

The Troubled Relationship between the Supreme Court of Norway and the EFTA Court – Recent Developments

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I. Introduction – ‘New’ Courts, Old Problems

Given the EEA Agreement’s near impossible goal of extending the internal market to the EFTA States without the latter having to relinquish legislative, administrative or judicial sovereignty to the EU, the assessment almost 20 years after its entry into force in 1994 can only be that the Agreement has worked, and continues to work, well.¹ A significant part of the credit for this accomplishment is due to the many courts which are entrusted with the interpretation and application of EEA law – the EFTA Court, the Court of Justice of the EU (ECJ) and the national courts of the 30 EEA States. In general, the various courts have all, albeit arguably to a greater or lesser extent, contributed towards the realisation of a homogeneous European Economic Area with equal conditions of competition and respect of the same rules (Article 1 EEA).² It may therefore seem unfair to devote this paper to the troubled relationship between the Supreme Court of Norway and the EFTA Court. As will emerge from the following discussion, the difficulties in the relationship between the judges in Oslo and Luxembourg are primarily of an institutional character and thus, fortunately, of limited practical interest for the judicial protection of EEA based rights and obligations. Still, the relationship between the EFTA Court and the highest court of the largest of the remaining EEA/EFTA States merits attention in its own right. This is particularly so because both courts in recent years have seen

¹ See e.g. the recent assessment of the EEA Council in ‘Conclusions of the 38th meeting of the EEA Council’, Brussels, 26 November 2012 (EEE 1610/12); of the EU Council in ‘Council conclusions on EU relations with EFTA countries’, Brussels, 12 December 2012 as well as that of the Norwegian Government in its 2012 White Paper on the EEA Agreement and Norway’s other agreements with the EU (Meld. St. 5 (2012-2013)). See further the similar conclusions in the final report of the independent Norwegian EEA Review Committee, ‘*Inside and Outside—Norway’s Agreements with the European Union*’, Official Norwegian Reports 2012: 2. But note also the somewhat more critical assessment of the EU Commission in its Staff Working Document ‘A review of the functioning of the European Economic Area’, Brussels, 7 December 2012 (SWD(2012) 425 final).

² See, in general, the contributions in EFTA Court (Ed.), *Judicial Protection in the European Economic Area*, Stuttgart 2012.

significant changes in their compositions and, thereafter, handed down important decisions which shed new light upon their understanding of EEA law in general, and their mutual relationship in particular. As far as the Supreme Court of Norway is concerned, an unprecedented generation change has taken place over the last couple of years. Out of the 20 Justices of the Court, twelve have been appointed in the last six years (of which nine were appointed in the last four years). As far as the EFTA Court is concerned, two of its three members were appointed as recently as in 2011. Thus, in a sense one may speak of two ‘new’ courts faced with ‘old’ problems concerning their mutual relationship.

The current contribution is limited to some thoughts on developments in the case-law of the Supreme Court of Norway and the EFTA Court in the last couple of years. It builds on my earlier research into the relationship between the ECJ, the EFTA Court and Norwegian courts, to which reference is made for an overview of the complex judicial architecture of the EEA and an analysis of earlier case-law from the said courts.³

II. Recent Developments on the Interpretation and Use of Article 34 of the Surveillance and Court Agreement

To some extent, the difficulties in the relationship between the Supreme Court of Norway and the EFTA Court may all be linked to Article 34 of the Surveillance and Court Agreement (SCA), which vests the EFTA Court with jurisdiction to answer questions from the national courts of the EFTA States concerning the interpretation of the EEA Agreement. As is well known to EEA lawyers, Article 34 SCA differs from its model in Article 267 in the Treaty on the Functioning of the European Union (TFEU) in two important ways: Unlike the situation in the EU, where Article 267 TFEU obliges national courts of last instance to refer unresolved questions of EU law (and thus EEA law) to the ECJ, Article 34 SCA as such imposes no corresponding obligation on the national courts of the EFTA States to turn to the EFTA Court. And secondly, the answers received from the EFTA Court are formally only advisory opinions on the interpretation of the EEA Agreement, not binding judgments. This section will

³ See, in English, ‘The EFTA Court Fifteen Years On’ (2010) 59 *International and Comparative Law Quarterly* 731–760; ‘One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area’, *Nordic Journal of International Law* 79 (2010) pp. 481-499 and ‘The Two EEA Courts – a Norwegian Perspective’, in: EFTA Court (Ed.), *Judicial Protection in the European Economic Area*, Stuttgart 2012, pp. 187-210.

deal with recent developments concerning possible limitations of the freedom of the national courts of the EFTA States to decide on whether to make a reference to the EFTA Court. Recent developments concerning the authority of the opinions of the EFTA Court will be dealt with in section III below.

Despite the clear wording of Article 34 SCA some authors argue that an obligation to refer unresolved questions of EEA law to the EFTA Court may be deduced from other sources of EEA law – first and foremost the general duty of loyal cooperation under Article 3 EEA and reasons of reciprocity with regard to judicial protection of rights in the EU and in the EFTA-pillar of the EEA.⁴ Support for such a conclusion may perhaps also be deduced from the new-found EEA law ‘principle of procedural homogeneity’, whose applicability – at least in the opinion of the EFTA Court – ‘cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law’.⁵ According to some, an obligation to turn to the EFTA Court may further be deduced from the principle of access to justice enshrined in Article 6 § 1 of the European Convention on Human Rights (ECHR).⁶ Still, a clear majority of EEA commentators are of the opinion that even though the national courts of the EFTA States *ought to* refer more cases to the EFTA Court, they are not legally *obliged* to do so.⁷

⁴ See, in particular, the EFTA Court’s former registrar Skúli Magnússon in his article ‘On the Authority of Advisory Opinions’, *Europarättslig Tidsskrift* 13 (2010) pp. 528-551 and the EFTA Court’s current president Carl Baudenbacher in his contribution ‘Some Thoughts on the EFTA Court’s Phases of Life’, in: EFTA Court (Ed.), *Judicial Protection in the European Economic Area*, Stuttgart 2012, pp. 2-28, at p. 14 f.

⁵ See Order of the President of 23 April 2012 granting the Commission leave to intervene in Case E-16/11 *EFTA Surveillance Authority v Iceland* (‘Icesave’), paragraph 32; later confirmed by the full Court in Case E-14/11 *DB Schenker v EFTA Surveillance Authority*, judgment of 21 December 2012 (not yet reported), paragraph 78.

⁶ See John Temple Lang, ‘The Duty of National Courts to Provide Justice in the EEA’, in: EFTA Court (ed.), *Judicial Protection in the European Economic Area*, Stuttgart 2012, pp. 100-135.

⁷ See e.g. Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice*, Oxford 2010 p. 17; Henrik Bull, Kommentarer til ODA artikkel 34, in: *Norsk lovkommentar* 2012 note 269; Anders Bøhn, Kommentarer til domstolloven § 51a, in: *Norsk lovkommentar* 2012 note 153; Halvard Haukeland Fredriksen and Gjermund Mathisen, *EØS-rett*, Bergen 2012 p. 175; M. Elvira Méndez-Pinedo, *EC and EEA Law*, Groningen 2009 p. 40; Tore Schei, Arnfinn Bårdsen, Dag Bugge Nordén, Christian Reusch and Torill M. Øie, *Twisteloven – Kommentartutgave*, Oslo 2007 p. 514; Fredrik Sejersted, Finn Arnesen, Ole-Andreas Rognstad and Olav Kolstad, *EØS-rett*, 3rd Ed., Oslo 2011 p. 170; Jens E.A. Skoghøy, *Twisteløsning*, Oslo 2010 p. 133 and Ró-

As far as the Supreme Court of Norway is concerned, it has hitherto been of the firm belief that it is completely free to decide whether unresolved questions of EEA law are to be referred to the EFTA Court or not.⁸ Recent examples confirming this include the following cases (from 2011 and 2012 only, predating the EFTA Court's advisory opinion of 28 September 2012 in *Irish Bank*, which will be discussed below):

- Rt. 2011 p. 1 (Directive 2001/97/EC on money laundering)
- Rt. 2011 p. 910 *Tine* (competition law)
- Rt. 2011 p. 1755 *Gate Gourmet* (Directive 2001/23/EC on transfer of undertakings)
- Rt. 2012 p. 355 *Lognvik* (arguably raising questions concerning Directive 93/13/EC on unfair terms in consumer contracts)⁹
- Rt. 2012 p. 629, Rt. 2012 p. 686 and Rt. 2012 p. 761 (criminal cases concerning Directive 2003/6/EC on insider dealing and market manipulation)
- Rt. 2012 p. 983 *Songa Services* (Directive 2001/23/EC on transfer of undertakings)
- Rt. 2012 p. 1380 *Statoil* (Article 31 EEA on freedom of establishment related to Norwegian tax authorities' treatment of a German GmbH & Co. KG-company)
- Rt. 2012 p. 1556 *Gran & Ekran* (competition law)

Apparently, none of the parties in any of these cases requested a referral to the EFTA Court. It is not suggested here that the Supreme Court ought to have referred them all *ex officio* to Luxembourg. Yet the mere fact that the possibility of a referral was not even considered demonstrates that the Supreme Court is of the opinion that it is under no obligation to refer unresolved questions of EEA law to the EFTA Court.

For the EFTA Court, the referral from Reykjavik District Court in *Irish Bank* offered an opportunity to address this issue.¹⁰ Under Icelandic law, decisions by lower courts to request

bert R. Spanó, 'The Concept of Procedural Homogeneity', in: EFTA Court (Ed.), *Judicial Protection in the European Economic Area*, Stuttgart 2012, pp. 152-159, at p. 158.

⁸ See Fredriksen, 'The Two EEA Courts – a Norwegian Perspective', fn. 3 *supra*, at p. 196-199.

⁹ See Marte Eidsand Kjörven, 'Anvendelse av avtaleloven § 36 ved salg av finansielle instrumenter til forbruker' (2012) 51 *Lov og Rett* 387-406 and Johan Giertsen, *Avtaler*, 2nd Ed., Oslo 2012, at p. 229 f., both criticizing the Supreme Court for not raising the question of the possible application of Directive 2001/23/EC *ex officio* and questioning whether the outcome of the case is in conformity with the Directive.

¹⁰ Case E-18/11 *Irish Bank Corporation Ltd v Kaupþing hf*, advisory opinion of 28 September 2012 (not yet reported).

advisory opinions from the EFTA Court may be appealed to the Supreme Court of Iceland.¹¹ In *Irish Bank* the Icelandic Supreme Court upheld the decision to seek an advisory opinion, but substantially amended the questions posed. In its subsequent letter to the EFTA Court, the District Court set out the questions as amended by the Supreme Court. Still, with regard to the facts, pleas and legal arguments submitted by the parties to the national proceedings, the District Court referred, *inter alia*, to its earlier decision to seek an advisory opinion. This ruling contained the questions which the District Court initially wished to refer to the EFTA Court, thus providing the latter with an opportunity to address the question of which set of questions to answer and, thereby, to also answer more general questions concerning the interpretation of Article 34 SCA.

As a starting point, the EFTA Court acknowledged that according to the wording of Article 34 SCA, there is no obligation on national courts of last instance to make any reference to the EFTA Court (paragraph 57). However, in the subsequent paragraph the Court added that:

‘At the same time, courts against whose decisions there is no judicial remedy under national law will take due account of the fact that they are bound to fulfil their duty of loyalty under Article 3 EEA. The Court notes in this context that EFTA citizens and economic operators benefit from the obligation of courts of the EU Member States against whose decision there is no judicial remedy under national law to make a reference to the ECJ (see Case C-452/01 *Ospelt and Schlösle Weisenberg* [1993] ECR I-9743).’

Concerning the competence of the Icelandic Supreme Court to intervene in the cooperation between the District Court and the EFTA Court, the EFTA Court made clear that Article 34 SCA does not preclude decisions by lower courts (by which questions are referred to it for an advisory opinion) from remaining subject to the remedies normally available under national law (paragraph 62). Still, it immediately added that Article 34 SCA is to be interpreted in the light of fundamental rights. This led to the following passage (paragraph 64):

‘In this regard, it must be kept in mind that when a court or tribunal against whose decisions there is no judicial remedy under national law refuses a motion to refer a case to another court, it cannot be excluded that such a decision may fall foul of the standards of Article 6(1) ECHR, which provides that in “determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

¹¹ See further on this Páll Hreinsson, ‘The Interaction between Icelandic Courts and the EFTA Court’, in: EFTA Court (Ed.), *Judicial Protection in the European Economic Area*, Stuttgart 2012, pp. 90-99.

In particular this may be the case if the decision to refuse is not reasoned and must therefore be considered arbitrary (compare *Ullens de Schooten and Rezabek v Belgium*, Case Nos 3989/07 and 38353/07, judgment of the European Court of Human Rights of 20 September 2011, paragraphs 59 and 60, and case-law cited).⁷

The EFTA Court added that these considerations may also apply in cases where a court of last instance upholds a decision to refer, but nevertheless decides to amend, the questions asked by the lower court. In the case at hand, this led the EFTA Court to answer the questions which the District Court of Reykjavik initially wished to refer to it as well as those formally posed after the intervention by the Supreme Court of Iceland. Thus, perhaps somewhat controversially, the EFTA Court answered a question which in its own opinion was not covered by the questions formally posed. The EFTA Court justified this, *inter alia*, by stating that the Supreme Court had not set out any reasons why the second question originally put by the District Court was omitted (paragraph 69).

The problems caused by the peculiarities of the Icelandic appeal system are of little interest to Norwegian courts and they will therefore not be addressed in this paper. As to the relationship between the highest courts of the EFTA States and the EFTA Court in general, *Irish Bank* hardly adds much to the discussion. Even though it was admitted that *according to the wording of Article 34 SCA* there is no such obligation to refer, the EFTA Court left open whether an obligation to refer may be deduced from *other sources* of EEA law. The direct implications of the obligation of national courts of last instance to pay ‘due account’ to their duty of loyalty under Article 3 EEA, in particular in light of considerations of reciprocity with regard to judicial protection in the EU and in the EFTA-pillar of the EEA, thus remain unclear.¹²

¹² Note, however, that the EFTA Court in Case E-14/11 *DB Schenker v EFTA Surveillance Authority*, judgment 21 December 2012 (not yet reported), appears to deduce concrete legal implications from considerations of reciprocity: In the opinion of the EFTA Court, the fact that Regulation No 1049/2001 secures public access to *inter alia* Commission documents meant that the EFTA Surveillance Authority was required to ensure at least the same degree of openness for ‘reasons of reciprocity’ (paragraph 121). The EFTA Court substantiated this view with a reference to paragraph 58 of *Irish Bank*, thereby perhaps suggesting that concrete legal implications could be deduced from ‘reasons of reciprocity’ also with regard to a possible obligation of the national courts of the EFTA States to turn to the EFTA Court. Still, no such conclusion was drawn in *Irish Bank* and it would surely be a controversial move to do so in the future.

The same applies to the cautious statement that it ‘cannot be excluded’ that a decision refusing a motion to refer a case to the EFTA Court ‘may’ fall foul of the standards of Article 6 § 1 ECHR. Still, the mere suggestion that the highest courts of the EFTA States may be unable to offer private parties a fair trial in EEA related matters unless they send the case to Luxembourg is highly unlikely to improve relations between the EFTA Court and the Norwegian Supreme Court. Further, it seems questionable whether the reference to the case-law of the European Court of Human Rights (ECtHR) concerning cases where courts of last instance in EU Member States have refused to make a reference to the ECJ really is fitting as the reasoning of the ECtHR appears to presuppose the existence of an obligation to refer.¹³ Given the existence of a clear obligation on courts of last instance from EU Member States to refer unresolved questions of EU law to the ECJ, it is hardly surprising that an arbitrary refusal of a request for such a referral may infringe the fairness of proceedings. If one assumes that there is no corresponding obligation on courts of last instance from the EFTA States to turn to the EFTA Court, it is much harder to see how a refusal of a request for such a referral may be deemed to be arbitrary.

Still, the recent judgment of the ECtHR in *Ullens de Schooten and Rezabek* suggests that *unreasoned refusal to refer* may fall foul of the standards of Article 6 § 1 ECHR even if the national court in question is under no obligation to make such a referral.¹⁴ If, as assumed by the EFTA Court in *Irish Bank*, this line of reasoning is applicable to the relationship between the EFTA Court and the national courts of the EFTA States under Article 34 SCA, Norwegian courts may be under an obligation to substantiate decisions refusing requests for a referral to

¹³ See, in particular, Case 15073/03, *John v Germany*, admissibility decision of 13 February 2007, where the ECtHR held that the lack of an obligation on a lower German court to seek a preliminary ruling from the CJEU meant that its refusal of a request for such a referral ‘does not raise an issue under Article 6 § 1 of the Convention.’ But see the recent judgment in *Ullens de Schooten and Rezabek*, fn. 14 *infra* and accompanying text.

¹⁴ Cases 3989/07 and 38353/07, *Ullens de Schooten and Rezabek v Belgium*, judgment of 20 September 2011, where the ECtHR in paragraph 59 stated that the refusal of a court to make a referral may affect the fairness of the proceedings even if the judge is not called upon to decide the matter in the last instance (and thus, in an EU law context, under no obligation to seek a preliminary ruling from the CJEU). However, other parts of the judgment as well as the case-law relied upon by the ECtHR in this context may suggest that the scope of this statement is limited to situations where the national judiciary in the end will be under an obligation to seek a preliminary ruling (see, *inter alia*, paragraph 57 second sentence and paragraph 60 *in fine*). Thus, its relevance to the EFTA-pillar of the EEA appears uncertain.

the EFTA Court in a more comprehensive manner than has hitherto often been the case.¹⁵ The practical effect of such an obligation depends, however, on the substance of the reasons required.¹⁶ If, *inter alia*, references to the national court's assessment of its own ability to interpret the EEA Agreement or to the inevitable delay and extra costs caused by a referral will suffice to substantiate a refusal, then the practical effect will be close to none.¹⁷ If, however, the only valid argument for refusal will be a substantiated view of the relevant questions of EEA law being *acte clair* – in particular due to existing case-law from the ECJ or the EFTA Court (*acte éclairé*) – then the net result will be the introduction of an ECHR-based obligation to refer unresolved questions of EEA law to the EFTA Court resembling the situation in the EU under Article 267 TFEU. Such an interpretation of the ECtHR's judgment in *Ullens de Schooten and Rezabek* seems, however, to draw quite far-reaching consequences from the ban on arbitrary refusals. In any event, even if it were to be adopted, the practical consequences appear limited. For understandable reasons the ECtHR is unwilling to assume the position of a supreme guardian of Article 267 TFEU.¹⁸ Thus, even if one assumes that a refusal to refer unresolved questions of EEA law to the EFTA Court may in principle fall foul of the standards of Article 6 § 1 ECHR, the ECtHR will not review the national court's (reasoned) opinion of the relevant questions of EEA law being *acte clair*.¹⁹

The reaction of the Supreme Court of Norway to *Irish Bank* remains to be seen. Even though the Supreme Court has already heard two important cases concerning EEA law after the EFTA Court delivered its advisory opinion in *Irish Bank (Personskadeforbundet and STX)*, both

¹⁵ Usually, Norwegian courts merely state that they do not find a referral to the EFTA Court 'necessary', see, *inter alia*, Rt. 2005 p. 1365 *Finanger (No 2)*; Rt. 2008 p. 453 *Otterstad* and Rt. 2010 p. 1500 *Edquist*.

¹⁶ See *Ullens de Schooten and Rezabek*, fn. 14 *supra*, paragraph 59 *in fine*.

¹⁷ A truly remarkable justification for a refusal to ask for an advisory opinion was offered by Agder Court of Appeal in a decision of 13 November 2012 (unpublished decision cited by the Court of Appeal in its subsequent judgment of 6 March 2013 in Case 12-180179AST-ALAG): The Court saw no need to obtain the EFTA Court's opinion on the compatibility of the (very strict) Norwegian rules on the use of personal watercrafts on Norwegian waters with Article 11 EEA as the opinion of the *EFTA Surveillance Authority* was already known to the Court through its access to correspondence between ESA and Norwegian authorities! The decision not to refer is understandable as the water scooter in question originated from outside the EEA, but the reasons offered is difficult to comprehend.

¹⁸ See further Halvard Haukeland Fredriksen, *Europäisches Vorlageverfahren und nationales Zivilprozessrecht*, Tübingen 2009, pp. 360-361.

¹⁹ Compare *Ullens de Schooten and Rezabek*, fn. 14 *supra*, paragraphs 54 and 61 *et seq.*, and case-law cited.

discussed further below) which both arguably would have justified a referral to Luxembourg, the Supreme Court was not confronted with a request for such a referral in either case.²⁰ The same goes for two other cases which arguably raised questions concerning Directive 93/13/EC on unfair terms in consumer contracts – *Aronsen Holding* and *Røeggen*.²¹ Of course, under Article 34 SCA the Supreme Court could very well have raised and discussed the question of a referral to the EFTA Court *ex officio* in any of these four cases, but the lack of an initiative from the private parties rules out the possibility of any infringement of Article 6 § 1 ECHR.²²

Of the four cases mentioned, *Personskadeforbundet* stands out as the most obvious candidate for a referral to the EFTA Court.²³ The case concerned state liability for deficient implementation of the Motor Vehicle Insurance Directives into Norwegian law. It was a follow-up to *Nguyen*, in which the EFTA Court (upon a referral from Oslo City Court) made it clear that it is not compatible with the directives to except redress for non-economic injury (‘pain and suffering’) from the compulsory insurance system under national law.²⁴ In *Nguyen*, the EFTA Court further held that the said breach of EEA law was sufficiently serious to entail State liability, at least following the ECJ’s interpretation of the directives in *Ferreira* (14 September 2000).²⁵ Accepting the opinion of the EFTA Court, the Norwegian government struck an out-of-court deal to compensate Ms. Nguyen as well as other victims of road accidents whose claims for redress could not be obtained from the person having caused the injury, but only for accidents which took place subsequent to what the government deemed to be a reasonable time after the ECJ’s judgment in *Ferreira* (fixed to 1 January 2001). The Norwegian Interest

²⁰ Note, however, that the private parties in *STX* stated that the Supreme Court had to refer the case back to the EFTA Court if inclined to deviate from the opinion of the EFTA Court. As will be shown in the discussion of the case below, the Supreme Court indeed did state its disagreement with the EFTA Court on several points, but it avoided letting these parts of its reasoning form part of the *ratio decidendi* of the judgment. Thus, strictly speaking, the Supreme Court did not dismiss an ‘operational’ request for a referral to the EFTA Court.

²¹ Rt. 2012 p. 1926 *Aronsen Holding* and judgment of 22 March 2013 in Case No 2011/1938 *Røeggen v DNB Bank ASA* (not yet reported).

²² From ECtHR case-law, see *John v Germany*, fn. 13 *supra*.

²³ Rt. 2012 p. 1793.

²⁴ Case E-8/07 *Nguyen v Norway* [2008] EFTA Court Report 224.

²⁵ See *Nguyen*, fn. 23 *supra*, paragraph 34, with reference to Case C-348/98 *Ferreira v Companhia de Seguros Mundial Confiança SA* [2000] ECR I-6711.

Group for Victims of Road Accidents (Personskadeforbundet), however, was of the opinion that the breach of EEA law was sufficiently serious from the time of entry into force of the EEA Agreement (1 January 1994) or, in the alternative, at least as of the ECJ's interpretations of the directives in *Bernáldez* (28 March 1996).²⁶ Thus, in the very first class action to be accepted by Norwegian courts, Personskadeforbundet sued the government on behalf of seven victims who were injured in road accidents which happened before 1 January 2001. They won in Oslo City Court, but lost in Borgarting Court of Appeal.

Before the Supreme Court, the government sought a “rematch” of the majority opinion of the full Supreme Court in the seminal *Finanger (No 2)* case from 2005 concerning the role of discretion in the assessment of whether there has been a sufficiently serious breach of EEA law. In short, the majority in *Finanger (No 2)* stated that a general distinction has to be drawn between situations in which the EEA rule in question leaves the EEA States a wide discretion and situations where they have only limited or even no discretion. The minority, on the other hand, held that the breach in any case has to be manifest and grave and that the existence or non-existence of discretion is thus only a criterion in the assessment of whether this threshold is exceeded.²⁷ In the opinion of the government, the approach of the minority raises the threshold for liability in cases where the EEA States have only limited or even no discretion.²⁸ In *Personskadeforbundet*, the government argued that subsequent judgments from the ECJ concerning the corresponding EU law principle of State liability had proved the minority right.²⁹ The Supreme Court, sitting in an ordinary chamber of five justices, addressed the question but ultimately left it open, concentrating instead on the degree of clarity of the directives infringed.³⁰ By implication, the judgment suggests that the structural disagreement in *Finanger (No 2)* need not have any consequences for the assessment of whether there has

²⁶ Case C-129/94 *Criminal proceedings against Rafael Ruiz Bernáldez* [1996] ECR I-1829.

²⁷ See Rt. 2005 p. 1365 *Finanger (No 2)*, paragraphs 59 *et seq* (the majority) and paragraphs 111 *et seq* (the minority).

²⁸ As illustrated by the fact that the majority of nine justices in *Finanger (No 2)* upheld the judgment of the City Court awarding Ms. Finanger damages, whereas the minority of four voted for the government.

²⁹ The government referred to Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11753; Case C-278/05 *Robins and Others v Secretary of State for Work and Pensions* [2007] ECR I-1053 and Case C-452/06 *The Queen, on the application of Synthon BV v Licensing Authority of the Department of Health* [2008] ECR I-7681.

³⁰ Rt. 2012 p. 1793 *Personskadeforbundet*, paragraph 48.

been a sufficiently serious breach of EEA law. This is, in my view, correct, but given the potential importance of this question, a referral to the EFTA Court would surely have been appropriate.

As to the outcome of the case, the Supreme Court was of the opinion that the wording of the directives was not sufficiently precise to hold the government liable from the point of entry into force of the EEA Agreement, but that the ECJ had clarified the interpretation of the directives in *Bernáldez* to such an extent that the maintenance thereafter of the rule excepting redress for non-economic injury from the compulsory insurance coverage constituted a sufficiently serious breach of EEA law to entail State liability. In accordance with an agreement of the parties, the government was then held liable for claims of redress for non-economic injury caused by road accidents which took place after 1 January 1997.³¹ Thus, even though the case strengthens the impression of a Supreme Court reluctant to refer cases to the EFTA Court, the judgment provides little support for any suggestion that the Justices in Oslo kept the case to themselves in order to protect the government from an unwelcome answer from Luxembourg.³²

At first sight, *STX* stands out as an even more obvious candidate for a referral to the EFTA Court than *Personskadeforbundet*, as in *STX* the Supreme Court clearly indicated for the very first time that it did not concur with the interpretation of EEA law advocated by the EFTA Court.³³ Still, the assessment of the Supreme Court's decision to decide the case on its own is complicated by the fact that the EFTA Court had already expressed its view on the interpretation of the directive in question – the Posted Workers Directive (96/71/EC) – in an advisory opinion obtained by the Borgarting Court of Appeal in the very same case.³⁴ Before the Supreme Court, the private parties argued that the case ought to be referred back to the EFTA Court if the Supreme Court intended to deviate from the opinion of the EFTA Court.³⁵ In its judgment, the Supreme Court did indeed go far by way of indicating its disagreement with the

³¹ Arguably, this left the government quite a lot of time to correct the implementation of the directives, but given the acceptance of the parties it is hardly surprising that the Supreme Court choose not to go into the question.

³² See the general allegation against supreme court judges made by the EFTA Court's president Carl Baudenbacher in his book *The EFTA Court in Action*, Stuttgart 2010 p. 24.

³³ Judgment of 5 March 2013 in Case No. 2012/1447 *STX and Others v The Norwegian State* (not yet reported).

³⁴ Case E-2/12, *STX and Others v The Norwegian State*, advisory opinion of 23 January 2012 (not yet reported).

³⁵ A view shared by Fredriksen/Mathisen, fn. 7 *supra*, at p. 235.

opinion of the EFTA Court on several points.³⁶ However, the Supreme Court did not conclude its findings on either of them as it was of the opinion that the Norwegian rules concerning terms and conditions of employment in the maritime construction industry conformed with EEA law even if the assessment was based on the advisory opinion of the EFTA Court. Thus, the points of law on which the Supreme Court voiced its scepticism towards the view of the EFTA Court do not form part of the *ratio decidendi* of the judgment.³⁷

On one important point, however, the reluctance of the Supreme Court to actually base its judgment on an interpretation of the Posted Workers Directive which deviates from the one advocated by the EFTA Court led to an interpretation of another provision of the Directive which appears questionable. The Supreme Court stated quite clearly that it disagrees with the EFTA Court's opinion that compensation for travel, board and lodging expenses for overnight stays away from home does not fall within the notion of pay within the meaning of Article 3(1) of the Directive, but it stopped short of concluding on the matter.³⁸ This forced the Supreme Court to continue with an assessment of whether Norwegian rules which secure posted workers compensation for such expenses may be justified on the basis of public policy provisions (Article 3(10) of the Directive). The Supreme Court answered this in the affirmative.³⁹ In the reasoning which led to this conclusion, the Supreme Court came very close to declaring the entire 'Norwegian model' of tripartite cooperation between trade unions, employers' organizations and the government to be a matter of public policy. By contrast, the EFTA Court in its advisory opinion stated that the notion of public policy, particularly when it is cited as a justification for derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly.⁴⁰ The EFTA Court added that the information given to it did not

³⁶ See further the discussion of the judgment in section III *infra*.

³⁷ See paragraphs 103 and 155 of the Supreme Court's judgment. A similar approach was taken by Oslo City Court in its judgment of 14 September 2012 in the case *Philip Morris Norway AS v Staten v/Helse- og omsorgsdepartementet* (Case No 10-041388TVI-OTIR/02). Here, the City Court questioned the interpretation of Article 11 EEA advocated by the EFTA Court in Case E-16/10, *Philip Morris Norway AS v Staten v/Helse- og omsorgsdepartementet* [2011] EFTA Ct. Rep. 330, but it concluded that the Norwegian ban on the visual display of tobacco products is a selling arrangement which does not constitute a measure having an effect equivalent to quantitative restrictions on imports even if the assessment was based on the advisory opinion of the EFTA Court.

³⁸ Paragraphs 143-155 of the Supreme Court's judgment.

³⁹ Paragraph 170 of the Supreme Court's judgment.

⁴⁰ Paragraph 99 of the EFTA Court's advisory opinion.

indicate that the allowances in question could be justified on public policy grounds.⁴¹ Still, the final assessment was left to the national courts. As the Supreme Court explicitly accepted the EFTA Court's view of the need for a strict interpretation of Article 3(10) of the Directive,⁴² it may be argued that the acquittal of the government is only based on a different application of the law to the facts of the case, and thus no second referral to the EFTA Court was called for. Still, it is difficult to reconcile the subsequent assessment of the Supreme Court with a strict interpretation of the notion of public policy. On the contrary, the judgment of the Supreme Court appears to be based on a rather wide interpretation of Article 3(10) of the Directive which does not sit comfortably with the advisory opinion of the EFTA Court nor the judgment of the ECJ in *Commission v Luxembourg*, in which the ECJ stated that reasons of public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.⁴³ In my view, the Supreme Court ought instead to have presented the EFTA Court with its arguments for an understanding of the notion of 'pay' within the meaning of Article 3(1) of the Directive which does include compensation for travel, board and lodging expenses for overnight stays away from home. As noted by the Supreme Court, support for such a conclusion is to be found in second subparagraph of Article 3(7) of the Directive, a provision which was not discussed by the EFTA Court. Use of Article 34 SCA could thus both have provided the EFTA Court with an opportunity to reconsider its interpretation of Article 3(1) of the Directive and, as a consequence, rendered it unnecessary for the Supreme Court to 'press' the notion of public policy in Article 3(10) in order to 'compensate' for what appears to be a too strict interpretation of Article 3(1).

⁴¹ Paragraph 101 of the EFTA Court's advisory opinion.

⁴² Paragraph 158 of the Supreme Court's judgment.

⁴³ Case C-319/06 *Commission v Luxembourg* [2008] I-4323, paragraph 50. The quoted passage from this judgment seems to imply that Article 3(10) of the Directive imposes stricter obligations on the EEA States than Article 56 TFEU/Article 36 EEA, but this is not easily reconciled with the ECJ's choice to apply Article 49 of the EC Treaty (now: Article 56 TFEU) rather than Article 3(10) of the Directive in Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767. In *STX*, neither the EFTA Court nor the Norwegian Supreme Court elaborates on the relationship between Article 3(10) of the Directive and Article 36 EEA. (Cf., however, the position argued by the EFTA Surveillance Authority in the Report for the Hearing in *STX*, fn. 34 *supra*, paragraphs 139-140, which appears sound.)

Shortly after the Supreme Court's judgment in *STX*, the EFTA Court responded in a remarkable *obiter dictum* in *Jonsson*.⁴⁴ The case concerned a very different question of EEA law and the referral from Borgarting Court of Appeal hardly offered an opportunity to comment on the interpretation and use of Article 34 SCA. Still, the EFTA Court's desire to defend its advisory opinion in *STX* is easily understood. After having defended its view on the relationship between Article 3 (1) of the Posted Workers Directive and Article 36 of the main part of the EEA Agreement (which was the only part of *STX* which *Jonsson* offered an opportunity to comment upon),⁴⁵ the EFTA Court added the following passage on Article 34 SCA (paragraph 60):

"It is ... important that such questions [concerning the right of EEA workers to move freely and the economic operators to exercise their freedom to provide services] are referred to the Court under the procedure provided for in Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority if the legal situation lacks clarity (Case E-18/11 *Irish Bank*, judgment of 28 September 2012, not yet reported, paragraphs 57 and 58). Thereby unnecessary mistakes in the interpretation and application of EEA law are avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU are ensured (see, in this respect, *Irish Bank*, cited above, paragraph 122, and Case E-14/11 *DB Schenker and Others*, judgment of 21 December 2012, not yet reported, paragraph 118)."

Even though the emphasis on reciprocity merits attention,⁴⁶ the statement as such does not really add much to the discussion on the interpretation of Article 34 SCA. Still, the poorly concealed accusation that the Supreme Court of Norway in *STX* committed an 'unnecessary mistake' in the interpretation and application of EEA law which could easily have been avoided through a second referral to the EFTA Court will hardly improve relations between the judges in Oslo and Luxembourg.

Less than three months after *Jonsson* the EFTA Court came up with another *obiter dictum* in *Koch*.⁴⁷ Just as *Jonsson*, *Koch* hardly offered an opportunity to comment on the interpretation and use of Article 34 SCA, but the EFTA Court nonetheless added the following passage on

⁴⁴ Case E-3/12 *Staten v/Arbeidsdepartementet v Jonsson*, advisory opinion of 20 March 2013 (not yet reported).

⁴⁵ See further the discussion of this question in section III *infra*.

⁴⁶ See the short discussion in fn. 12 *supra*.

⁴⁷ Case E-11/12, *Koch, Hummel and Müller v Swiss Life (Liechtenstein) AG*, advisory opinion of 13 June 2013 (not yet reported).

access to justice and effective judicial protection in the EEA (paragraph 117, emphasis added):

“Access to justice and effective judicial protection are essential elements in the EEA legal framework (see Case E-2/02 *Bellona v ESA* [2003] EFTA Ct. Rep. 52, paragraph 36; and in relation to the EU see Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37). This can only be achieved if EEA/EFTA and EU nationals and economic operators enjoy *equal access to the courts in both the EU and EFTA pillars of the EEA* to ensure their rights which they derive from the EEA Agreement.”

The last sentence of this passage may be understood as suggesting that effective judicial protection will only be guaranteed in the EFTA pillar if there is an access to the EFTA Court which equals the access to the ECJ in the EU pillar. This is, however, not clearly stated and no reasons are offered which can explain why the judicial protection offered by the national courts of the EFTA States may not suffice. Again, suggestions such as this are highly unlikely to improve relations between the EFTA Court and the Norwegian Supreme Court. And further, even in EU law the principle of effective judicial protection is basically satisfied as long as individuals and economic operators have access to national courts.⁴⁸

It is probably only a matter of time before the Supreme Court is confronted with a request for a referral to the EFTA Court, in which reference is made to *Irish Bank, Jonsson and Koch*. Given that the Supreme Court to date has been of the firm belief that it is under no obligation to refer unresolved questions of EEA law to the EFTA Court, it seems unlikely that the inconclusive reasoning in *Irish Bank* will cause it to change its mind. Still, it may be hoped that the not –to-cautious push of the EFTA Court will lead to increased understanding in the Supreme Court of the importance of sincere cooperation with the EFTA Court. Even though the Supreme Court may perhaps be correct in its assessment of its own capability to solve EEA-related cases without the assistance of the EFTA Court, the Justices in Oslo ought to recognise that it may matter in a broader context whether judicial protection of EEA based rights 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 credibility of the judicial architecture of

⁴⁸ As illustrated by e.g. Case C-432/05 *Unibet v Justitiekanslern* [2007] ECR I-2271 (to which the EFTA Court referred in *Koch*) and as indicated by Article 19 TEU. Of course, an exception has to be made for direct actions before the EU Courts, but this is of no relevance for our present purposes.

the whole EEA Agreement in the eyes of the other Contracting Parties.⁴⁹ More than 10 years after its last referral to the EFTA Court,⁵⁰ it is thus respectfully submitted that the Supreme Court should seize the next opportunity to revive cooperation with the judges in Luxembourg. After *Irish Bank, STX, Jonsson* and *Koch* this is a matter of some urgency. The present exchange of more or less subtle insults in a ‘two-way monologue’ is simply incompatible with the spirit of judicial cooperation upon which Article 34 SCA is based.

III. Recent Developments concerning the Authority of the Advisory Opinions of the EFTA Court

As to the authority of the advisory opinions of the EFTA Court, recent case-law of the Norwegian Supreme Court appears at first glance to have barely changed. In its above mentioned judgment in *STX*, the Supreme Court, sitting in an ordinary chamber of five justices, cited the unanimous opinion of the full Court in the seminal *Finanger (No 1)* judgment of 2000: The opinions of the EFTA Court under Article 34 SCA are of an advisory character only, and it is thus for the Supreme Court to decide for itself whether and to what extent they are to be followed. That said, the opinions are to be accorded ‘significant weight’.⁵¹ This is due to the fact that the EFTA States found it appropriate to establish a separate court of justice for the EFTA-pillar, the EFTA Court’s expert knowledge of EEA law, the rules of procedure opening up for input from the EU Commission, the EFTA Surveillance Authority and the EEA Member States and the clear intentions of the Norwegian parliament when ratifying the EEA Agreement.⁵² In *STX*, the Supreme Court emphasised that it has ‘both the authority and duty’ to independently assess whether and to what extent an advisory opinion of the EFTA Court is to be followed. Thus, the Supreme Court is not ‘formally prohibited’ from building its judgment upon a different interpretation of EEA law than the one advocated by the EFTA Court. How-

⁴⁹ See Fredriksen, ‘The Two EEA Courts – a Norwegian Perspective’, fn. 3 *supra*, at p. 208 f.

⁵⁰ Case E-3/02 *Paranova AS v Merck & Co., Inc. and Others* [2003] EFTA Court Report 101.

⁵¹ Judgment of the Supreme Court in *STX*, fn. 33 *supra*, paragraph 93, citing Rt. 2000 p. 1811 *Finanger (No 1)*. Earlier approval of the statements from *Finanger (No 1)* are found in Rt. 2004 p. 904 *Paranova*, paragraph 67; Rt. 2005 p. 1365 *Finanger (No 2)*, paragraph 52; Rt. 2007 p. 1003 *Gaming Machines*, paragraph 79 and Rt. 2009 p. 839 *Pedicel*, paragraph 7.

⁵² Rt. 2000 p. 1811 *Finanger (No 1)*, at p. 1820.

ever, due to the significant weight to be accorded to the opinions of the EFTA Court, this requires the existence of ‘special reasons’.⁵³

In reality, however, recent case-law suggests a troubling diminution in the Norwegian Supreme Court’s interest towards the advisory opinions of the EFTA Court. The main example is *STX*, in which the Supreme Court for the very first time clearly indicated that it did not concur with the interpretation of EEA law advocated by the EFTA Court. As will be shown in the following section, however, this judgment is arguably only the culmination and overt expression of a development which has taken place over the last couple of years.

The Supreme Court’s scepticism in *STX* towards the EFTA Court’s interpretation of Article 3(1) as well as Article 3(10) of the Posted Workers Directive has already been discussed in section II above. Here, it is to be added that the Justices in Oslo voiced similar scepticism towards the EFTA Court’s understanding of the relationship between the Directive and Article 36 EEA (the provision in the main part of the EEA Agreement mirroring that of Article 56 TFEU). In the opinion of the EFTA Court, the fact that the second subparagraph of Article 3(1) of the Directive states that the definition of the concept of minimum rates of pay is left to the national law and/or practice of the EEA State to whose territory the worker is posted, means that even if an additional remuneration to the basic hourly wage (*in casu* for work assignments requiring overnight stays away from home) is to be regarded as part of that concept, a separate assessment of the compatibility of this solution with Article 36 EEA is called for.⁵⁴ According to the Supreme Court, however, this is a position which is ‘difficult to reconcile’ with the case-law of the ECJ and the purpose of the Directive.⁵⁵

In the attempt to substantiate its opposition, the Supreme Court closely followed the arguments of the Belgian, Norwegian, Polish and Swedish governments as well as the EFTA Surveillance Authority and the Commission before the EFTA Court in the procedure which led to the latter’s advisory opinion in the case.⁵⁶ The EFTA Court’s claim to find support in the

⁵³ Judgment of the Supreme Court in *STX*, fn. 33 *supra*, paragraph 94.

⁵⁴ Advisory opinion of the EFTA Court in *STX*, fn. 34 *supra*, paragraphs 74 *et seq.*

⁵⁵ Paragraph 100 of the Supreme Court’s judgment.

⁵⁶ For a summary of the arguments before the EFTA Court, see Report for the Hearing in *STX*, fn. 34 *supra*, paragraphs 123 *et seq.*

judgment of the ECJ in *Laval* was rejected with reference to the fact that this case concerned working conditions which were found to fall outside the scope of the Directive.⁵⁷ Further, the Supreme Court referred to *Laval* as well as to the judgments of the ECJ in *Rüffert* and *Commission v Luxembourg* as authority for the view that Article 3(1) of the Directive sets out an exhaustive list of the matters in respect of which a host EEA State may give priority to its own rules.⁵⁸ The Supreme Court emphasised that the Commission in *Commission v Luxembourg* had not challenged the fact that minimum wages under Luxembourg law are indexed to the cost of living as this requirement, and that as noted by the ECJ, was ‘unquestionably covered by point (c) of the first subparagraph of Article 3(1) of Directive’.⁵⁹ Evidently, this is understood by the Supreme Court as *e contrario* support for the general view that if an employment condition falls within the scope of Article 3(1) of the Directive, no supplementary examination of its compatibility with Article 36 EEA/Article 56 TFEU is necessary. In the words of the Supreme Court: if such supplementary examination was to be necessary, ‘little would be gained by the Directive’.⁶⁰

As noted in section II above, the EFTA Court seized the very first opportunity to respond through a remarkable *obiter dictum* in *Jonsson*. Here, the EFTA Court essentially maintained the view that the lack of harmonisation of the material content of the terms and conditions of employment referred to in Article 3 (1) of the Directive necessitates a supplementary examination of whether the national rules in question comply with the general principles of EEA law.⁶¹ The reasoning does not include any references to the judgment of the Supreme Court, but there is little doubt as to the addressee.⁶² This paper is not the proper place to discuss at

⁵⁷ Paragraphs 97-98 of the Supreme Court’s judgment, citing and discussing the ECJ’s judgment in *Laval*, fn. 43 *supra*.

⁵⁸ Paragraph 99 of the Supreme Court’s judgment, citing and discussing *Laval*, fn. 43 *supra*, as well as Case C-346/06 *Rüffert v Land Niedersachsen* [2008] ECR I-1989 and *Commission v Luxembourg*, fn. 43 *supra*.

⁵⁹ Paragraph 99 of the Supreme Court’s judgment, citing paragraph 45 of *Commission v Luxembourg*, fn. 43 *supra*.

⁶⁰ Paragraph 99 of the Supreme Court’s judgment.

⁶¹ *Jonsson*, fn. 44 *supra*, paragraphs 56 *et seq.*

⁶² See in particular paragraph 57, where the Posted Workers Directive is (in my view rightly) distinguished from secondary legislation which exhaustively harmonises an issue in which there is general agreement that there is no need for any supplementary examination in the light of primary law. The example used by the EFTA Court, the ECJ’s interpretation of Directive 75/439/EEC on the disposal of waste oils in Case C-37/92 *Vanacker and*

length whether the EFTA Court or the Supreme Court is right in their understanding of the relationship between the Directive and Article 36 EEA.⁶³ In the present context, it must suffice to emphasise that the Supreme Court was careful to add that its position was in line with the one argued by the EFTA Surveillance Authority and the Commission before the EFTA Court.⁶⁴ One may assume that the Supreme Court knows that if it were to disregard the answers received from the EFTA Court in a way which in the opinion of the EFTA Surveillance Authority brings Norway into a situation where it no longer fulfils its obligations under the EEA Agreement, the EFTA Surveillance Authority may be expected to bring an infringement action before the EFTA Court under Article 31 SCA. This would enable the EFTA Court to have the last word on the matter in the form of a binding judgment (Article 33 SCA). If, however, the Supreme Court's interpretation of EEA law is no more 'State friendly' than the one advocated by the EFTA Surveillance Authority and the Commission, the risk of a 'rematch' before the EFTA Court appears limited.⁶⁵

The risk of an infringement action before the EFTA Court is further reduced by the fact that the Supreme Court, as already mentioned, stopped short of actually concluding that the EFTA Court was wrong in its call for a supplementary examination of the compatibility of the rules in question with Article 36 EEA. The Supreme Court justified this by stating that 'in any case'

Lesage [1993] ECR I-4947, is obviously motivated by the fact that the Supreme Court referred to this case in its judgment in *STX* (see paragraph 101 of the Supreme Court's judgment).

⁶³ In my view, the answer depends on the interpretation of Article 3(1)(c) of the Directive. If one is of the opinion that subparagraph 2 of Article 3 (1) leaves the EEA States completely free to define the concept 'minimum rates of pay' in Article 3(1)(c), then the supplementary examination under Article 36 EEA called for by the EFTA Court appears necessary. If, however, one assumes that the Directive itself limits what the EEA States may reasonably define as 'minimum rates of pay', then the view of the Supreme Court seems to be the correct one. This appears to be the position argued by the EFTA Surveillance Authority and the Commission (see fn. 54 *supra*). Support for such an interpretation of the Directive may be found in paragraphs 47 *et seq* of *Commission v Luxembourg*, fn. 43 *supra*, as well as, somewhat paradoxically, in paragraph 97 of the advisory opinion of the EFTA Court. Unfortunately, however, the judgment of the Norwegian Supreme Court is not particularly clear on this matter as the Court sometimes seems to presuppose that the EEA States are indeed free to define the concept 'minimum rates of pay' (see, in particular, paragraphs 143-144).

⁶⁴ Paragraph 102 of the Supreme Court's judgment.

⁶⁵ Thus, the argument that the advisory opinions of the EFTA Court are 'indirectly binding' due to the infringement procedure (see e.g. Baudenbacher, 'Some Thoughts on the EFTA Court's Phases of Life', fn. 4 *supra*, at p. 15) has to include a reservation for circumstances such as those in *STX*.

it was ‘clear’ that the rules concerning additional remuneration for work assignments requiring overnight stays away from home were in conformity with Article 36 EEA.⁶⁶ Even though the EFTA Court had left it to the national courts to determine whether the rules in fact upheld the social protection of posted workers and did so in a manner proportionate to the attainment of that objective,⁶⁷ the assessment of the Supreme Court is difficult to reconcile with the advisory opinion of the EFTA Court. According to the EFTA Court, national rules intended to protect workers cannot be held to confer a genuine benefit on posted workers if they in fact deter employers from exercising their freedom to provide services by pursuing activities in Norway, thereby reducing the job opportunities for workers from other EEA States.⁶⁸ The Supreme Court rejected both these arguments on the facts as well as – and of greater interest in the present context – on the law. Citing the judgment of the ECJ in *Wolff & Müller*, the Supreme Court held it to be ‘self-evident’ that additional remuneration for work assignments requiring overnight stays away from home does not lose its character of an objective benefit to posted workers just because they may reduce the demand for workers from other EEA States.⁶⁹ Noting that a weakened position on the labour market is always a risk with benefits intended to increase the social protection of workers, the Supreme Court implicitly stated that the test called for by the EFTA Court would undermine all attempts to protect posted workers.⁷⁰

It is too soon to assess the consequences of the STX case on the relationship between the Norwegian Supreme Court and the EFTA Court. If the ‘declaration of independence’ of the Justices in Oslo is limited to situations where the EFTA Court advocates an interpretation of EEA law which goes beyond the one argued by the Commission and the EFTA Surveillance Authority, then the development need not cause significant problems to the functioning of the EEA Agreement. Firstly, this is a situation which is unlikely to appear often. Secondly, should it occur again in the future, it can hardly be problematic to the EU and its Member States if

⁶⁶ Paragraphs 103-116 of the Supreme Court’s judgment.

⁶⁷ Paragraphs 84-87 of the EFTA Court’s advisory opinion.

⁶⁸ Paragraph 85 of the EFTA Court’s advisory opinion.

⁶⁹ Paragraphs 113-115 of the Supreme Court’s judgment, citing Case C-60/03 *Wolff & Müller GmbH & Co. KG v Pereira Félix* [2004] ECR I-9553, paragraph 40.

⁷⁰ Paragraphs 58 and 59 of the EFTA Court’s *obiter dictum* in *Jonsson*, fn. 44 *supra*, may be understood as an attempt to both modify and defend this part of the advisory opinion in *STX*.

the national courts of the EFTA States choose to interpret and apply EEA law in accordance with the view of the Commission.

Unfortunately, however, the Supreme Court itself did little to downplay the possible consequences of the judgment on its relationship to the EFTA Court. The tone of the judgment is rather unfriendly towards the EFTA Court. As shown above, the parts of the reasoning where the Supreme Court most clearly stated its disagreement with the advisory opinion of the EFTA Court do not form part of the *ratio decidendi* of the judgment and could thus simply have been omitted. Further, all five Justices participating in the case (including the Chief Justice) agreed that the interpretation and application of the EEA rules in question were ‘clear’, ‘not uncertain’, ‘free from doubt’ etc.⁷¹ The possibility of referring the case to the Grand Chamber (or to the full Court) was apparently not even contemplated. And the newly-established requirement of ‘special reasons’ to justify deviation from an advisory opinion was not linked to the fact that the Commission and the EFTA Surveillance Authority disagreed with the view of the EFTA Court.

Further still, the judgment in *STX* does not stand alone. Albeit far from as astonishing as *STX*, other recent decisions of the Supreme Court strengthen the impression that the justices in Oslo are far more interested in rulings from the ECJ than those of the EFTA Court. Recent examples include *Gate Gourmet* and *Songa Services*, both concerning Directive 2001/23/EC on transfer of undertakings.⁷² Whereas earlier judgments in such cases have always included at least some references to relevant decisions of the EFTA Court, the attention of the Supreme Court is now solely directed towards the ECJ.⁷³ This is reflected in the introductory statements in *Songa Services*: In the opinion of the Supreme Court, the Norwegian legislation implementing the directive is to be applied in accordance with the *ECJ's* interpretation of the directive.⁷⁴

⁷¹ See e.g. paragraphs 103, 109, 155, 175 and 183 of the Supreme Court’s judgment.

⁷² Rt. 2011 p. 1755 *Gate Gourmet* and Rt. 2012 p. 983 *Songa Services*.

⁷³ Compare *Gate Gourmet* and *Songa Services* to Rt.1997 p. 1965 *Eidesund*; Rt. 2001 p. 248 *Olderdalen Ambulanse*; Rt. 2006 p. 71 *SAS* and Rt. 2010 p. 330 *Bardufoss*.

⁷⁴ *Songa Services*, fn. 70 *supra*, paragraph 60.

Two other recent judgments hinting in the same direction are *Edquist* and *Personskadeforbundet*, both concerning State liability for breach of EEA law.⁷⁵ Admittedly, both of these judgments do indeed include references to the relevant State liability cases from the EFTA Court. Just as when the full Supreme Court acknowledged the existence of the principle in the *Finanger (No 2)* judgment from 2005, however, the references to the case-law of the EFTA Court are limited to introductory statements concerning the general conditions for the liability of the State. When it comes to the details, the attention of the Supreme Court is firmly directed towards ECJ case-law concerning the principle of State liability under EU law. The basis for this approach is to be found in the Supreme Court's understanding of the EEA law principle of State liability as coextensive with its EU law model.⁷⁶ According to the Supreme Court, it follows that the State liability case-law of the ECJ is to be accorded 'significant weight' by Norwegian courts when deciding cases concerning the possible liability of public authorities for breach of EEA law.⁷⁷ As mentioned in section II above, this led to a discussion in *Personskadeforbundet* on whether recent decisions from the ECJ necessitated adjustments in the Supreme Court's understanding of the place and significance of discretion for the assessment of whether there has been a sufficiently serious breach of EEA law, apparently without any contemplation of the possibility of referring the question to the EFTA Court.

From the perspective of the EFTA Court, the approach of the Supreme Court in State liability cases in particular warrants some concern. Established by the EFTA Court in the seminal *Sveinbjörnsdóttir* case from 1998, the principle of State liability for breach of EEA law is the jewel in the EFTA Court's crown.⁷⁸ The subsequent acknowledgment of this unwritten principle as an inherent part of the EEA Agreement by the ECJ and by the highest courts of the EFTA States manifests the clearest recognition to date of the persuasive authority of the EF-

⁷⁵ Rt. 2010 p. 1500 and Rt. 2012 p. 1793.

⁷⁶ See Rt. 2010 p. 1500, paragraphs 91-92 and Rt. 2012 p. 1793, paragraph 40, confirming the understanding of the full Court in Rt. 2005 p. 1365 *Finanger (No 2)*, paragraph 58.

⁷⁷ *Ibid.*

⁷⁸ Case E-9/97 *Sveinbjörnsdóttir v Iceland* [1998] EFTA Court Report 95. For an assessment of the decision's importance to the EEA Agreement and to the EFTA Court, see Carl Baudenbacher, 'If Not EEA State Liability, Then What? Reflections Ten Years After the EFTA Court's *Sveinbjörnsdóttir* Ruling', 10 *Chicago Journal of International Law* (2009) 333-358.

TA Court.⁷⁹ Even though the Norwegian Supreme Court's understanding of the EEA law principle of State liability as being coextensive with its EU law model ought to be endorsed from the perspectives of homogeneity and reciprocity,⁸⁰ the EFTA Court is therefore unlikely to applaud the Supreme Court's *de facto* 'hand-over' of the ownership and control of the principle from the EFTA Court to the ECJ.

Indeed, it is possible to understand the EFTA Court's most recent State liability case – *HOB-vín*⁸¹ – as a response to the 'ECJ-centred' approach of the Norwegian Supreme Court in *Edquist* and *Personskadeforbundet*.⁸² To start with, the EFTA Court emphasized that the finding that the principle of State liability is an integral part of the EEA Agreement differs from the development in the case law of the ECJ of the principle of State liability under EU law. Therefore, according to the EFTA Court, 'the application of the principles may not necessarily be coextensive in all respects' (paragraph 120). True enough, this is only a confirmation of earlier statements made *Karlsson*.⁸³ Still, whereas these statements were needed in *Karlsson* in order to repudiate the Norwegian government's assertion that the differences between EU and EEA law concerning the question of direct effect precludes the very existence of an EEA law principle of State liability,⁸⁴ it was hardly necessary to reiterate them in *HOB-vín*. Thus,

⁷⁹ See Case C-140/97 *Rechberger and Others v Austria* [1999] ECR I-3499; judgment of the Supreme Court of Iceland of 16 December 1999 in Case 236/1999 *Iceland v Sveinbjörnsdóttir*; judgment of the Supreme Court of Norway in *Finanger (No 2)*, fn. 67 *supra* and judgment of the Supreme Court of Liechtenstein of 7 May 2010 in Case CO.2004.2 *Liechtenstein v Dr. Tschannet (No 2)*. In addition, the principle of State liability for breach of EEA law was accepted by the Supreme Court of Sweden in a judgment of 26 November 2004 in Case T 2593-01 *Andersson v Sweden*.

⁸⁰ With a possible exception for cases where the lack of an EEA law principle of direct effect has contributed to the plaintiff's loss. While recognizing the theoretical interest of this question, it will have to suffice in the present context to note that the effect which Norwegian law gives to EEA law is such that it appears unlikely that the question will ever be of practical importance to Norwegian courts.

⁸¹ Case E-2/12 *HOB-vín ehf. v Áfengis- og tóbaksverslun ríkisins*, advisory opinion of 11 December 2012 (not yet reported).

⁸² As well as to the Supreme Court of Liechtenstein's judgment in *Dr. Tschannet (No 2)*, fn. 77 *supra*, in which the comprehensive references to ECJ case-law and the complete absence of any such to the relevant decisions of the EFTA Court are equally striking.

⁸³ Case E-4/01 *Karl K. Karlsson hf. v Iceland* [2002] EFTA Court Report 240, paragraph 30.

⁸⁴ See *Karlsson*, fn. 81 *supra*, paragraphs 26-30.

HOB-vín represents a shift from the other State liability cases decided after *Karlsson*, in which the EFTA Court has not referred to these statements.

Secondly, it is hard to overlook the EFTA Court's consistent references in *HOB-vín* to the liability of the *EFTA States* only (see paragraphs 119-138). In earlier State liability cases, the EFTA Court has been careful to refer to the liability of (all of) the *Contracting Parties* or to that of (all of) the *EEA States*.⁸⁵ This change, which is carried through in such a systematic manner that it cannot be a mere coincidence, leaves one with the impression that the EFTA Court strengthens the message to the national courts of the EFTA States that the liability of the EFTA States may not necessarily be coextensive in all respects with that of the EU Member States.

Thirdly, *HOB-vín* is characterised by extensive paraphrasing of passages taken from the State liability jurisprudence of the ECJ, but without any references to the sources (see, *inter alia*, paragraphs 125, 130 and 131).⁸⁶ True enough; the EFTA Court has not been too eager to refer to ECJ case-law concerning the principle of State liability under EU law in other cases either, but the reluctance in *HOB-vín* seems particularly apparent.⁸⁷ And if compared to the many references to relevant ECJ case-law in cases dealing with other aspects of EEA law, the lack of any such references in *HOB-vín* is certainly striking. Again, one is left with the impression that the EFTA Court is eager to avoid a complete 'hand-over' of the principle of State liability to the ECJ.

Further, even if one accepts that reasons of homogeneity and reciprocity strongly suggest that the application of the EEA law principle of State liability will be coextensive with its EU law model in most cases, a final opportunity for the EFTA Court to increase its appeal in the eyes of national judges lies in a wide interpretation of the allocation of competences between the

⁸⁵ The only exception being *Sveinbjörnsdóttir*, fn. 76 *supra*, which include some references to the liability of the EFTA States and some to that of the Contracting Parties.

⁸⁶ The passage in paragraph 125 *in fine* is clearly taken from Case C-445/06 *Danske Slagterier v Germany* [2009] ECR I-2119, paragraph 23; paragraph 130 is a paraphrase of Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas* [1996] ECR I-2553, paragraph 28 (and subsequent ECJ case-law) and paragraph 131 is a paraphrase of Case C-278/05 *Robins v. Secretary of State for Work and Pensions* [2007] ECR I-1053, paragraph 73.

⁸⁷ Compare *HOB-vín* to, *inter alia*, *Karlsson*, fn. 81 *supra*, paragraphs 32, 37, 40 and 47.

EFTA Court and the referring national court under Article 34 SCA. Just as for the ECJ under Article 267 TFEU, the competence of the EFTA under Article 34 SCA is limited to ‘interpretation’ of the law, whereas the application of the law to the facts of the case is left to the national courts.⁸⁸ Disregarding objections from the Norwegian government in particular, ever since *Karlsson*, the EFTA Court has demonstrated a definite will to assert itself as primary adjudicator of whether a breach of EEA law is sufficiently serious to entail State liability.⁸⁹ According to the Court’s President this may be justified by the need to ensure effective protection of individual rights.⁹⁰ The implicit distrust of the national courts is unlikely to improve relations to the Supreme Court of Norway, but the EFTA Court may perhaps hope that the approach will encourage references from lower courts more interested in opportunities to ease their own caseload than in general questions concerning the allocation of competences between the EFTA Court and national courts.

IV. Concluding remarks

Commenting upon the relationship between the Norwegian Supreme Court and the EFTA Court, Hans Petter Graver stated some years ago that the functioning of the EEA Agreement presupposes that the ‘hard questions’ concerning the judicial architecture of the EEA are not pursued and that prudence is thus called for from all parties concerned.⁹¹ For a long time, both the EFTA Court and the Supreme Court of Norway seemed to take this advice. Through *Irish Bank*, *STX* and *Jonsson*, however, the quiet understanding that no good may be expected to come from a struggle for the judicial supremacy in the EFTA pillar of the EEA seems to have been broken.

Fortunately for economic operators doing business in the EFTA pillar of the EEA, the difficulties in the relationship between the judges in Oslo and Luxembourg are of an institutional character only and thus of limited practical interest for the judicial protection of EEA based

⁸⁸ See in general Broberg and Fenger, *Preliminary References to the European Court of Justice*, fn. 7 *supra*, at pp. 419 *et seq.*

⁸⁹ See, most recently, *HOB-vín*, fn. 79 *supra*, paragraph 136.

⁹⁰ See Carl Baudenbacher, ‘The Implementation of Decisions of the ECJ and the EFTA Court in Member State’s Domestic Legal Orders’ (2005) 40 *Texas International Law Journal* 383-416 at p. 410 (concerning the similar approach of the ECJ).

⁹¹ Hans Petter Graver, ‘Domstolene og EØS’ [‘The Courts and the EEA’] (2005) 44 *Lov og Rett* 577-578.

rights and obligations. This is due to the fact that both the EFTA Court and the Supreme Court of Norway has recognised that within the reach of the principle of homogeneity the supreme authority on the interpretation of the EEA Agreement rests firmly with the ECJ.⁹² The Supreme Court's judgment in *STX* is illustrative in this regard: The judgment is dotted with references to ECJ case-law and clearly based on the assumption that the Posted Workers Directive, as well as Article 36 EEA, is to be interpreted and applied in accordance with the views of the ECJ. Thus, the deviations from the advisory opinion of the EFTA Court only show that the Supreme Court will indeed, as foreseen by Henrik Bull almost ten years ago, 'opt for the ECJ version rather than the EFTA Court version of EEA law' (if convinced that the two versions are indeed inconsistent).⁹³ This is in conformity with the hints made in earlier cases such as *Finanger (No 1)* and *Edquist*.⁹⁴ The judgment in *STX* may rightly be portrayed as the Supreme Court demonstrating its independence from the EFTA Court, but with the connotation that this independence is used only to adhere to what the Supreme Court believes to be 'the ECJ version of EEA law'.

True enough, an important difference between *STX* on the one hand, and *Finanger (No 1)* and *Equist* on the other hand lies in the fact that no new ECJ case-law was involved in *STX*: The disagreement of the Supreme Court and the EFTA Court in *STX* is based on diverging interpretation of the very same decisions from the ECJ. However, as shown in section III above, the circumstances were rather special; the interpretation of EEA law advocated by the EFTA Court went beyond the one argued by the Commission and the EFTA Surveillance Authority. If limited to such scenarios, the approach of the Supreme Court can hardly be problematic to the EU.

Should, however, the Supreme Court deviate in the future from the case-law of the EFTA Court in a case where the EFTA Surveillance Authority and the Commission agrees with the interpretation advocated by the EFTA Court, then ESA may find itself forced to defend the

⁹² See, concerning the EFTA Court, Fredriksen, 'One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area', fn. 3 *supra*, and, concerning the Supreme Court of Norway, Fredriksen, 'The Two EEA Courts – a Norwegian Perspective', fn. 3 *supra*, at pp. 189 *et seq.*

⁹³ Henrik Bull, 'European Law and Norwegian Courts', in: Peter-Christian Müller-Graff and Erling Selvig (eds.), *The Approach to European Law in Germany and Norway*, Berlin 2004, pp. 95-114, at pp. 112 *et seq.*

⁹⁴ Rt. 2000 p. 1811 *Finanger (No 1)*, at p. 1825 and Rt. 2010 p. 1500 *Edquist*, paragraph 113.

credibility of the judicial mechanism of the EFTA pillar by initiating an infringement procedure against Norway. It is, as stated by Hans Petter Graver in his above mentioned contribution, in the interest of all parties concerned that this scenario is never played out. One way to ensure this is by holding that the ‘special reasons’ required to justify deviation from the case-law of the EFTA Court will only be present if there is either new case-law of the ECJ or clear support from the Commission and the EFTA Surveillance Authority. If the opinion of the Commission and the EFTA Surveillance Authority is unknown, it may easily be obtained by way of a referral to the EFTA Court under Article 34 SCA (as both the Commission and the EFTA Surveillance Authority may safely be expected to submit their observations).

With a possible exception of cases where an advisory opinion has already been obtained by a lower court (such as in *STX*), the credibility of the judicial architecture of the EFTA pillar strongly suggests that any Norwegian court inclined to deviate from existing case-law of the EFTA Court ought first to give the EFTA Court the opportunity to have a fresh look at the relevant provisions of EEA law.⁹⁵

As the Supreme Court’s independence from the EFTA Court is intrinsically linked to the recognition of the ECJ as the supreme authority on the interpretation of EEA law, the reach of the authority of the ECJ may come to play an important role in the future development of the relationship between the Supreme Court and the EFTA Court. As suggested in section III above, the recent State-liability case-law of both the Supreme Court and the EFTA Court may be understood in this light: by tying the EEA law principle of State liability to the principle of State liability under EU law, the Norwegian Supreme Court in *Edquist* and *Personskadeforbundet* sidelined the EFTA Court. By emphasising that the application of the said principles may not necessarily be coextensive in all respects and by demonstrating its will to assess *in concreto* whether a breach of EEA law is sufficiently serious to entail State liability, the EFTA Court in *HOB-vín* reclaimed its position on the playing field.

As long as the Norwegian Supreme Court adheres to the best of its ability to the case-law of the ECJ, it is primarily in cases concerning ‘EEA specific’ matters that the EFTA Court will have an opportunity to make a real impact upon the interpretation of the EEA Agreement.

⁹⁵ As Follo District Court and Oslo District Court did in Joined Cases E-9/07 and E-10/07 *L’Oréal Norge AS v Aarskog Per AS and Others and Smart Club Norge* [2008] EFTA Ct. Report 259.

This should, however, by no means lead to any depreciation of the importance of the EFTA Court. Firstly, there are a significant number of ‘EEA specific’ questions, not least due to the lack of a much needed update of the main part of the Agreement.⁹⁶ Secondly, one may not overlook the importance of the EFTA Court as a guarantor of the EFTA States’ fulfilment of their obligations under the Agreement. Even if in little demand for the time being, it is unquestionably important to the credibility of the EEA Agreement that the EU and its Member States may rest assured that the EFTA Surveillance Authority and the EFTA Court will see to it that Norwegian courts continue to interpret and apply the internal market *aquis* in accordance with ECJ case-law.

⁹⁶ Negotiated as they were in 1990-1992, the substantive provisions of the main part of the EEA Agreement still mirror the corresponding provisions of the EC Treaty as they stood at that time.