to be made to the EFTA Court, but the Supreme Court could not be convinced. Still, and of significant importance, the subsequent outcome of the case shows that there is no basis for any suggestion that the Supreme Court kept the case to itself in order to avvoid an unwelcome answer from Luxembourg: The majority quashed the judgment of the Borgarting Court of Appeal, upholding the judgment of the Oslo District Court awarding Ms. Finanger damages. The case could be argued both ways and it is thus interesting that a rather clear majority of the Supreme Court ruled against the State – evidence from state liability cases from other EEA Member States seem to suggest that this is not always the case.[53]

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[46] Decision of the Appeals Selection Committee 17 October 2005.
[47] Case 281/81 *CILFIT* [1982] ECR 3415, paragraphs 14 ff.
[48] See Case E-1/06 *EFTA Surveillance Authority v Norway* [2007] EFTA Court Report 8.
[49] See, e.g., Case C-42/07 *Liga Portuguesa* [2009] ECR I-7633.
[50] This decision was later reversed in the wake of the EFTA Court's judgment in Case E-1/06 *EFTA Surveillance Authority v Norway* [2007] EFTA Court Report 8.
[51] See Rt. 2007 p. 1003, paragraph 110.
[52] Rt. 2005 p. 1365.
[53] See *Carl Baudenbacher*, 'The implementation of decisions of the ECJ and of the EFTA Court in the Member States' domestic legal systems' 40 Texas International Law Journal (2005) 383-416, at 407 ff.

Earlier examples of the Supreme Court deciding on its own questions of EEA law which it itself, explicitly or implicitly, recognised as beeing unresolved, may be found in cases such as *Spets* and *Hunter* (both concerning Directive 86/653/EEC on commercial agents) as well as *God Morgon* and *Gule Sider* (both concerning the Trade Mark Directive).[54] More recent examples are found in two important judgments concerning EEA rules on consumer protection – *Jato v Solbakken* from 2006 (known in Norway as the "boot heel-case") and *Sandven v Westrum* from 2010.[55] The former case concerned interpretation of Article 3 (3) of Directive 1999/44/EC on the sale of consumer goods, whereas the latter raised questions as to the understaning of the concept "distance contract" as defined in Article 2 (1) of Directive 97/7/EC on the protection of consumers in respect of distance contracts. In both cases the Supreme Court appears to have got it right, but in neither could the relevant questions of EEA reasonably be held to be *acte clair*. The same goes for *Otterstad*, a 2008 judgment concerning the possibility of reducing compensation to a passenger riding in a car driven by an intoxicated driver as a consequence of contributory negligence.[56] The EFTA Court dealt with this question in *Finanger*, holding that it would be incompatible with the Motor Vehicle Insurance Directives if compensation was to be reduced in a way which was disproportionate to the contribution to the injury by the injured party.[57] Thus, in essence, *Otterstad* concerned the concrete implications of this assessment. The plaintiff urged the Supreme Court to ask the EFTA Court for more detailed guidelines, but in vain. However, just as in *Finanger (No. 2)*, there followed a rather 'EEA-friendly' judgment, where the rather harsh reduction imposed by Agder Court of Appeal (60 %) was reduced to 40 % (close to the 30 % suggested by the plaintiff himself).

Two even more recent examples are found in the judgments *Edquist* from 2010 and *Tine* from 2011.[58] *Edquist* is to a certain extent the Norwegian parallell to the English *Test Claimants* cases[59], raising questions of repayment of taxes levied in breach of EU/EEA law and, alternatively, State liability (as well as questions on statutory limitation and procedural

[54] Rt. 1999 p. 569; Rt. 2001 p. 1390; Rt. 2002 p. 391; Rt. 2005 p. 1601. On these and other cases such as Rt. 1997 p. 1954 (*Løten*), Rt. 1999 p. 393; Rt. 1999 p. 977 (*Nemko*) and Rt. 2001 p. 248 (*Olderdalen ambulanse*), see *Henrik Bull*, 'European Law and Norwegian Courts', in: Müller-Graff/Selvig (eds), The Approach to European Law in Germany and Norway, Berlin 2004, pp. 95-114, at 112 ff.
[55] Rt. 2006 p. 179 and Rt. 2010 p. 1580.
[56] Rt. 2008 p. 453.
[57] Case E-1/99 *Finanger* [1999] EFTA Court Report 119, paragraph 34. The ECJ followed suit in Case C-537/03 *Candolin* [2005] ECR I-5745 and Case C-356/05 *Farrell* [2007] ECR I-3067.
[58] Rt. 2010 p. 1500 and judgment 22 June 2011 in Case 2010/1947 (nyr).
[59] Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107; Case C-201/05 *Test Claimants in the CFC and Dividend Group Litigation* [2008] ECR I-2875.

time limits). Just as the English *Test Claimants* cases, *Edquist* was choosen as a test case, with proceedings in more than 100 similar cases stayed in order to await the outcome. In light of the ECJ's assessment in the *Test Claimants* cases, it was fairly evident that the treshold of a sufficient serious breach was not met in *Edquist* either.[60] Still, the case raised difficult questions concerning the possible impact of the principle of equivalence as the private parties argued that established Norwegian law on State liability offered better protection in comparable situations. Their plea for a request to the EFTA Court was, however, not heard by the Supreme Court.

By contrast, in *Tine*, the first competition law case concerning allegded abuse of a dominant position ever to be heard by the Supreme Court, the parties reportedly agreed not to ask for a request to be made to the EFTA Court. As the allegded abuse was deemed not to have any effect on inter-state trade, the case fell outside the scope of Article 54 EEA. Still, as Section 11 of the Norwegian Competition Act mirrors Article 54 EEA and the case raised several unresolved legal questions, it may be argued that a request to the EFTA Court would have been appropriate.[61]

The list of cases in which unresolved questions of EEA law has been raised before the Supreme Court without any request beeing made to the EFTA Court could easily be prolonged. However, the examples mentioned already seem more than sufficient to support the conclusion that there is a persistent reluctance in the Supreme Court as to the use of Article 34 SCA.[62]

IV. Including lower Norwegian courts in the picture

If broadened to encompass all Norwegian courts, a somewhat less disturbing picture emerges:

Fig. 1: Norwegian referrals to the EFTA Court 1994-2011

		EFTA Court Case No.	Referring court/tribunal
1994	2	E-8/94 Forbrukerombudet v Mattel Scandinavia AS E-9/94 Forbrukerombudet v Lego Norge AS	Market Council Market Council
1995	2	E-2/95 Eidesund v Stavanger Catering AS E-3/95 Langeland v Norske Fabricom AS	Gulating Court of Appeal Stavanger City Court
1996	5	E-2/96 Ulstein og Røiseng v Asbjørn Møller E-3/96 Ask v ABB Offshore Technology AS E-4/96 Gundersen v Oslo municipality	Inderøy District Court Gulating Court of Appeal Oslo City Court

[60] See, e.g., *Test Claimants in the FII Group Litigation*, cited *supra* note 58, paragraph 215 and *Test Claimants in the Thin Cap Group Litigation*, cited *supra* note 58, paragraph 121.
[61] The fact that the case fell outside the scope of Article 54 EEA would not have prevented the EFTA Court from answering questions on the interpretation of that provision, cf. the ECJ's approach in such cases as laid down in Case C-297/88 *Dzodzi* [1990] ECR I-3763, paragraphs 29 ff.
[62] Cf. Graver, cited *supra* note 19, at p. 89 ('a certain reluctance').

		E-5/96 Ullensaker municipality v Nille AS E-6/96 Tore Wilhelmsen AS v Oslo municipality	Borgarting Court of Appeal Oslo City Court
1997	5	E-1/97 Gundersen v Oslo municipality E-2/97 Mag Instrument Inc v California Trading Comp Norway E-3/97 Jæger v Opel Norge AS E-5/97 European Navigation Inc v Star Forsikring AS E-8/97 TV 1000 Sverige AB v Norway	Oslo City Court Fredrikstad City Court Nedre Romerike Distr Court Supreme Court Oslo City Court
1998	2	E-1/98 Norway v Astra Norge AS E-4/98 Blyth Software Ltd. v AlphaBit AS	Borgarting Court of Appeal Oslo City Court
1999	1	E-1/99 Storebrand Skadeforsikring AS v Finanger	Supreme Court
2000	2	E-2/00 Allied Colloids v Norway E-8/00 LO v KS	Oslo City Court Labour Court
2001	3	E-6/01 CIBA v Norway E-7/01 Hegelstad v Hydro Texaco AS E-8/01 Gunnar Amundsen AS v Vectura AS	Oslo City Court Gulating Court of Appeal Borgarting Court of Appeal
2002	1	E-3/02 Paranova AS v Merck & Co Inc.	Supreme Court
2003	-		
2004	4	E-1/04 Fokus Bank ASA v Norway E-2/04 Rasmussen v Total E&P Norge AS E-3/04 Athanasios v Norway E-4/04 Pedicel AS v Norway	Frostating Court of Appeal Gulating Court of Appeal Gulating Court of Appeal Market Council
2005	-		
2006	2	E-3/06 Ladbrokes Ltd. V Norway E-4/06 KLM Royal Dutch Airlines v Norway	Oslo District Court Borgarting Court of Appeal
2007	5	E-7/07 Seabrokers AS v Norway E-8/07 Nguyen v Norway E-9/07 L'Oréal Norge AS v Per Aarskog AS E-10/07 L'Oréal Norge AS v Nille AS and Smart Club AS E-11/07 Rindal v Norway	Stavanger District Court Oslo District Court Follo District Court Oslo District Court Borgarting Court of Appeal
2008	1	E-1/09 Slinning v Norway	Oslo District Court
2009	-		
2010	2	E-1/10 Periscopus v Oslo Børs and Erik Must AS E-16/10 Philip Morris Norway AS v Norway	Oslo District Court Oslo District Court
2011	2	E-1/11 Dr. A v Norway E-2/11 STX Norway Offshore AS v Norway E-15/11 Arcade Drilling v Norway	Norwegian Appeal Board for Health Personnel Borgarting Court of Appeal Oslo District Court

If including the three requests made in 2011, the total number of Norwegian referrals to the EFTA Court 1994-2011 is 40. Out of these, 36 (90%) stem from lower courts or tribunals.

Still, the more cooperative attitude of the lower courts has only heightened the number of requests for advisory opinions from Norwegian courts to an average just over two pro anno. If compared with the number of preliminary references to the two EEA courts from the other Nordic EEA countries in the last ten years (2001-2010), the statistics are as follows:

Fig. 2: Preliminary references from the Nordic countries 2001-2010

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Total
Norway	3	1	-	4	-	2	5	1	-	2	18
Iceland	3	-	1	-	1	-	2	-	-	1	8
Denmark	5	8	3	4	4	3	5	6	3	10	51

Finland	3	7	4	4	4	5	5	4	2	6	44
Sweden	4	5	4	5	11	2	6	7	5	6	55

The numbers show that Danish, Finnish and Swedish judges, on average, annually contribute each with more than twice as many preliminary references to the ECJ as their Norwegian counterparts submit to the EFTA Court. If one takes into account that the Icelandic population only amounts to about 300 000, Icelandic judges too appear more willing to request advisory opinions from the EFTA Court. Now, importantly, as the scope of EU law is broader that that of EEA law, the numbers are not completely comparable as between the EU Member States Denmark, Finland and Sweden on the one hand and the EFTA States Iceland and Norway of the other. Still, even taking this into account, the differences are so substantial that it seems safe to submit that Danish, Finnish and Swedish judges appear more cooperative towards the ECJ than is their Norwegian counterparts towards the EFTA Court.[63]

Just as with the Supreme Court, there is no shortage of cases from the lower courts in which unresolved questions of EEA law has been decided without any request for an advisory opinion beeing made to the EFTA Court. This is not the proper occasion to go into the details, but the decisions not to refer in the three cases *European Naviagtion*, *KLM* and *Gaming Machines* merit particular attention: As mentioned above, the 2004 judgment from Oslo District Court judgment in *KLM* is the only case in which a Norwegian court has explicitly deviated from EFTA Court case law. According to the District Court, the interpretation of Article 36 EEA in Case E-1/03 *EFTA Surveillance Authority v Iceland* was incompatible with the ECJ's interpretation of what is now Articles 56 and 58 TFEU in *Stylianakis*.[64] The District Court chose to follow the ECJ, apparently even without considering the possibility to ask the EFTA Court for clarification! In *European Naviagtion* and *Gaming Machines*, on the other hand, the question of a possible preliminary reference to the EFTA Court was considered by Borgarting Court of Appeal, but ultimately rejected.[65] The decision in *European Navigation* is striking because the Court of Appeal subsequently held that the possible impact of EEA law upon the rules on security for costs in the Norwegian Act on civil procedure was too uncertain to justify disapplication of the latter![66] The decision in *Gaming Machines* is equally striking

[63] Unfortunately, ECJ statistics do not provide the information necessary in order to exclude preliminary references from national courts and tribunals in cases which fall outside the scope of the EEA Agreement.
[64] See *supra* note 41.
[65] See the decisions of 22 April 1997 (LB-1997-1) and of 26 August 2005 (LB-2005-5287).
[66] As mentioned *supra* note 43 and accompanying text, the case was ultimately brought before the Supreme Court. The Appeals Selection Committee decided to request an advisory opinion from the EFTA Court, but it was later withdrawn as the appellant withdrew his appeal. Still, the Court of Appeal's interpretation of Article 4

because this is a rare example of a case where both parties appearing before the court, the operators of gaming machines and the Norwegian government (!) alike, pleaded for a preliminary reference to the EFTA Court. Still, the presiding judge at the Court of Appeal simply stated that he did not see 'sufficient grounds' for such a reference. A subsequent application to the court to reverse that decision was not granted.

V. An attempt at understanding the lack of Norwegian referrals to the EFTA Court

Given the unequivocal wording of Article 34 SCA and the fact that the EEA Agreement itself does not foresee even the possibility of preliminary references to the EFTA Court, it seems that the Supreme Court is under no obligation to request advisory opinions from the EFTA Court.[67] Recourse to Article 6 (1) of the European Convention on Human Rights hardly alters this – as long as EEA-based civil rights and obligations are adequately protected by the national courts of the EFTA States, Article 6 (1) seems to be satisfied.[68]

Still, the lack of an obligation to refer hardly answers the question why the Supreme Court does not make use of its unequivocal *right* to turn to the EFTA Court. As the court itself, unfortunately, offers little or no reasons in its decisions, one is largely left to speculate.

As far as the inevitable delay of the national proceedings brought about by a preliminary reference is concerned, one should perhaps think that this would result in a higher number of referrals to the EFTA Court. After all, the average time it takes to receive an answer from the EFTA Court seems to be about 8 months, far better than the ECJ's average of 16 months in 2010.[69] Still, Norwegian courts take great pride in their status as the most efficient courts in Europe.[70] In civil cases, the average time of proceedings before the Supreme Court is as little as 6 months.[71] Even though the abovementioned decisions to request advisory opinions in *European Navigation*, *Finanger* and *Paranova* as well as the decisions to stay the proceedings in both *Gaming Machines* and *CHC Norway* do show that the Supreme Court will

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EEA in this case resulted in the EFTA Surveillance Authority threatening to bring an infringement action before the EFTA Court. The Norwegian rules on security for costs were then changend, with an exeption for EEA foreigners beeing introduced.

[67] For a different view, see *Skuli Magnusson*, 'On the Authority of Advisory Opinions – Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court' (2010) 13 Europarättslig Tidskrift pp. 528-551, deducing an obligation to refer from the general duty of loyal cooperation in Article 3 EEA.

[68] See *Fredriksen*, Europäische Vorlageverfahren und nationales Zivilprozessrecht, cited *supra* note 10, at p. 185.

[69] The latter number stems from the ECJ's Annual Report for 2010. As the EFTA Court does not publish a similar report, the former number stems from a survey of recent preliminary references decided by the EFTA Court.

[70] Cf. the 4th report of the European Commission for Efficiency of Justice (2010), available at www.coe.int/cepej.

[71] Cf. the 2010 Annual Report of the Norwegian Courts Administration, available at www.domstol.no. On average, it took the Appeals Selection Committee one month to decide whether or not to grant leave to appeal and then, if answered in the affirmative, another 4,8 months for the Supreme Court to judge on the merits. In criminal cases, the average time of proceedings before the Supreme Court is as little as three months.

not always let the goal of efficiency prevail, it might be that the Court is more sensitive to the delays brought about by a preliminary reference than is the courts of other EEA States.

Further, the work and appurtenant costs related to a preliminary reference is surely also taken into consideration. Still, these factors are hardly sufficient alone to explain why Norwegian courts in general, and the Supreme Court in particular, refer far fewer cases to Luxembourg than do the courts in the other Nordic EEA States. It is possible, however, that the Norwegian legislator's emphasis on proportionality as a general principle of civil procedure in the new 2005 Dispute Act has lead Norwegian courts to think twice before requesting an advisory opinion from the EFTA Court: According to Section 1-1, the procedure and the costs involved shall be 'reasonably proportionate to the importance of the case'. If not read in an EEA-friendly manner, this principle could be understood as raising the threshold for a reference in cases where the value of the subject matter of the action is rather low (as, e.g., in most consumer protection cases).

Assuming that considerations of delays, work and costs alone are not sufficient to explain why Norwegian courts refer far fewer cases to Luxembourg than do the courts in the other Nordic EEA States, it is tempting to add the specificities of the judicial architecture of the EEA Agreement as an EEA specific explanation. As the EFTA Court consistently (and commendably) has let the objective of a homogeneous EEA prevail over any temptation it may have had to pursue its own interpretation of the EEA Agreement, the result is, it is submitted, the *de facto* acknowledgment of the ECJ as the supreme authority on the interpretation of (substantive) EEA law.[72] In the EFTA Court's own words in *L'Oréal*: the goal of homogeneity 'calls for an interpretation of EEA law in line with new case law of the ECJ regardless of whether the EFTA Court has previously ruled on the question'.[73]

Particularly illustrating from the perspective of Norwegian courts are the circumstances in *Finanger*. This being the very first case where the Supreme Court obtained an advisory opinion from the EFTA Court, it may only be describes as unfortunate that the ECJ rendered its not particularly clear judgment in *Ferreira* before the Supreme Court could hand down its final judgment.[74] Rather than straightforward application of the EFTA Court's opinion in the case, the Supreme Court found itself faced with submissions on contradicting case law from the two EEA Courts. The Supreme Court eventually managed to distinguish the cases, but only after a rather thorough analysis of *Ferreira*. As stated by Henrik Bull, its willingness to

[72] See further *Fredriksen*, 'One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area', cited *supra* note 12.
[73] Joined cases E-9/07 and E-10/07 *L'Oréal* [2008] EFTA Ct. Rep. 258, paragraph 29.
[74] Case C-348/98 *Ferreira* [2000] ECR I-6711.

go into detailed analysis of *Ferreira* certainly indicates that the Supreme Court would be prepared 'to opt for the ECJ version rather than the EFTA version of EEA law' if convinced that there was indeed a divergence in the case law of the two EEA courts.[75]

Intent to side with the ECJ in a case of diverging case law may arguably also be inferred from the Supreme Court's recent judgment in *Edquist*. Here, the Supreme Court found it appropriate to note as an obiter dictum that the EFTA Court had failed to convince the ECJ that international tax treaties must be excluded when determining the presence or absence of discrimination between resident and non-resident shareholders under Article 40 EEA/Article 63 TFEU. The Supreme Court added that it could thus be expected that the EFTA Court would be 'unable to maintain the views from the Fokus Bank case' if the same question would come up before it anew.[76]

Given this background, it is possible, perhaps even probable, that the Supreme Court asks itself how much there really is to gain from a preliminary reference to the EFTA Court and if the advantages outweigh the delay, work and cost entailed.

A related explanation for the low number of requests from Norwegian courts is the interests of the parties appearing before the national court. Even though there are several cases in which a (private) party has pleaded for a reference to be made, it is perhaps even more striking that this seems not have been the case in the majority of the abovementioned cases. It is certainly tempting to speculate that parties (and interveners) with an interest in a more general clarification of EU and EEA law, such as, e.g., The Norwegian Competition Authority in *Tine* or The Norwegian Consumer Council and The Federation of Norwegian Commercial and Service Enterprises as interveners on each their side in the "boot heel-case", would be keener on preliminary references if the recipient was the ECJ rather than the EFTA Court.

In cases against the state in which the private party nonetheless do ask for a preliminary reference to be made, the mostly firm opposition to any such suggestion from the Norwegian Attorney General for Civil Affairs has to be taken into account as a contributing factor.[77] Even though the decision of Borgarting Court of Appeal in *Gaming Machines* shows that even agreement among the parties need not be sufficient, the number of Norwegian referrals would surely be higher if the Government lawyers were to support rather than to oppose such pleas. However, with *Fokus Bank* and, reportedly, also *Slinning*, *Rindal* and, at least partially, *Nguyen* as commendable exceptions, most preliminary references are made against the

[75] *Bull*, cited *supra* note 54, at 111.
[76] Rt. 2010 p. 1500, paragraph 113.
[77] Cf. *Bull*, cited *supra* note 54, at 113.

advice of the Attorney General. The usual argument put forward by the Government lawyers is that the competence of the EFTA Court under Article 34 SCA is limited to the general interpretation of EEA law whereas the case at hand typically raises questions of application of EEA law only, thereby implying that the EFTA Court will be unable to offer more detailed guidelines than those already found in ECJ case law. Apparently, it was this line of argument which convinced the Supreme Court not to request an advisory opinion in *Gaming Machines*. The fact that the EFTA Court and the ECJ both clearly draw the distinction between interpretation and application differently, arguably stretching the notion of 'interpretation' in order to provide the referring court or tribunal with a truly helpful answer, is apparently disregarded as examples of the two EEA courts usurping competences which belong to the national courts.[78]

As stated by Henrik Bull, it is tempting to speculate that the Attorney General hopes that his arguments in favour of the Government's position would be more persuasive in the ears of Norwegian judges who are not themselves experts in EEA law, than in the ears of judges in Luxembourg.[79] However, if this is indeed the case, it is of even greater importance to underscore that the survey of the application of EEA law in Norwegian courts offers very little support for any suggestion that such a strategy is succeeding – Norwegian courts do keep cases to themselves, but apparently not in order to avvoid unwelcome answers from the EFTA Court.[80]

VI. Assessing the Supreme Court's approach

As far as the reception of ECJ and EFTA Court case law is concerned, the open and EEA-friendly approach of the Supreme Court merit praise. As to its relationship to the latter court, however, the persistent lack of referrals is, it is submitted, highly unfortunate.

As to the possible reasons set out above, none of them appears sufficient to justify the current situation. The delay, work and cost entailed with a preliminary reference should at least be disregarded in situations in which the parties appearing before a Norwegian court ask for a request to be made. In cases against the state, the willingness of the private party to await an answer from the EFTA Court and, if need be, to pay the extra costs, should be suffi-

[78] Accordingly, in cases where a Norwegian court nonetheless decide to request an advisory opinion, the Attorney General will regularly argue for the questions to be worded in very general terms. And further, once before the EFTA Court, the Government will remind the Court of its limited competences under Article 34 SCA, see, most recently, the Norwegian Governments observations in Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Court Report 234 (as summarised in paragraph 76 of the Report for the Hearing) and Case E-16/10 *Philip Morris Norway*, judgment 12.9.2011 (nyr), para.58.

[79] *Bull*, cited *supra* note 54, at 113.

[80] Cf. the (general) allegation made by *Carl Baudenbacher*, 'The EFTA Court in Action', Stuttgart 2010, at p. 24.

cient to eliminate this argument. Further, the principle of proportionality as an inherent part of Norwegian civil procedure ought to be understood in an EEA-friendly manner. Actually, proportionality could be invoked in favour of a reference being made already by the first instance court, thereby possibly removing the need for a time consuming and costly appeal to the Court of Appeal (or even further to the Supreme Court). In any case, particular attention should be brought to the judgment of the European Court of Human Rights in *Pafitis and others v Greece*, in which the Strasbourg court held that the period of time spent on a preliminary reference to the ECJ is to be disregarded in the assessment of whether the national proceedings is concluded within a reasonable time as guaranteed under Article 6 (1) ECHR.[81] It may be inferred from this judgment that the goal of efficient justice may not be used as an argument against a preliminary reference, be it to the ECJ or to the EFTA Court.[82]

Further, as far as the usefulness of an advisory opinion is concerned, it is submitted that this is, on average, far bigger than the few cases brought before the Supreme Court may have lead the latter to think. It is a unavoidable consequence of the national court system that the cases ultimately brought before the Supreme Court are the ones where it either appears questionable whether the EFTA Court really got it right or where the case is of such a character that all the EFTA Court could do was to offer some guidelines to the national courts (typically in cases depending upon concrete application of the proportionality principle). Thus, the majority of cases where the answer received from the EFTA Court is such that there is not much left to say (see *infra* section II) are never brought to the attention of the Supreme Court.

Somewhat paradoxically, the best line of arguments in favour of a preliminary reference to the EFTA Court is the one offered by the full Supreme Court itself when explaining why EFTA Court case law ought to be given 'significant weight' (see *infra* section II).

Quite possibly, the Supreme Court would prefer to have direct access to the ECJ, enabling it to participate more directly in the 'judicial dialogue' through which EU and EEA law evolves. However, given that it seems neither constitutionally nor politically possible for Norway to submit to the jurisdiction of the 'foreign judges' of the ECJ under Article 107 EEA,[83] the Supreme Court ought to recognise that its only possibility to have its voice heard on the European stage currently, and for the forseeable future, runs through requests to the EFTA Court for advisory opinions.

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[81] Case *Pafitis and others v Greece*, judgment of 26 February 1998, Reports 1998-I, at paragraph 95.
[82] In Case E-2/03 *Asgeirsson* [2003] EFTA Court Report 185, the EFTA Court rightly held *Pafitis* to be applicable to preliminary references under Article 34 SCA as well.
[83] See further *infra* Section C.

Further still, it should not be overlooked that a reference to the EFTA Court may function as a sort of insurance against possible reactions in cases in which a Norwegian court is in doubt as to the proper the interpretation of EEA law. At worst, misapplication of EEA law may lead to an infringement action being brought before the EFTA Court by the EFTA Surveillance Authority or to a claim against the state for damages. As to the former, a defeat in an infringement action brought about by a Norwegian court decision may under Norwegian procedural law lead to the reopening of the case.[84] As to the latter, the conscious decision not to refer in a situation in which the national court itself acknowledges that it is uncertain about the correct interpretation of EEA law, certainly has to be taken into account when assessing whether a breach of EEA law committed by a national court is to be regarded as sufficiently serious to entail liability for the State in question.[85]

True enough, the Supreme Court may object that its track record in the field of EEA law is a fine one and that essentially what matters to economic operators doing business in Norway is that their EEA rights are adequately protected, not in which court judicial protection is offered. Still, as is well known, justice has not only to be done, it has to be seen to be done. In the EEA setting, this general statement may be understood as to encompass not only the perspective of private parties, but also the perspective of other Contracting Parties to the EEA Agreement. From this perspective, it is submitted, the Norwegian Supreme Court ought to acknowledge that it may still matter in a broader context whether judicial protection is offered in Norwegian courts alone or in cooperation with the EFTA Court: Perhaps not so much for the parties in the concrete case, but for the continued success of the EEA Agreement.

From the perspective of the ECJ, the EFTA Court has proved to be a reliable and independent guarantor of the EFTA States' fulfilment of their obligations under the Agreement.[86] Under the principle of reciprocity referred to in the fourth recital in the preamble of the EEA Agreement, this may impact upon the ECJ's contined willingness to grant market operators from the EFTA States the same rights as their EU competitors. Having studied the development in ECJ's approach to EEA law from the deep scepticism voiced in

[84] See further *Fredriksen*, Europäische Vorlageverfahren und nationales Zivilprozessrecht, cited *supra* note 10, at p. 308 ff.
[85] See, as far as EU law is concerned, Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 55. The fact that Article 34 SCA entails no obligation of national courts to request an advisory opinion from the EFTA Court seems of little relevance in this context – from the perspective of tort law, the decisive point as to the question of whether the error of law was excusable or inexcusable (*Köbler*, paragraph 55) ought to be that the national court had a clear and viable alternative which would have prevented a visible risk of judicial wrongdoing from materialising.
[86] Similarily, *Martin Johansson and Sven Nordberg*, 'EFTA-domstolen – Garant för det homogena EES' [The EFTA Court – Guarantor for the homogeneous EEA'], 14 Europarättslig Tidskrift (2011) 379-392.

Opinion 1/91 and, albeit to a lesser extent, in Opinion 1/92, through a phase of apparent softening (and, possibly, internal discussion) to gradual recognition of the possibility to realise the Agreement's objective to extend the internal market to the EFTA States, I am of the firm belief that the EFTA Court's dynamic and integration friendly interpretation of EEA law has been a contributory factor of significant importance.[87]

Thus, even if the Supreme Court may be right in its apparent assessment of its own capability to predict the development in ECJ case law with the same accuracy as does the EFTA Court (although this may be questioned, not least due to the EFTA Court's expert knowledge of EEA law and to the rules of procedure opening up for input from the Commission, the EFTA Surveillance Authority and the EEA Member States), it is difficult for the other Contracting Parties (and the ECJ) to assess for themselves whether this is (and remains to be) the case. The position of the EFTA Court now appears to be of such a nature that even in a hypothetical case in which it ends up accepting national restrictions on the fundamental freedoms of the EEA Agreement which should have been disallowed pursuant to subsequent ECJ case law, no one will suspect it of wilful contribution to the feared 'cherry picking' of the EFTA States. By contrast, the 'margin of error' of the Supreme Court of Norway is probably of a more limited nature – rightly or wrongly, there is something slightly suspicious about a supreme court refusing to cooperate with the EEA judges in Luxembourg.

C. Outlook

Even more than 18 years after the entry into force of the EEA Agreement, the relationship between the EFTA Court and the Supreme Court of Norway has yet to find its form. Apparently, there is at present some disagreement within the Supreme Court as to its attitude towards the EFTA Court.[88] Interestingly, there is currently an unprecedented generation change at the Supreme Court: Out of the 20 current justices of the court, thirteen has been appointed in the last six years (of which nine in the last three years!). Out of the thirteen justices deciding the *Finanger (No. II)* case in 2005, only five are still at the Court. Further, it is noteworthy that the Supreme Court only in 2011 got it first member with an EEA law background when the former Norwegian judge at the EFTA Court, Henrik Bull, was appointed to the bench.

[87] *Fredriksen*, 'The EFTA Court 15 Years On', cited *supra* note 2.
[88] So the assessment of justice *Jens Edvin A. Skoghøy* in his book Tvisteløsning, Oslo 2010, at p. 134, referring to 'differing opinions' within the Supreme Court and stating that the decision of the Appeals Selection Committee in Rt. 2005 p. 1598 to stay the proceedings in the *Gaming Machines* case in order to await the outcome of the infringement case before the EFTA Court 'by no means' is to be seen as authoritative clarification of the relationship between the Supreme Court and the EFTA Court.

It remains to be seen if the many new justices will bring about changes. If not, it may be argued that the legislator ought to intervene. However, this is likely to bring up difficult constitutional and political questions as to the Supreme Court's relationship to the two EEA Courts.

From the perspective of homogeneity, there is no denial that the best solution would be to open up for preliminary references to the ECJ under Article 107 EEA. To the EU, this would be the ultimate proof of the willingness of Norway and its courts to play by the rules of the internal market, whereas it from the perspective of the Supreme Court would grant direct access to the institution entrusted with the last word on the interpretation and judicial development of the internal market *acquis* to which Norway is subject. Still, if limited to a mere possibility to turn to the ECJ, it might be feared that the much longer delay caused by a preliminary reference to the ECJ (as compared to one to the EFTA Court) will limit Norwegian courts' use of Article 107 EEA considerably. Further, in a situation where the EFTA Court would retain competence in all direct actions (including infringement actions against Norway) as well as to answer request for advisory opinions from Lichtenstein and Icelandic courts, one would still have to live with the immanent possibility of conflicting case law. And further still, it has to be taken into account that use of Article 107 EEA would represent a huge blow to the EFTA Court which could have unforeseen consequences for a complex judicial architecture which after all seems to be working remarkably well. In any case, and even omitting the controversial question whether Articles 88 and 90 of the Norwegian constitution would allow for binding judgments from the 'foreign judges' of the ECJ,[89] the Norwegian government has made very clear that use of Article 107 EEA is out of the question for political reasons alone.[90]

In the alternative, the legislator could introduce procedural provisions forcing Norwegian courts to reconsider their relationship to the EFTA Court. A gentle version would be the introduction of an obligation to at least give reasons when rejecting petitions for a preliminary reference, preferably with clarification in the *travaux préparatoires* as to the effect that the principle of procedural proportionality is not to be understood as a hindrance towards the use of Article 34 SCA. Further, it would probably be helpful if the legislator was to state in general that Norwegian courts ought to contribute to the EFTA Court getting a sufficient number of cases in order to fulfil its role as guarantor of the EFTA States' fulfilment of their EEA

[89] See on this *Fredriksen*, Europäische Vorlageverfahren und nationales Zivilprozessrecht, cited *supra* note 10, at 74 ff.

[90] See the assessment of the Government on the occasion of the Norwegian parliament's ratification of the EEA Agreement; Royal Proposition No. 100 (1991-1992), at p. 340.

obligations. If this proves insufficient to raise the number of references, the possibility of introducing an obligation to refer unresolved questions of EEA law to the EFTA Court would be the last resort.[91] As long as the answers received from the EFTA Court are not formally binding, there seems to be no constitutional hindrance towards such an obligation. Still, the introduction of an obligation to cooperate with the EFTA Court would hardly be welcomed by the Supreme Court and would as such be a rather sensitive matter. A far less radical, but probably just as effective solution would quite simply be for the Norwegian government to reconsider its present opposition to preliminary references to the EFTA Court.

[91] See *Fredriksen*, Europäische Vorlageverfahren und nationales Zivilprozessrecht, cited *supra* note 10, at 368.