THE EFTA COURT

COMPARISON WITH THE EC COURTS
AND EFFECTS ON ECJ CASE LAW

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ABSTRACT

The EFTA Court plays an important role in keeping, *inter alia*, the homogeneity principle and continuous cooperation and legitimate development in its judgements. In this study an analysis is made on four cases on both the Community and the EFTA side in case of case law effect made by the EFTA Court. It is important to recognize case law influences by an ‘outside’ Court, even though the Community Courts are not bound to be influenced, as it states how dynamic responsibility the EFTA Court has. There are differences of how the Community recognizes ‘case law’ made by the EFTA Court which are rooted on legislative and political grounds with an outcome allowing for naming some Judges and Advocate General ‘EFTA friendly’.
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EUROPEAN COURT OF FIRST INSTANCE


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<td>Art.</td>
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<td>CFI</td>
<td>Court of First Instance</td>
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<td>CMLR</td>
<td>Common Market Law Reports</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>E.C.R.</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>EC Treaty</td>
<td>European Community Treaty</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EES</td>
<td>European Economic Space</td>
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<td>EEC</td>
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<td>European Free Trade Association</td>
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<td>European Law Review</td>
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<td>ESA</td>
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<td>EU</td>
<td>European Union</td>
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<td>FTA</td>
<td>Free Trade Agreement</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>OECD</td>
<td>Organization for Economic Co-Operation and Development</td>
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<td>Organization of European Economic Co-Operation</td>
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<td>OJ</td>
<td>Official Journal (of the European Communities)</td>
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<td>para.</td>
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<td>p.ex.</td>
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<td>SCA</td>
<td>Surveillance and Court Agreement</td>
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<td>World Trade Organization</td>
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1 INTRODUCTION

The European Economic Community (EEC), now the European Union (EU), and the European Free Trade Association (EFTA) have a solid relationship based on more than 30 years of cooperation. The European Economic Area (EEA) Agreement was signed in 1992, entry into force in 1994, which is the first of its kind and is the most comprehensive agreement of free trade between countries ever signed in Europe. Those two trading blocks were established because of different viewpoints on economical and political integration, where at first they competed as rivals but eventually came to an agreement of deep cooperation. The EEA Agreement has been in force for 12 years, during that time the Member States of the EU has grown in numbers but an opposite development on the EFTA side. This evolution has had some effect on the EFTA-EC relationship but both parties (though mainly EEA/EFTA institutions and authorities) have maintained to keep the ‘homogeneity principle’, the main object of the EEA Agreement.

The jurisdiction of the EFTA Court is limited to the EEA/EFTA Contracting parties, therefore, compared to the Courts of the Community, their judgement have a shorter time frame and workload reflects on their jurisdiction. When analyzing the EEA provisions and possible influence of the EFTA Court on case law of the Community courts it has to be kept in mind that the EFTA Court is the only ‘outside’ court that could possibly ‘influence’ judgement made by the Community. During the enforcement of the EEA Agreement few cases relating to it has developed. The European Court of Justice (ECJ) first Opinion, influenced by the EEA/EFTA States sovereign protection, had considerable effect, inter alia, on the EFTA Court jurisdiction and competence. According to article 6 EEA judgement made before the signature of the EEA Agreement are bound by law on the EEA/EFTA States, and according to article 105 EEA, the EFTA Joint Committee has to keep under constant review the development of the Community and the EFTA Court case law. Article 3(2) of the Surveillance and Court Agreement (SCA) implies that the EFTA Court and the EFTA Surveillance Authority (ESA) should respectfully take notice of all judgement made by the Community Courts after the signature of the EEA Agreement. National courts of the

1 Decided cases are 74 and pending cases are 8, 17th of December 2005. See more detail at the homepage of the EFTA Court were all cases are published: www.eftacourt.int.
EEA/EFTA contracting parties and the EFTA Court are therefore bound to look at judgements in question as fundamental solution according to occurrence at hand. EFTA Authorities are therefore not bound by judgement dated after signature of the EEA Agreement in the same way as judgements made before the signature. The bottom line regarding the subject of this paper lies in the content of article 3(2) SCA, where it states non mutual effect towards the Community, which means that no provisions of the EEA Agreement or its adhesion Agreements state that the Community Courts or the Commission are bound by or has to take notice of judgement or opinion made at the EFTA side. Nevertheless, even though the Community is not bound by judgement of the EFTA court or institutions they have made important backdoor effect on Community case law in few cases.

1.1 **Problem Statement**

Based on above, the paper will answer following question and sub questions;

*Has the EFTA Court made any influences on case law of the EC Court of Justice?*

With the purpose of explaining and describing the functioning of the EFTA Court it is appropriate to answer following sub questions:

*What are the differences between the EFTA Court and the Community Courts?*

*What effect had the ECJ Opinion 1/91?*

*What effect has the non-transfer of national sovereignty of the EEA/EFTA States?*

*Is the homogeneity principle secured concomitant with development of case law and amendments of the EU Treaties?*

Giving answers to those questions a survey will be on applicable legislation of both the Community and the EFTA, secondly, refer to case law of the EFTA Court and Community Courts, when applicable. The literature is from various sources with critical evaluation on all references made in terms of validity and liability.

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1.2 Motivation and Delimitations

The EEA/EFTA States obtain many benefits through the EEA Agreement even though it ‘only’ provides half way house to the Community. The Agreement created the largest free trade system on a world scale but at the same time excluded the EEA States voting rights when amendment to or codification of EU Legislation. Moreover case law of the EFTA Court and decision of the EFTA Joint Committee will have no effect on case law of the Community Courts. Those negative sides are built on legal footing to be compatible, *inter alia*, with the EC Treaty. The latter just mentioned is a safeguard measure created at the signature of the Agreement but nevertheless form an interesting question whether case law of the EFTA Court has had any influences. There are at least eight cases fulfilling this effect which means 16 cases when including Community cases. As the size of this paper does not allow for analyses on all those cases, it contains a deep description on four EFTA cases and four ECJ cases.

In this paper the focus will be on case law of the EFTA Court and whether they have made any influences on case law of the Community Courts, excluding all analyses on a Member State level of both the Community and EFTA States.

Historical background of the development of the EFTA-EC relationship will not be deeply presented but short introduction given. Analyses on EFTA Institutions and Committees will be short handed in all cases except in case of the EFTA Court, where exhaustive description will be given of a comparison with the ECJ.

The author of this paper is of Icelandic nationality, one contracting State of the EEA Agreement, with business background.
1.3 Structure of the Paper

This paper is divided into six parts where the first part contains introduction and problem statement. The second part deals briefly with the historical background of the EFTA-EC relationship, how it developed, enlarged and retrenched. The two pillar approach that the EFTA is built upon explains the infrastructure and procedure within the EFTA institutions. Moreover, the main content of the EEA Agreement\(^3\) and how the Community Courts’ Opinion changed dramatically position and procedure of the EFTA institutions. The EEA Agreement did not create the same legal basis as the legislation of the Community, the differences concerning legal aspects will be explained f.ex. the EFTA edition of preliminary rulings and direct effect. In part three, author finds it appropriate to picture the most important EFTA Institutions and Committees, their field of work, \textit{inter alia}, is to uphold the rule of law created by the cooperation. In part four a concrete description of the differences between the EFTA Court of Justice and the Community Courts are listed. In part five, analyzes on four EFTA Court cases are presented with the purpose to examine whether, and within what degree, the EFTA Court has made any influences on case law of the Community Courts. The last part of the paper states final conclusion and future research propositions. Each part will conclude with appropriate findings which will be summarized and connected with other parts of the thesis as well as in final conclusion. Thus, the first four parts are of an introductory character of the fifth but none of them bears mark to be exhaustive.

\(^3\) Also named the ‘Porto Agreement’. 
2 EFTA-EC RELATIONSHIP

2.1 BRIEF HISTORICAL BACKGROUND

This chapter will outline the most important historical background of the EFTA-EC relationship. The purpose is not to give a concrete overview but to explain its current existence which can mainly be explained by its development.

The Organization for European Economic Co-operation (OEEC), later became the OECD, was established in 1947. The organization was established because of the Marshall aid\(^4\) after the Second World War to strengthen Western Europe economically\(^5\). At that time Europe was fragmented economically which seriously called intention to prevent another disaster to take place. The historical starting point of the OEEC later established two trade blocks in Europe, i.e. the EEC\(^6\) (later developed to the EU)\(^7\) and the EFTA\(^8\). Those two trade blocks had different views on cooperation were the EEC was named the ‘inner Six’ and the EFTA the ‘outer Seven’. The very first Treaty of the EEC was signed in 1951 creating the European Coal and Steel Community (ECSC) and in 1955 proposals for the EEC was formed which in 1957 created the Treaty of Rome. The ‘outside Seven’ signed the Stockholm convention 1960 after parliamentary approvals but a referendum in Switzerland (they therefore pertain to the Swiss-EEC/ECSC FTAs)\(^9\). The main purpose of the EFTA creation was twofold, firstly because of newly created EEC, the inner Six wanted to avert economic discrimination from the Seven and secondly to create equivalent free trade between the outer Seven as within the inner Six, with future possibility to later establish an agreement with the inner Six\(^10\). The main provisions in the Stockholm convention, apart from the basic provisions regarding full free trade in industrial products, abolished and prohibited

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\(^4\) Mr. George Marshall, the Foreign Secretary of the United States initiated an idea to reconstruct Europe, also known as the ‘Marshall Plan’.


\(^6\) By Germany, France and the Benelux countries.

\(^7\) The Treaty of the EU entered into force 1\(^{st}\) of November 1993 which amended the EEC Treaty by changing the name, the contents and numbering of certain articles, Blanchet et.al., (1994), p. 30.

\(^8\) By Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom.


import duties and quantitative restrictions and equivalent measures on imports and exports\textsuperscript{11}.

The countries establishing the OEEC had different concepts of a cooperation and economic integration were the EEC created a customs union with joint market including agricultural products but the EFTA countries wanted to create a free trade association without giving supranational institutions its legislative power, therefore, keeping its national sovereignty. EFTA States consequently only eliminated tariffs for industrial products and later widened its external relations by signing similar bilateral and multilateral agreements with third countries.

The outside Seven tried hard to create cooperation with the inner Six for 12 years with no success and more over were treated as rivals with the Community\textsuperscript{12}. It was not until the first enlargement of the EEC, in 1973, that their relationship changed its direction. The foundation of the EFTA by the Stockholm convention therefore took the first step that year of the EFTA-EC relations by creation of the bilateral Free Trade Agreements (FTAs). After an implementation process of the FTAs from 1972 till end of 1983 the creation of the European Economic Space (EES) was accomplished in the beginning of the year 1984. The EES was the first multilateral agreement that the EFTA made with the EEC. The negotiation period between 1989 and 1993 was the most dynamic relationship phase between EFTA and EEC, namely the creation of the EEA Agreement. The Agreement created solid cooperation which has developed dramatically through the years and moreover created the largest free trade system on a world scale\textsuperscript{13}.

\section*{2.2 \textit{EFTA enlargement and retrenchment}}

The first EFTA ‘informal’ enlargement was in 1961 when Finland became an associate member and not a full member because of trade relations to the Soviet Union, but became a full member in 1986. Iceland enjoyed in 1970 and Lichtenstein in 1991, but the United Kingdom and Denmark left the association in 1972, Portugal in 1985, and

\begin{itemize}
\item \textsuperscript{11} Norberg et.al., (1993), p. 41 et seq, in addition, \textit{inter alia}, provisions regarding Staid aid, public undertakings measures, restrictive business practices, dumped and subsidized imports.
\item \textsuperscript{13} Ibid, (1993), p. 48.
\end{itemize}
Austria, Finland and Sweden at the end of 1994, all six joining the EEC\textsuperscript{14}. Four countries are therefore organizing EFTA today with population of little less than 12 millions but all of them with high GDP and low unemployment rate and stable inflation\textsuperscript{15}. The results of the retrenchment of EFTA into the EEC the year 1989 has been given the name “\textit{annus mirabilis}”, i.e. only three, Iceland, Norway and Lichtenstein, Contracting States on the EEA/EFTA side\textsuperscript{16}. Norway held its second Community membership referendum in September 1972 with negative results\textsuperscript{17}. Norway therefore concluded a bilateral FTAs agreement with the Community in March 1973 but Austria, Iceland, Portugal, Sweden and Switzerland in July 1972, entry into force on January the 1\textsuperscript{st} 1973, the same date as when Denmark, United Kingdom and Ireland acceded to the Community\textsuperscript{18}.

The cooperation between those two economic trade blocks in Europe has deepened and developed in a positive direction. Those changes have weakened the bargaining power of the EEA/EFTA States were the opposite happened in the EU. At the beginning the Member States of EFTA were seven but now only three at the EEA/EFTA side, with less than five millions inhabitants. This development makes it more difficult for EEA/EFTA states to influence any decision or amendments made at the Community level.

\subsection*{2.3 The Two Pillar Approach}

When the EEC deepened its inner cooperation with aims of creating the ‘Single Market’ the EFTA States welcomed Mr. Jacques Delors, at that time President of the European Commission, who held a speech to the Parliament in Strasbourg on January the 17\textsuperscript{th} 1989. Mr. Delors proposed much deeper relationship from an industrial viewpoint. EFTA governments and heads of States reached a positive future negotiation at the Oslo meeting on March 14\textsuperscript{th} and 15\textsuperscript{th}, 1989. From an EFTA point of view the speech was met with a signal of enthusiasm but within the Community some voices passed negative

\textsuperscript{15} Ibid, p 74. See also the OECD webpage for number information like GDP etc.
\textsuperscript{16} Iceland, Norway and Lichtenstein, Benediktsson, (2003), p. 27.
\textsuperscript{17} The first referendum membership was held 25 September 1972 also with negative results of 53,5\% on the “no” side and the second one with 52,2\% of “no” votes, see http://en.wikipedia.org/wiki/Norwegian_EU_referendum_1994
\textsuperscript{18} Regarding the FTAs with Iceland the agreement came into force on 1\textsuperscript{st} of March 1973 and with Norway 1\textsuperscript{st} of July 1973 and Finland 1\textsuperscript{st} of January 1974, Norberg et.al., (1993), p. 46 et seq.
judgement on this form of a relationship. The negative voices were unhappy with how the EFTA countries would benefit from the internal market and at the same time outside the economic and political price, that was (at first) seen unacceptable\(^{19}\). Some voices spoke with negativism with the opinion that the EFTA States were bad substitute and believed that it could prevent others from applying for membership. However, some voices saw the benefit of this kind of cooperation\(^{20}\). It was therefore necessary to establish an institutional system that would take into account obligation of the EFTA States in harmony with the Community legislation. Next chapter will explain how the two pillar system was decided upon and thereafter in chapter three an explanation of the most important EFTA institutions function and structure are given.

### 2.4 *ECJ First Opinion*

The period between Mr. Deloris declaration in Luxemburg and till April 1992, representatives from all contracting parties at the EFTA side and the Commission laid down draft of the Agreement. At the end of the negotiation period and before the ECJ gave its opinion, few bottles of champagne were opened and hard work celebrated.

At the EEA negotiations stage the judicial system and the dispute settlement procedure was among the most difficult issues\(^{21}\). To provide legal security it was necessary to create a judicial system and moreover the system had to ensure uniform interpretation and application of rules. This was a sensitive mechanism for two very important reasons, and perhaps it is safe to declare that those two reasons have led the relationship between EC and EFTA at present stage. The first one is the sovereignty protection at the EFTA side, the main political reason for not enjoying the European club which has strong effect on case law within the EEA/EFTA States as well as rights and obligation upon individual and economic operators. Secondly, the EC courts are structurally independent where almost everything solved or decided by them have a binding effect, without any other institutions of the EU to influence or have the right to nullify their final outcome. Therefore, the two parties had to balance those interest and legal terms,

\(^{19}\) Baragiola, (1991), p. 18 et seq.
both to be compatible with the EC Treaty and to approve the EEA Agreement. After a long and repeated conclusion at the negotiation stage both parties finally agreed, *inter alia*, on establishment of an independent EEA Court (on the 14th of May 1991, and upheld at the Luxemburg Ministerial meetings on October the 21st – 22nd, 1991). The EEA Court was supposed to compose of five judges from the Community side and three judges from the EFTA side. Moreover, the EEA Court was supposed to be functionally integrated with ECJ. Its competent was dispute settlement, brought before the Court (1) by an EEA Joint Committee or a Contracting EFTA State, (2) between ESA and an EFTA State and (3) between enterprises or States against decisions of the EFTA structure in matters of competition. At the meeting in October 21st – 22nd 1991 the “*preliminary rulings*” was added on the list of the EEA Court competences. Before that meeting, the Commission, according to article 300 EC (ex. article 228 EEC), requested the ECJ for an opinion of compatibility of the EEA Agreement with the EEC Treaty. Furthermore, the Rules of Procedure22 of the Court of Justice of the EEC, according to article 107(2) provide the Court’s to give Opinion were it ‘[…] may deal not only with the question whether the envisaged agreement is compatible with the provisions of the EC Treaty but also with the question whether the Community or any Community Institutions has the power to enter into that agreement”. Moreover, according to article 245(3) EC (ex. art. 188 EEC), those rules can only be adopted with unanimous approval of the Council23. The ECJ made several serious commentaries in its first Opinion 1/9124 which will be listed in following subchapters.

**A. INTERPRETATION AND OBLIGATIONS**

The first thing the ECJ pointed out was that in spite of its identical wording of the Agreement provisions, it is important that national courts interpret the agreement and the community legislation in light of its objectives and not only its wording. The EEA Agreement had different objectives and context compared to the Community Treaties. Sovereign rights to intergovernmental institutions were not transferred, only giving rights and obligations between contracting parties. At that time it was clear that the

24 OJ [1991], 14 December, E.C.R. I-06079, pursuant to art. 300(1) EC (ex. art. 228(1) EEC). ECJ Opinion is binding on those who it is addressed to.
principles of direct effect and primacy were part of the Community legal order which form certain right and obligations upon individuals and economic operators.

Homogeneity was very important and had to be secured in some way. The Court examined in what way this could be accomplished since it was not secured in wording. Interpreting the Agreement in conformity with case law of the EC Courts was also an important factor missing on that stage. It was clear in the Agreement that rulings cited upon before the signature would form part of the Agreement but it was not clear what effect case law ruled upon after the entry into force of the Agreement. It was also unclear whether the EEA Agreement would have primacy over contrary national provisions. Therefore it was important to state how to demonstrate compliance of ruling of the Community Courts.\(^{25}\)

**B. SYSTEM OF COURTS - JURISDICTION**

According to article 220 EC (ex art. 164 EEC), the Community Courts has prerogative to interpret the EC Treaties and moreover has the obligation to observe the law of those Treaties. The Courts concern was how the EEA Court would interpreted ‘Contracting Parties’ and gave its ruling that it include ‘both or either’ the Community or the Member States. Giving the EEA Court jurisdiction over the Community Member States would not be compatible with the Community law and moreover would affect the autonomy of the Community Courts. This matter is clearly stated in article 220 EC (ex. article 164 EEC) and article 87 ECSC Treaty and article 219 EEC the method settlement of dispute is stated which gives the Community the interpretation right.\(^{26}\)

**C. THE COMMUNITY COMPETENCE**

The Court of the EEA had a duty to interpret the Agreement Provisions “[…] in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement”\(^{27}\). Decisions taken by the Community Courts would have no obligations for the EEA Court to develop accordingly and in harmony of rules laid down in the Community Treaty. This was incompatible with the Community Treaty and would

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\(^{26}\) Ibid, para 2.

\(^{27}\) The Community Courts are not bound by this as it would prevent normal development of case law at the EEC, Christiansen, (1997), p. 545.
jeopardize the main principle and objectives of the EEA Agreement, namely the ‘homogeneity’.

**D. BINDING EFFECT**

The ECJ stated that no provisions within the EEC Treaty regarding obligations of national courts or tribunals related to international agreements to make a reference to its self but ruled that it would be unacceptable that ECJ ruling would lack the binding effect.

**E. INTERVENE AND CONFLICTS**

The ECJ stated that it would be unnecessary to change article 164 EEC to give the EEA/EFTA States the right to intervene. Even though the EEA Agreement goes further and deeper than normally is the case of international agreements and hence to establish a system of a Court, it would be incompatible with article 310 EC (ex. art. 238 EEC).

As is listed above, the first Opinion of the ECJ was very negative and hence it required amendments to be compatible with the founding Treaty of the Community. At this point the participants at the negotiation had short time to make changes as the parliamentary procedure and referendum had to take place within the EFTA Contracting Parties. There after, an implementation process had to take place before the Agreement to entry into force. Next the second Opinion of the ECJ is examined which gives an overview of how the contents of the EEA Agreement Provisions were amended.

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29 Ibid, para 4.
30 Ibid, para 5.
31 Ibid, para 6.
2.5 ECJ Second Opinion

As listed above, the ECJ gave rather negative opinion on the draft EEA Agreement which required the negotiations groups to amend accordingly. The negotiation was reopened by the Commission and two months after the ECJ first opinion a draft EEA Agreement was ready to be given its second Opinion32.

The ECJ approved that the EFTA Joint Committee empowered by article 105 EEA “[…] to keep under constant review the development of the case-law of the Court of Justice of the European Communities and of the Court of the European Free Trade Association and to act so as to preserve the homogeneous interpretation of the agreement. On the other hand, decisions taken by the EFTA Joint Committee are not to affect the case law of the Court of Justice”33.

The Court approved that under article 111 EEA “[…] the Joint Committee is empowered to settle disputes brought before it by the Community or a State of the EFTA on the interpretation or application of the agreement, including, pursuant to article 105(3) EEA, disputes relating to a difference in case-law which the Committee has been unable to settle under the procedure laid down in article 105 EEA”34.

Article 111 EEA lays down how to interpretive provisions of the EEA Agreement and will have no effect on the autonomy of the Community legal order or case-law of the Court of Justice, since it is linked to article 105 EEA. Those two articles therefore have “to be interpreted systematically and consistently”35. According to article 111(3) EEA, the Joint Committee may interpret provisions of the Agreement and is therefore consistent with “the jurisdiction to interpret the relevant rules conferred to the Court of Justice” if the provisions referred to are identically worded to equivalent rules of Community law. The same article also gives the right to ask the EC Court of Justice to interpret provisions of the Agreement and will have a binding effect on Contracting Parties36.

34 Ibid, para 2.
36 Ibid, para 3.
The ECJ approved that under article 107 EEA national courts of the EEA/EFTA States can be authorized to request the ECJ for interpretation of provisions of the Agreement and furthermore, that answers given will be binding. Therefore, the ‘preliminary rulings’ and the mechanism ‘binding effect’ was secured within the EEA Agreement and fully compatible with Community law. Article 56 EEA is expressly designed to avoid “[…] any transfer of power to the EFTA Surveillance Authority and the EFTA Court” from the Community institutions.

2.6 Creation of the EEA Agreement

The EEA Agreement was signed in Oporto 2nd of May 1992 by 19 countries and entered into force the 1st of January 1994, created a free trade area and not a customs union. Switzerland, however, subsequent of negative referendum (6th of December 1992) could not ratify the Agreement and consequently Liechtenstein could not ratify the Agreement until customs agreement and other agreements (monetary and postal union) with Switzerland had been modified. A fear rose on both sides that Switzerland would benefit certain advantages of the EEA Agreement through Lichtenstein membership. This was solved with results of an adjusting protocol and the EEA Agreement entered into force on the agreed date.

Picturing overview of the main content of the EEA Agreement as well as its background is relevant in this report but also how the Agreement formed EFTA institutions (see chapter 3) and legal effect in its existent appearance. The EEA Agreement has its limits and freedom and classifies as public international law. That means, inter alia, that the EEA/EFTA States if not following its obligations they will be “[…] brought before an international tribunal for breach of its international obligations…”.

Even though other ideas and thoughts came to the surface at the negotiation process which never got the change to be rooted, the main purpose of the EEA Agreement is to

38 vide supra, fn. 7 and 9 plus Spain, Greece.
39 After a renegotiation with Switzerland a referendum was held in September 1994 with positive outcome and Lichtenstein became a full member of the EEA Agreement.
41 OJ L 1, 03/01/1994 pp. 0572–0605.
extend the benefits of the Internal market to the EFTA countries. The hard labour to combine both interest and Community law firstly created common rules and secondly intergovernmental bodies with no legislative powers or supranational factors. The Agreement falls under international law which is transposed into national law according to rules and procedures of each Member States specific national system. Compared to other international treaties, the EEA Agreement requires the national system to be more involved than normally is known. The main part of the Agreement has been transposed into national law of the EEA/EFTA States as national legislation.

According to article 128 EEA, every EU applicant country has to apply for a membership of the EEA Agreement. Furthermore, it nullifies all agreements\(^\text{43}\) that the applicant countries had made with other countries (including EEA/EFTA). The EU has followed the ‘no backward principle’, i.e. they try not to put countries in worse situation when entering the Community. This applies to bilateral agreements between EFTA and applicant countries.

2.6.1 **Main content of the EEA Agreement**

The EEA Agreement covers the ‘four freedoms’\(^\text{44}\), competition policy and harmonization of a large part of national law of adoption of EC secondary law, with the aim of creating a dynamic and homogeneous European economic space\(^\text{45}\). The Agreement is made up of 129 articles divided into nine parts\(^\text{46}\) and are in a close consistence to the substantive provisions of the EEC Treaty, 22 Annexes covering the secondary legislation of the EC acts (i.e. the ‘acquis communautaire’) and 49 Protocols (i.e. provisions on specific areas such as rules on origin of goods, transition periods for

\(^{41}\) EFTA had free trade agreement between most of the last applicant countries which granted zero tariffs to industrial products and fishery products (with few minimum exceptions). The last EU enlargement nullified those agreements and EU provisions took effect, therefore would add tariffs on many fishery products if exported from EEA/EFTA countries to the internal market. For more detail information see Eurostat (2004).

\(^{42}\) Including provisions on product liability, energy, social security, mutual recognition of qualifications, financial services, broadcasting and telecommunications, transport, public procurement, intellectual property, health and safety regulation, employment law, consumer protection, environmental regulation, company law, veterinary and phytosanitary matters and technical regulations and standardisation (Strivens, (1993), p. 517).


\(^{44}\) Part II covers free movement of goods, part III free movements of persons, service and capital, part VI competition and other common rules, part V horizontal provisions relevant to the four freedoms, part VI research, development and education, part VII contains the institutional provisions, i.e. decision-making procedure, measures safeguarding homogeneity, surveillance mechanism, settlement of disputes and safeguard measures, part VIII cohesion found and part IX contains general and final provisions.
the EEA/EFTA states and customs procedure)\textsuperscript{47}. Under article 119 EEA both the Annexes and the Protocols form an integral part of the Agreement\textsuperscript{48}. The Agreement, therefore, covers fundamental part of rules of economic and trade relations within the Community. Agricultural and fisheries policies (in some extent there exists complementary rules on a bilateral basis), external relations, taxation, common home or foreign affairs policies or economic and monetary union are all excluded from the Agreement\textsuperscript{49}.

Whenever an EEA-relevant legal act is amended or a new one adopted by the EU an equivalent amendment should be made to a relevant Annex of the EEA agreement. This is crucial in maintaining the principle of homogeneity of the EEA, the main objective of the Agreement.

Addition to its content and main purpose, the EEA Agreement was also seen as a ‘half way house’ to the Community. Three of the then EFTA countries (Sweden, Finland and Austria) were likely to apply for a full Community membership. The Agreement therefore was seen as transitional period providing many of the benefits of membership without transferring national sovereignty. The Eastern European countries were likely to take this direction before becoming a full member of the Community, but the entire last applicant countries applied directly, leaving the EEA as a ‘anachronistic anomaly’\textsuperscript{50}. The reason for their bypass is of an economical perspective as well as their main reason for entering the EU. To predict what country would be likely to joining the EEA/EFTA is Switzerland, which is already a member of EFTA and has already an agreement with the EU.

The EEA Agreement has not so far been adapted to the Maastricht, Amsterdam and Nice amendments of the EC Treaty\textsuperscript{51}, which is rather strange as the homogeneity principle is very important. Some say that in the EFTA case E-1/01 \textit{Einarsson}, this effect can be seen. The case was about discriminatory taxation within the meaning of article 14(2) EEA (mirroring article 90(2) EC). The Amsterdam Treaty added a

\textsuperscript{47} Norberg et.al., (1993), p. 76.
\textsuperscript{51} Baudenbacher, (2003), p. 890.
protection provision of culture, article 151(4) EC, which can justify discrimination. Not having adopted those amendments can jeopardise the homogeneity.\textsuperscript{52}

\subsection*{2.6.2 EC Judgement precedent}

Both judgements of the EC and the EFTA courts can be significant in matters of creating precedent at both EFTA and EC sides. According to article 6 EEA all judgements made before the signature of the EEA Agreement are bound by law as a precedent. National courts of the EEA contracting parties and the EFTA Court are therefore bound to look at judgements in question as fundamental solution according to occurrence at hand. Article 3(2) SCA implies that both the EFTA Court and the ESA should respectfully take notice of all judgements made after signature of the Agreement, as it concerns the content of the Agreement. EFTA Authorities are therefore not bound by judgement dated after signature of the EEA Agreement as judgements made before signature, at least not in the same way. It is worth noticing that article 3(2) SCA is not mutual, that means that no provisions of the Agreement or its adhesion agreements state that the Community courts or the Commission has to take notice of judgement made by the EFTA Court. The reason for this, as stated above, is to protect the autonomy of the ECJ and to be compatible with the Community law.

Other judgements of the Community courts can have a precedent effect even though it does not directly fulfil provisions of articles 6 and 3 EEA. This can be seen in the \textit{Restmark} case E-1/94, where the court was interpreting the concepts “court or tribunal” as the questions brought before the court for an advisory opinion by \textit{Tullilautakunta}, a Finish Custom Organisation. The EFTA Court gave admissibility to ask for an advisory opinion\textsuperscript{53} which means that the Court was therefore fulfilling the main objective of the Agreement, mainly the homogeneity. Furthermore, the EEA Agreement does not require the EFTA Court to “[…] \textit{follow the reasoning when interpreting the main part}…”\textsuperscript{54}.

\textsuperscript{52} Ibid.
\textsuperscript{53} Case E-1/94, para 31.
\textsuperscript{54} Ibid, para 24, and Christiansen, (1997), p. 545.
2.7 Legal bases created by the Agreement

2.7.1 The Principle of Direct effect

The ECJ ruled on the doctrine ‘direct effect’ in the cases Van Gend and Costa/ENEL. Many articles have been written regarding whether EC style direct effect is part of the EEA Agreement, which some of them gives misleading interpretation and should be read provisionally.

What effect directives have in national law matters upon whom it is addressed to and who has the obligation and rights laid down in each act. Member States, individuals and economic operators are groups that fall within this meaning. National courts have the duty to construct national rules in harmony with appropriate directives. The most important element in form of obligation put on Member States is to interpret national law, as is laid down by article 249(3) EC (ex. art. 189(3) EEC), in harmony with the wording and the purpose of the directive in order to achieve the result. This obligation is fully applicable in the EEA/EFTA States. It was not until the EFTA Court gave ruling in the case Karlsson on the doctrine that it was clear what rights the principle creates to individuals and economic operators. The most important element made by the Agreement was the non transfer of legislative power to the EC institutions. This is made clear in article 7 EEA and Protocol 35 to the Agreement. Hence, individuals and economic operators cannot rely on non implemented rules of the Agreement before national courts. However, the EFTA Court also stated in Karlsson that national court should take into account the “[… general objective of the EEA Agreement of establishing a dynamic and homogeneous market, in the ensuing emphasis on the judicial defence and enforcement of the rights of individuals, as well as in the public international law principle of effectiveness, that national courts will consider any relevant element of EEA law, whether implemented or not, when interpreting national law”57. This means that national courts of the EEA/EFTA States have the obligation and ‘freedom’ to decide what affects non implemented EEA rules will have both on individuals and on the future EFTA-EC relationship and development58. To explain this

55 Cases C-26/62 and C-6/64.
56 Case E-4/01, para 28.
57 Ibid.
difference between the doctrine effect at the EFTA and the EC, the EFTA States had to establish by law the EEA Agreement as it could have direct effect, either by transformation or incorporation. Some provisions were not established by law, instead Protocols and Annexes were formed and can therefore not obtain direct effect or direct applicability.  

2.7.2 State liability

It was not until 1990 that the ECJ ruled on the State Liability principle in the *Francovich* cases. The principle is of a protection concern to individual and economic operators, if national governments of the contracting parties have caused damages due to wrongly implementing or non-implementing directives, hence giving rights for compensation. It is therefore a save clause for those injured thereof and motivates governments to act on their obligations. It was of a general opinion at the EEA/EFTA side that the Principle State liability was not made part of the Agreement. The EFTA Court, however, ruled the opposite in its advisory opinion in the case *Sveinbjörnsdóttir*. The Court said that even though the direct effect was precluded form the Agreement, the principle State liability is part of the Agreement. However, three conditions have to be fulfilled if rights upon individuals are conferred. First of all the individual concerned has to have obtain ‘rights’ of the legislation infringed, secondly the breach made of the government concerned has to be ‘sufficiently serious’ and thirdly a ‘causal link between the violation and the damage has to be clear’. The EFTA Court further ruled in the *Karlsson* case that this principle applies both to secondary EEA legislation and to the main part of the EEA Agreement.

2.7.3 Principle of Primacy

In many cases the EC Courts have ruled that EC law have primacy over national legislation even though national constitution in some Member States state specifically that international agreements could never have supremacy. Furthermore, the age of the  

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62 Case E-04/01 *Karlsson*, para 29.
provisions at hand does not have any effect, i.e. whether national provision was adopted before or after the Community law. The Treaty of Rome does not state the principle of primacy but the ECJ has ruled in several cases about this issue. In the Case 6/64 Costa/ENEL\textsuperscript{64} the ECJ said according to art. 249(2) EC (ex. art. 189 EEC) that the Member States had by joining the EEC remise certain power to the EEC which prohibit them to make unilateral measure, otherwise the article 249(2) EC (ex. art. 189 EEC) would not have any meaning. Regarding the EEA Agreement this subject has to be split into two categories. Firstly, it matters whether statutory provisions of the EEA Agreement has been implemented into national law and if so the EEA law prevails, secondly if unsuccessfully or not implemented at all the national law prevails\textsuperscript{65}. The primacy of the EEA rule will therefore derive not from its own inherent character, but from the national law\textsuperscript{66}.

\textbf{2.7.4 Preliminary Ruling vs. Advisory Opinion}

Article 234 EC (ex. art. 177 EEC) contains the principle of Preliminary ruling where in paragraph 1-2 it states the ECJ jurisdiction to give preliminary ruling and paragraph 3, Member States of the EU are in some cases obligated to ask the ECJ for preliminary ruling. And as the principle implies the given ruling is binding on those concerned. The ECJ also has a jurisdiction under article 7 EEA and article 1 of the Protocol 34, i.e. when provisions of the EEA Agreement are identical in substance of the Community law\textsuperscript{67}. This is not mandatory to courts or tribunal in EEA/EFTA States, rather an option if a question needs to be interpretive in accordance to the Community law.

At the EEA/EFTA side the similar procedure is the ‘advisory opinion’ and according to article 34 SCE the contracting parties are never obligated to ask for advisory opinion and, as the principle implies, is only an opinion and therefore does not have a binding effect\textsuperscript{68}. At the EFTA side the national courts therefore has to preserve a cooperative approach as the effect of advisory opinion versus preliminary ruling, as the wording implies, can have different effect. If the requesting national court should disregard an

\textsuperscript{64} Case 6/64, Costa/ENEL [1964] E.C.R. 585.
\textsuperscript{65} Protocol 35 to the EEA Agreement.
\textsuperscript{67} Ibid, p. 516 and Brown & Kennedy, (2000), p. 266
opinion given by the EFTA court and replace its own interpretation of EEA law, it would bring the state in question into a situation of violation of the EEA Agreement (has never happened)\textsuperscript{69}.

2.8 \textit{Chapter Findings}

It is clear, even though this chapter bear the look of a short overview, that the EEA Agreement established deep cooperation with the Community. At the same time it bears marks of a positive direction in many ways. Even though the Agreement mainly covers the four freedoms it is a certain statement by the EEA/EFTA States to continue ‘eating the cream of the cake’ as it is clear that the Agreement is not a temporary stage which leads to EU membership. It is of the Authors opinion that something has to change dramatically, either on EEA/EFTA national stage or within the Community, that the small rich EEA/EFTA States will see the benefit to enjoy.

The difference between the EEA/EFTA and the Community is first of all that the former States kept their full sovereignty. Secondly the EEA Agreement is not a custom union but a free trade area. Thirdly, the EEA/EFTA States kept its autonomy in foreign affairs whereas the Community speak with one voice.

Regarding legal effects, the EFTA Court judgements have made it clear that both primacy and direct effect are not part of the EEA Agreement in the form as they are at the EC. Even though the homogeneity objective is very important and EFTA institutions have contributed to make that goal, those two principles are lacking but have not so far had effect to weaken the homogeneity principle. On the other hand the State Liability is part of the Agreement as to preserve that a State cannot, willingly or not, implement secondary legislation either in wrong way or not at all. This is very important both to keep the homogeny principle in balance but also to keep the right and obligations according to the Community legislation. Taken together, in the case of non implemented provisions the principle of primacy and state liability will follow on a solution of EEA/EFTA edition of direct effect.

3  EFTA INSTITUTIONS AND COMMITTEES

This chapter will only give short description on EFTA institutions and committees70 (as it concerns the EEA Agreement) with the purpose of picturing their main competences in terms of legal aspects and dispute settlement71. The two pillar system contains six individual institutions and committees to handle internal matters were four bodies are common to the Community.

The Stockholm Convention created institutions but when the EEA Agreement was signed it called for new institutions. Because of changed cooperation purposes and deepening integration with the EEC the Agreement created the EFTA Court, the Surveillance Authority and the EFTA Standing Committee. Those institutions called for Agreements to be signed and to enter into force at the same time as the EEA Agreement72.

Competence, form and structure of EFTA institutions and committees and the right to influence EC legislation was at the negotiation stage a life-size argument. Both the EFTA States and the Community emphasised on keeping their autonomy the consequence for the EFTA States are reflected in the decision making procedure and opting out is not an option.

3.1  EFTA STANDING COMMITTEE

Within the EFTA Standing Committee are representatives of Ministerial or High Officials of the EEA/EFTA States. The main role of the Standing Committee is to unify posture to EFTA States within the Agreement towards the Community before meetings are held within the EFTA Joint Committee. The EFTA Standing Committee are assisted by five subcommittees, one subcommittee covering issues regarding free movements of goods, capital, persons, freedom to provide services and Company law, on flanking and horizontal policies and lastly on legal and institutional matters. Many working groups assist subcommittees especially on pre-pipeline stage. Decisions taken by the Standing

70 Switzerland has an observer status in (1) EFTA Standing Committee, (2) Committee of MPs of the EFTA States, (3) EEA Joint Parliamentary Committee and (4) EEA Consultative Committee, www.efta.int
Committee are binding on the EEA/EFTA States which normally requires unanimity\(^{73}\). Ministries of each EFTA State have a clear connection through subcommittees which are constituted by public officials and experts on special fields covered by the EEA Agreement.

### 3.2 EFTA Surveillance Authority

Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, either called the ESA/EFTA Court Agreement or the SCA, signed in Oporto 2\(^{nd}\) of May 1992.

ESA observes that obligations are fulfilled and competition measures performed by EEA contracting parties are legal according to the Agreement. This means the EEA Agreement, its protocols and the acts referred to in the Annexes, have to be correctly implemented and applied by national authority. ESA institution and competence are corresponding to the EC Commission regarding surveillance with the main role on how the EC legislation is implemented into national law and how it will be enforced by governments. Addition to that, according to Protocols 1-4, ESA has the important role to secure rightful competition, surveillance staid aid and public procurement. Regarding implementation of competition rules a list of further legal acts are listed in Annexes I–II. ESA on the other hand lack the role in relation to policy formulation which is on the list of the Commission competence\(^{74}\).

ESA can adopt measure by its own initiative or because of compliant from one or more EEA/EFTA State, an institution of the Community and private parties, i.e. citizens, organizations and economic operators. ESA opens case on the basis of complaints and by its own initiative. In order to secure uniform surveillance throughout the EEA both the European Commission and ESA carries out same task within the European Community through the two pillar system. They exchange information and consult each other on surveillance policy matters and individual cases. If the Agreement is violated ESA has the authority to impose and decide the level of fine on the party concerned. If

\(^{73}\) Article 6 of the Agreement on a Standing Committee of the EFTA States, in matters when majority is sufficient is a list in the Annex to the Agreement, see article 6(2).

ESA consider that an EEA/EFTA State has failed to fulfil an obligation according to the EEA Agreement, it may initiate formal infringement proceeding under article 31 SCA.\textsuperscript{75}

### 3.3 Court of Justice

The EFTA court has similar role towards EEA/EFTA States as the Community Courts towards its Member States. According to article 108(2) EEA, the EEA/EFTA States was obligated, \textit{inter alia}, to establish a Court of Justice. The EFTA Court competence, jurisdiction and organization will be described in more detail in chapter 4.

### 3.4 EEA Joint Committee

The main cooperation area within the EFTA States and the EC is the EEA Joint Committee (articles 92-94 EEA). The main role of the EEA Joint Committee is to secure functional enforcement of the Agreement and is therefore the managerial body of the EEA. The Joint Committee consist of representative’s from the EEA/EFTA States and the EC Commission. According to article 106 EEA the Joint Committee has to set up information system between the Courts in the Community and on the EFTA side. Member States of the Community have the right to attend Joint Committee meetings but have no rights to speak. The Committee meet once in a month to deal with decisions regarding new EC legislation to be adopted at the EEA side. Addition to that the Joint Committee arena is also to solve problems that rise based on the Agreement. The Joint Committee (and the EFTA Standing Committee) has five subcommittees as assistants and are specialized in fields corresponding to the nine parts of the Agreement.

The principle ‘dispute settlement procedure’ is set out in article 111 EEA. EEA law is largely identical in substance with Community law, the reason being that the EEA/EFTA states are obligated to adopt and implement Community law in an ongoing process in the areas covered by the EEA Agreement.\textsuperscript{76}

\textsuperscript{75} ESA may however apply the pre-article 31 letter SCA, i.e. an informal letter is sent to the EFTA State in question inviting it to adopt the measures necessary to comply with EEA Law (EFTA Surveillance Authority (2003), p. 9).

\textsuperscript{76} Baudenbacher, (2003), p. 881.
The EEA Joint Committee takes all decisions regarding amendments of Annexes of the Agreement as closely as possible to the adoption of new Community legislation. The EEA Agreement contains the right to influence the shaping of EEA relevant legislation and to submit comments on upcoming legislation, in the same way as the EU Member States experts are consulted. When a final decision is taken on the legislation on the EU side, EEA/EFTA states can neither sit nor vote in the European Parliament or the European Council of Ministers. Hence, have an obligation to integrate into the EEA Agreement what finally will be decided.

### 3.5 EEA COUNCIL

The EEA Council (articles 89-91 EEA) consists of members of the EC Council, EC Commission and Minister of Foreign Affairs of each EFTA State. Their main role is to be political generator regarding enforcement of the EEA Agreement and to lay down general guidelines for the EEA Joint Committee. The EEA Council is the forum where the appointed representatives of Member States meet and take decisions about wide range of issues⁷⁷.

### 3.6 THE EEA TWO PILLAR INSTITUTIONAL SYSTEM

It was seen in the very beginning of drafting the EEA Agreement that its function had to be in some way corresponding to the Community institutions and in harmony of the Community law. At the EC side, institutions already existed and some institutions and committees as well at the EFTA side. Nevertheless it was important to establish a strong link between them, as the cooperation is deep. The ESA takes care of the surveillance which corresponds to the Commission which also obligates them to exchange information, cooperate and consult on matters of surveillance policy and individual cases⁷⁸. The EFTA Court has the judicial control which corresponds to the ECJ in many ways but the former competences are different form that of the ECJ (see for more detail in chapter 4).

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⁷⁷ European Trends, p. 84.
3.6.1 Decision making and the decision shaping procedures

As noted above the enlargement development of the EU and the opposite development at the EFTA side, makes it more difficult for EEA/EFTA states to influence any decision or amendments made at the Community level. The EEA/EFTA States are outside the EU but are part of the internal market which, *inter alia*, obligates them to implement relevant provisions of the EU legislation without having any voting rights. There are fundamental differences between the ‘decision making procedure’ and the ‘decision shaping procedure’ regarding EEA/EFTA participation. The fact that the EEA/EFTA States are not a full member of the EU gives them no right in the former procedure but when a relevant act is amended or a new one adopted, the EEA/EFTA States obtain the rights at the decision shaping stage.

The involvement of the EFTA States is limited to consultation at the level of experts before the formal submission of proposals by the Commission is given to the Council of Ministers (arts. 99(1) and 100 EEA)\(^{79}\). Because the EEA Agreement was drafted in such a way as not require amendments of the EC Treaty, hence, the EEA/EFTA consultation has not been made part of articles 250 and 251 EC (ex. arts. 189a and b EEC). The side effects are that the process cannot be seen essential which require adaptation of Community legislation\(^{80}\).

According to article 102(1) EEA, the Joint Committee has the power to take decisions to amend Annexes to the EEA agreement (which contain the detailed legislation). To secure the homogeneity of the two legal orders it is suggested to make amendments at the same time as adopting new Community legislation\(^{81}\).

Another fact of the EEA Agreement is the requirement of speaking with one voice. If the EEA Council and or the EEA Joint Committee take a decision requires the EFTA States to come to agree. Blocking a decision could have a serious consequences (has never happened) which means therefore that all the EEA/EFTA States have to take a decision in harmony with decisions taken by the Community. Opting out is not an option within the EEA Agreement, which means that is a State does not agree the others can not go forward. In other words, one State can seriously affect the others if an amendment to or a new legislation is adopted at the EC side which it cannot agree upon.

\(^{80}\) Ibid, p. 512.  
\(^{81}\) Ibid, p. 512.
to adopt in national law. This perhaps is less of a problem degree as there are ‘only’ three States remaining on the EEA/EFTA side. This was nevertheless agreed upon when the Contracting Parties were seven, i.e. when drafting the Agreement. This restrain puts a pressure on all the EEA/EFTA States to approve decision taken by the Community, as it otherwise affects not only it self but all the others as well.

3.6.2 Homogeneity, Settlement of Disputes and Surveillance Procedure

As stated above, the homogeneity principle, the settlement of disputes and surveillance procedure are very important parts of the Agreement. Hereunder a description will be given and links between them of both the procedure and obligation.

Starting with the homogeneity, the main objective of the EEA Agreement, the EEA Joint Committee has to keep under constant review the development of case law of Courts on both sides (article 105(2) EEA) and same article para 1 states the uniform interpretation as possible. Article 105(3) EEA states that the EEA Joint Committee has two months to preserve the homogeneity interpretation if a difference in case law of the Courts will come the surface and moreover if unsuccessful, the settlement of dispute procedure will apply. Both the Community and the EEA/EFTA States may bring the matter under the procedure (article 111(1) EEA). The EEA Joint Committee has then three months to get the case settled, if unsuccessful the Contracting Parties concerned may request the ECJ to give ruling which then will have a binding effect. If six months will run and a dispute has not been applied and the Contracting Parties have not asked the ECJ for ruling, a Contracting Party has two options in order to remedy possible imbalances according to article 111(3) EEA, (1) take safeguard measure or (2) regard the involved provisions as provisionally suspended. The Surveillance procedure is laid down in articles 109 and 110 EEA. Both the ESA and the Commission have a fulfillment obligation under the EEA Agreement, they therefore have to cooperate, exchange information and consult each other. The EFTA Court has the power to take a decision to suspend a decision taken by ESA and the ECJ has the same power on the Commission (article 110(2) EEA).

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82 Articles 31, 32, 35, 36, and 37 of the SCA (Evans, (1994), p. 77 et.seq.).
### 3.7 Survival of the EEA

As mentioned above, the EEA Agreement has not been amended according to Maastricht, Amsterdam and Nice Treaties. The EEA/EFTA Authorities have requested the Community to amend accordingly, which have been turned down on the Community side\(^{83}\).

The Treaty establishing a constitution for Europe (not yet approved by all EU Member States) changes dramatically previous EU Treaties. The Treaty draft was submitted on an Intergovernmental Conference and approved by Heads of State or Governments of the EU Member States on 17\(^{th}\) and 18\(^{th}\) June 2004. If the Constitution will come to effect it will change, limit and simplify current instruments, which are dozens in its present form. The most possible influence on the EEA Agreement are changes in the structure of secondary legislation and the decision making processes. The acts will only be six in total and renamed as representing different effect. They are categorized in three parts firstly ‘Legislative acts’; (a) European Law (replacing Regulations), (b) European framework law (replacing Directives), secondly are the ‘Non Legislative acts’; (c) European regulation, (d) European decision and thirdly ‘Points of view’; (e-f) Recommendation and Opinions\(^{84}\).

Based on above, i.e. the Community not willing to amend the EEA Agreement until now, one might conclude a same denial of turning down proposal to amend according to the Constitution Treaty (if it will be approved).

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\(^{84}\) [www.europa.eu.int/constitution](http://www.europa.eu.int/constitution)
3.8 Chapter Findings

In many ways the EFTA institutions have the same competence as similar Community institutions. There are however differences which can be explained by the limitation given by the EEA Agreement, as it does not go as far as the EC Treaty. The very fact that the EEA/EFTA States kept its sovereignty mirrors the function and rights referred upon them. Whether that will lead to problems in the future is of course unknown, but as developments of the EU has deepened and widened and hence the content of the EEA Agreement at the same time has not been amended accordingly, increases the possibility of discrepancy. It therefore could lead to difficulties of keeping homogeneous European Economic Area.

The trade off between the autonomy and sovereignty versus legislation decision making rights is on a gray area. The latter is almost worth nothing and furthermore the opting out is not an option. Nevertheless the EEA Agreement freedom cream is very valuable to the EEA/EFTA States which gives an impression that small ‘rich’ countries still not applying for membership, as perhaps was foreseen at the Community side, is worth to keep the cooperation as it has been the last 12 years.

If the EU Constitution Treaty will come to force it is very likely that amendments to the EEA Agreements and its adhesion Agreements will have to be performed if keeping the main object, i.e. the homogeneity. The bargaining power on the EEA/EFTA side has weakened and hence it requires even greater political negotiation.
4 THE EFTA COURT

This chapter will outline the EFTA Court, its competence and comparison with the Community Courts. The main focus in this report is to analyze in some extent the effect of the EFTA Court on case law of the ECJ. Therefore it is important first to examine the difference (and mostly the difference) between them which explain in some way the possibility to have effect.

The EFTA court was located in Geneva but moved to Luxembourg to reinforce its relationship with the Courts of the EU. Article 108(2) EEA provides for the EFTA States to establish a Court of Justice, which is known as the EFTA Court. In accordance with the ECJ Opinions it was necessary to establish a separate agreement to fulfil the EFTA obligations. Thereon, the ESA/Court Agreement (SCA) was concluded. By signing the EEA Agreement the Contracting Parties consented to establish, inter alia, judicial control. It was clear that it would somehow not be the same as at the Community and the negotiations groups but had to secure the homogeneity interpretation and the legal balance between the EU and EFTA had to be secured.

As presented above, the ECJ first Opinion made considerable effect on function of the EFTA Court, which is their obligation according to article 220 EC (ex. art. 164 EEC), i.e. making sure that “[…] in the interpretation and application of this Treaty the law is observed”. If joint courts would have been established, it seriously would have undermined arrangement of a joint courts and the preliminary references procedure. The first ECJ Opinion also stated the reason for avoiding granting jurisdiction to the EEA Court in a preliminary procedure which would have been negative reaction of the Court of Justice to similar proposals in its earlier Opinion 1/76.

85 Evans, (1994), p. 43 and 77; “Protocol 5 to the agreement between EFTA states on the establishment of a Surveillance Authority and a Court of Justice contain the Statute of the new Court”.
86 The EFTA Court provisions and legal bases are therefore constituted by the EEA and the SCA Agreements; has also been named “EFTA Court Texts”.
89 Draft agreement establishing a European laying-up fund for inland waterway vessels.
4.1 Composition

The Court consists of equal number of its Member States\(^{90}\) and they sit in a plenary session and deliberate in closed session\(^{91}\). The Court can request the EEA/EFTA Governments according to article 29 EEA to establish chambers. Because numbers of judges are only three a list of ad hoc judges was established. There are no Advocate Generals as it was unnecessary in a procedure as dispute settlement\(^{92}\). Only in case of need, there will be establishment of a Court of First Instance (as the development at the EU side\(^{93}\)), this was given in form of Declaration by the EEA/EFTA Governments\(^{94}\). The working language is English and everything published as well, plus in the language of the State concerned\(^{95}\).

4.2 Competence and Jurisdiction

Competences are laid down in the SCA which can be split into two categories. Firstly, direct actions brought against an EEA/EFTA State or the ESA, and secondly when the EFTA Court has received a request from a national court for an advisory opinion\(^{96}\). Regarding direct action, the first difference between the Community and the EEA/EFTA is in a case when EEA/EFTA State brings a case against another EEA/EFTA State. The State is not required to bring the matter before ESA prior to taking action, according to article 32 SCA. This is however stated in article 227 EC (ex. art. 170(2) EEC)\(^{97}\). Second difference is, according to article 33 SCA the EFTA Court has limitations to impose penalties (unlike article 228 EC (ex. art. 171 EEC)). Thirdly, the EFTA Court has no jurisdiction to give ruling regarding staff cases, hence employees will have to take their case to administrative tribunal of the International Labour Organization Arbitration\(^{98}\).

\(^{90}\) Nominated by EEA/EFTA Governments and appointed on common accord, they sit on six year term.
\(^{91}\) Christiansen, (1997), p. 541.
\(^{92}\) Ibid.
\(^{93}\) The ECJ was set up 1952 and due to increasing workload the EEC established the Court of First Instance in 1989 with the main role to strengthen the judicial safeguards, (OP, 1995, pp. 4-5).
\(^{95}\) Norberg et.al., (1993), p. 710 et.seq.
\(^{97}\) Christiansen, (1997), p. 541.
For the most part, the difference between the EC Courts and the EFTA Court are the nature of the advisory opinion\(^9\). It is of an advisory and hence lacks the binding effect. If however, a national court would disregard the Opinion it would possibly be breaking the EEA Agreement. The EFTA Court enforceability lies therefore in national legislation of the EEA/EFTA States. The EEA Joint Committee has the power to examine validity of legislation which the EFTA Court has no power to rule thereon.

4.3 Arbitration Procedure

In some cases the EEA Agreement foresaw arbitration procedure which is laid down in Protocol 33 of the EEA Agreement. The provisions contain the structure of two party arbitration concepts, even though there are two or more participants on each side\(^10\), with possibility of two or a number of participation on one side. According to article 111(4) EEA and ECJ second opinion 1/92, arbitration may not interpret provisions of the Agreement that is identical in substance to corresponding rules of the Treaty, as the ECJ named the terminology in its opinion “textual identical”. The Joint Committee has tree months to resolve a dispute, if that time limit is exceeded any contracting State may refer the dispute to arbitration which will be binding on the parties concerned.

4.4 Community Jurisdiction under the EEA Agreement

The Community will have jurisdiction in all cases where trade between the EC Member States is affected appreciably and even in some cases where trade between one EU Member State and one EFTA States is affected. Sharing competence was accepted by the EJC as it posed no threat to the Community’s jurisdiction\(^11\). To protect the indecencies of the Community Courts, the EFTA Court jurisdiction is solely to its contracting parties at the EFTA side (article 108(2) EEA). As noted above, the ECJ has jurisdiction to give ruling in interpretation of the EEA Agreement pursuant to article

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\(^9\) cf. ch. 2.7.4.
108 EEA and Protocol 34. A dispute has at least twice been covered by the EEA Agreement in Community cases\textsuperscript{102}.

### 4.5 Chapter Findings

The EFTA Court competences are mostly analogous to the Community Courts, there are however differences that can mainly be rooted to the ECJ Opinion\textsuperscript{103}. There is no Court of First Instance at the EFTA Side as the jurisdiction only covering EEA/EFTA States, therefore there have not been any need. The EFTA Court plays an important role in keeping the homogeneity principle in balance and hence the future of the cooperation with the Community. The possibility for the Court to effect the Community lays on the fact that the EEA Agreement and its adhesion Agreements are mostly corresponding to Community law. Based on that and workload corresponding jurisdiction and competence gives the EFTA Court considerable change to give effect. Next chapter will outline in four examples when this has been accomplished.


\textsuperscript{103} OJ [1991], No. L176/7, cf. ch. 2.4
5 EFTA COURT EFFECT ON EC CASE LAW

Carl Baudenbacher, a president of the EFTA Court, states in his article\textsuperscript{104} important EFTA Court cases that have influenced judgements of the European Community courts. In this chapter a concrete description in four ECJ cases will be given in case of analysing whether and what kind of effect has been accomplished. Moreover a connection will be made to previous chapters in this report in order to explain judgement of the EFTA Court and more importantly to analyze whether and what kind of influences the court has made on case law of the Community Courts. Few cases can be examined regarding this purpose. When examining the cases it was appropriate to divide them into four sub-chapters which are listed by dates of the rulings made by the EFTA Court, i.e. (1) Permissibility of a state alcohol monopoly, (2) the TV directive, (3) International exhaustion of trade mark rights and (4) State liability.

Those cases where chosen on grounds of (1) publicity relationship in Iceland and (2) importance legal effects. The first case is a debate both on Icelandic political and public sides, i.e. whether retail State monopoly can be justified. Second case regards TV-ads targeting children which Icelandic national law do not prohibit, hence some commercials are not within ‘ethical line’ and have been of a great discussion with suggestion of prohibiting ads targeting children. Third case regards international business where the EEA Agreement has had tremendous economical effect, \textit{inter alia}, on Icelandic export and import. The last case had important legal effect on individuals and economic operators in EEA/EFTA States.

Four cases examination are excluded in this report (regarding above mention purpose), which contain (1) Precautionary principle in food stuff law\textsuperscript{105}, (2) Succession of contracts under the acquired rights directive\textsuperscript{106}, (3) General principle of EEA law and\textsuperscript{107} (4) State guaranties for public enterprises\textsuperscript{108}.

\textsuperscript{104} Baudenbacher, (2003), p. 896.
\textsuperscript{105} Case T-13/99 \textit{Pfizer Animal Health} and Case T-70/99 \textit{Alpharma}.
\textsuperscript{106} C-13/95 \textit{Ayse Süssen} and C-172/99 \textit{Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen}
\textsuperscript{107} Case T-115/94 \textit{Opel Austria}
\textsuperscript{108} Case 126/01 \textit{Ministre de l’économie, des finances et de l’industrie v CEMO SA
**5.1 Permissibility of a State Alcohol Monopoly**

**5.1.1 E-1/94 Restmark and C-189/95 Harry Fransén**

The EFTA case E-1/94 *Restmark v Tullilautakunta* was the first case on the table for the EFTA Court to give advisory opinion. The content of the case was on the interpretation of articles 11 and 16 of the EEA Agreement, i.e. whether Finland could contain its alcohol monopoly of both importation and retail. First, the Court had to give ruling on whether the Helsinki District Customs House could be considered “a court or tribunal” as is stated in article 34 SCA\(^{109}\), as the case was sought by the Finnish Customs Administrations for an advisory opinion. Even though this point was important in this case it will not be discussed hereunder\(^{110}\), as the EFTA Court found it admissible\(^{111}\).

The case C-189/95\(^{112}\) *Franzén* regarded interpretation of the articles 30 and 37 EEC (now articles 28 and 31 EC Treaty), in relation to Swedish monopoly on the retail of alcohol beverages. Those two cases both regard State monopoly on alcohol beverages importation and retail. The EEA provisions concerning the case at hand are therefore corresponding to the EC provision.

**Factual Circumstances**

The EFTA case concerned retail within an EEA/EFTA State and importation from several Member States of the Community. It was considered to bring possibly unfair effect to other Member States of the EEA. *Restmark* (an individual) imported into Finland few kinds of alcohol beverage from Member States of the EEA to be in free circulation with commercial purpose. That import was refused by the Helsinki District Customs House, based on Finnish legislation. *Restmark* was required to hand in information regarding purpose of the import and buyer of the products, but denied that request based on business secrets\(^{113}\). The first question to be answered by the EFTA Court was to interpret whether the statutory State monopoly was contrary to article 11

\(^{109}\) E-1/94, para 7.

\(^{110}\) Cf. ch. 2.6.2. for deeper discussion but is not exhaustive.

\(^{111}\) E-1/94, para 31.

\(^{112}\) Criminal proceedings against *Harry Franzén* [1997] ECR I-5909.

\(^{113}\) E-1/94, paras 1-4.
EEA, i.e. does it constitute a measure having equivalent effect to a quantitative restriction? Second question, paragraph one, whether the statutory monopoly was contrary to article 16 EEA (State monopolies of a commercial character). In the second question, paragraph two, the court was asked whether article 16 EEA is unconditional and sufficiently precise to have direct effect, therefore expiring import monopoly at the same time as the EEA Agreement took effect\textsuperscript{114}.

The ECJ case was very similar to the Restmark case as it concern State monopoly on retail in Sweden and importation of alcoholic beverages\textsuperscript{115}. It differs (other than being on the EC side or the EFTA side) in that way that Fransén was importing and selling alcohol beverage in Sweden without a licence and hence the case was a subject to criminal penalties. Fransén argued in his defence that the Swedish law was contrary to articles 28 and 31 (ex. arts. 30 and 37 EEC) of the EC Treaty, claiming that alcohol beverages produced in other Member States to be imported into Sweden were discriminatory as the selection system were restrictive. Systembolaget, owned by the Swedish State, is responsible for the retail of alcohol beverage pursuing the Swedish ‘Law on Alcohol’. According to that law a special production and wholesale license were required with the aim to minimize consumption and furthermore, a holder of such a licence has to, \textit{inter alia}, have sufficient storage capacity and provide a bank guarantee\textsuperscript{116}. In first questions brought before the ECJ for preliminary ruling by the Swedish District Court (Landskrona Tingsrätt) was whether the Statutory monopoly were compatible with article 28 EC (ex. art. 30 EEC). The second question was whether the monopoly were contrary to article 31 EC (ex. art. 37 EEC) and whether it could be adjusted or does it have to be abolished. In third question, pre-required of a yes answer in question two, should it have been abolished of the entrance into the Community or is adjustment possible\textsuperscript{117}.

\textsuperscript{114} E-1/94, para 5.
\textsuperscript{116} C-189/95, paras 5-11.
\textsuperscript{117} Ibid, para 29.
**Related Law**

Article 16 EEA is identical in substance to article 31 EC (ex. art. 37 EEC). Article 16(1) EEA prohibits any discrimination of production and marketing of goods both between the EU States and EEA/EFTA States, as well as between them. Definition of a State monopoly of commercial character can be found in article 16(2) EEA. There is one disparity between article 16 EEA and article 37 EC, i.e. it had to be added in article 16(2) EEA “[…] competent authorities…” as there is no “Community policies”, referring to the Member States of the EU. In Protocol 8 of the EEA a particular transitional periods are listed and according to article 16 EEA any state monopoly are to be applicable latest one year after the entry into force of the EEA Agreement. However, the Protocol states specifically that article 16 EEA applies to wine (HS heading No 22.04).

The EFTA court made a reference to the Dassonville that it is sufficient that the effect on trade can possibly have effect, thereby outruling the proof condition where in the Dassionville the court ruled “Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measure having an effect equivalent to quantitative restrictions”.

Article 11 EEA is identical in substance to article 28 EC (ex. art. 30 EEC), quantitative restrictions on imports and all measures having equivalent effect are prohibited between the contracting parties. Furthermore, when interpreting the articles in question, competition aspect cannot be excluded. Hence, it was appropriate to consider article 1(1) and(2) EEA, corresponding to article 3(g) EC.

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119 Three contracting parties were given permission for adjustment period to abolish state monopoly, i.e. Austria monopoly of salt, Icelandic monopoly on fertilizers and Liechtenstein monopoly on salt and pepper, Protocol 8 of the EEA Agreement, E-1/94, paras 40-41.
121 E-1/94, para 47.
122 C-8/74, para 5.
124 For more information regarding EEA Agreement competition law, see article by Robert Strivens, “Competition law under the EEA Agreement”, (1993), pp. 512-517.
ARGUMENTS

In the EFTA case the Finish Government argued that in Nordic countries alcohol monopolies had been part of the health and social policy with the purpose to minimize harmful effect of alcohol beverages consumption. The government pointed out that the EC Court had justified State monopolies based on article 30 EC (ex. art. 36 EEC). Furthermore, the government said its policy to be aligned with the “1984 Resolution on the Targets for Health for All by the WTO Regional Committee for Europe”. They further asked for a reasonable adjustment period based on that it was a complex matter, justifying that request on the transitional nature of article 37 EEC. It is very interesting that the request was not based on article 16 EEA! One may wonder whether the reason was because article 16 EEA did not have as comprehensive history of transition?

Arguments given by the Norwegian Government was in line with the Finnish Government. Their view was that the monopoly was based on, inter alia, public health and not only on trade policy. Furthermore, they argued that the EEA/EFTA contracting parties “[…] must have certain discretion in determining which measure they wish to employ for the purpose of their national alcohol policy”. They also admitted that traditional import monopoly was in a way discriminatory but was also on the opinion that “[…] an import monopoly which cannot refuse to handle an import order...should not be considered discriminatory”.

The EFTA Surveillance Authority based its opinion on the Manghera case which is a similar case regarding interpreting article 31 EC (ex. art. 37 EEC). In that case few individuals imported tobacco into Italy and were prosecuted as it was prohibited according to Italian law. The ECJ ruled that an exclusive import was contrary to article 31 EC (ex. art. 37 EEC).

125 E-1/94, paras 53-54.
126 Ibid, para 53.
127 Ibid, para 53.
128 Ibid, para 72.
129 E-1/94, para 55.
130 Ibid, para 68.
131 C-59/75 Pubblico Ministero v Flavia Manghera and Others [1976] ECR 91, para 12.
132 E-1/94, para 69.
133 C-59/97 Pubblico Ministero v Flavia Manghera and Others, para 12.
The EC Commission as well based its opinion on the Manghera\textsuperscript{134} case, inter alia, that it was of a discrimination nature to maintain the exclusive right when importing alcohol beverages. In addition, the Commission was of the opinion that it was also discriminating to exporters in other Member States and to consumers in Finland\textsuperscript{135}.

Arguments in the ECJ case by the French, Finnish, Swedish and Norwegian Governments and the Commission stated that article 31 EC (ex. art. 37 EEC) does not preclude national provisions allowing statutory retail monopoly. In their opinion the Swedish law in question does not meet the requirement of not being discriminatory towards nationality of traders nor does the law discriminate origin of goods. They point out that the purpose of article 31 EC (ex. art. 37 EEC) is not to abolish State monopoly of commercial character but to adjust national law in such a way that it does not discriminate conditions for import and export\textsuperscript{136}.

Fransén argued that Systembolaget were selecting certain beverages for new products to enter the market, by pursuing a quality test which was unfair and difficult, i.e. the provisional and basic assortment lists\textsuperscript{137}. He also stated that the networks used by Systembolaget were restrictive, not offering a full range of beverages available\textsuperscript{138} based on its exclusive sales channel to consumers\textsuperscript{139}. Furthermore, he claimed that the system for promoting alcohol beverages were in favour of products produced in Sweden\textsuperscript{140}. In the reference proceeded in the Opinion of Advocate General Elmer, Fransén stated that the monopoly increases “[…] illegal home-distilled alcohol…” and therefore increases the risk of human health and hence cannot be derogated from article 31 EC (ex. art. 37 EEC). He also claimed that the monopoly was dissimilar to the principle of proportionality as the system for licensing was restrictive\textsuperscript{141}.

The ECJ mainly supports its arguments on the purpose of the provisions in question by evaluate the plaintiff and defendant arguments. Furthermore, the Court made a reference to case law where it pinpointed the importance of products to be able to move freely within the Community and conditions for competition between Member States are to be

\textsuperscript{134} Ibid.
\textsuperscript{135} E-1/94, para 70.
\textsuperscript{136} C-189/95, para 33.
\textsuperscript{137} Ibid, para 43. “Provisional assortment” means alcohol beverages which consumers have ordered or requested specifically to be imported into Sweden.
\textsuperscript{138} Ibid, para 53.
\textsuperscript{139} Advocate General Opinion, C-189/95, para 47.
\textsuperscript{140} C-189/95, para 58.
\textsuperscript{141} Advocate General Opinion, C-189/95, para 47.
maintained normal. It has been stated in case law\textsuperscript{142} that article 31 EC (ex. art. 37 EEC) only requires State monopoly to be adjusted if that way it is entrusted that no discrimination exists of trade conditions between Member States.

\textbf{Cases Conclusion}

The EFTA Court ruled that it was impediment to intra trade within the EEA to obligate an authorization or licence from a statutory State monopoly when importing alcoholic beverages and to put them into free circulation, based on article 11 EEA\textsuperscript{143}. Furthermore, and more important, article 11 EEA was interpretive as precluding a national State to maintain an exclusive right to import alcohol beverage. The Court did not justify a derogation based on public health, article 13 EEA (corresponds to article 30 EEC)\textsuperscript{144}. When relying on derogation it has often been held that to succeed the burden of proof relies on the one asking for derogation. In the case at hand, the \textit{Finnish Government} did not provide convincing evident to justify derogation\textsuperscript{145}. Giving answer to question two, paragraph one, the article 16 EEA was suppose to take effect on the 1\textsuperscript{st} of January 1994, not stating any transitional period (like article 37 EEC) other than those stated in Protocol 8 of the EEA Agreement\textsuperscript{146}. The second paragraph of question two concerned whether article 16 EEA were unconditional and sufficiently precise to give direct effect. The EFTA Court came to the same ruling as the ECJ in the \textit{Manghera}\textsuperscript{147} case, i.e. individual can rely on article 16 EEA before national court.

The ECJ did not found the selection system utilized by the \textit{Systembolaget} to be discriminatory nor any evidence that imported products were handled in a disadvantaged way\textsuperscript{148}. The Court found the network system to be imperfect but the main findings were that the system did not discriminate products produced and imported from other Member States\textsuperscript{149}. Regarding promotion of alcoholic beverages in question the Court found neither facts nor conditions that were incompatible with article 31 EC (ex.

\textsuperscript{142} \textit{Manghera}, para 5; \textit{Hansen}, para 8; \textit{Commission v Italy}, para 11; \textit{Banchero II}, para 27, C-189/95, para 38.

\textsuperscript{143} E-1/94, para 50.

\textsuperscript{144} Ibid, paras 56-59.

\textsuperscript{145} Ibid, paras 60-61.

\textsuperscript{146} Ibid, paras 73-74.

\textsuperscript{147} Cf. fn. 132., para 16.

\textsuperscript{148} C-189/95, para 52.

\textsuperscript{149} Ibid, paras 54-57.
art. 37 EEC)\textsuperscript{150}. On the other hand, the ECJ found the licensing system to be incompatible with article 28 EC (ex. art. 30 EEC) based on low number of license given (being only 223 in October 1996) mainly to traders located in Sweden\textsuperscript{151}. In addition, the ECJ based its judgement, \textit{inter alia}, on high charge of storage capacity\textsuperscript{152}. As for the derogation justification, the Swedish law were not proportionate and were considered restricting the intra Community trade and hence its request was denied\textsuperscript{153}.

**EFTA Court effect on the case law**

To underline and point out the EFTA Court effect on the case C-189/95 \textit{Fransén} a reference by the Opinion of Mr. Advocate General Elmer\textsuperscript{154} has to point out as the ECJ never made a reference to the advisory opinion of the EFTA Court. As those two cases are very similar there are however differences. Nevertheless, the main thing concerned whether Finland and Sweden were pursuing a national law allowing State monopoly with commercial character contrary to the EC Treaty and the EEA Agreement.

In the \textit{Fransén} case the Swedish Government did not use in its main arguments that the State monopoly or the retail system was pursued in its way to protect human health, as was the main argument in the \textit{Restmark} case. It can therefore be reasoned that because the Norwegian Government in the \textit{Restmark} case did not succeed in pursuing that argument, hence the Swedish Government argued on human health issue as ‘secondary’. It has to be stated that the Swedish national law in question is based on minimizing alcohol consumption and hence is emphasizing on protection of human health. The ECJ evaluated whether it could be justified to derogate from article 31 EC (ex. art. 37 EEC) but the Court interprets it narrowly and this case did not fall within its requirements. The main issue in the \textit{Fransén} case was whether the Swedish system was discriminating and restrictive. Even though the Opinion\textsuperscript{155} of Advocate General \textit{Elmer} was contrary to the ruling of the ECJ, the EFTA Court and the ECJ came to the same findings.

\textsuperscript{150} Ibid, para 66.
\textsuperscript{151} Ibid, paras 72-73.
\textsuperscript{152} Ibid, para 76.
\textsuperscript{153} Ibid, para 75.
\textsuperscript{154} Delivered 4\textsuperscript{th} March 1997. Advocate General Elmer makes a reference, to the EFTA Court Case E-1/95, in para 3.
\textsuperscript{155} C-189/95, para 124(1).
5.2 **The TV Directive**

5.2.1 **Joined cases E-8-9/94 Mattel/Lego joined cases C-34-35-36/95 De Agostini and TV-Shop**

The EFTA Court judged in the joint cases regarding the Council TV directive 89/552/EEC\(^{156}\) and articles 11, 13 and 36 EEA. Markedsrådet (the Market Council) asked the court for an advisory opinion\(^{157}\) brought before the Court by the Forbrukerombudet (the Norwegian Consumer Ombudsman) against *Mattel Scandinavia A/S* and *Lego Norge A/S*.

The ECJ also judged in the joined cases Konsumentombudsmannen (KO) v *De Agostini* (Svenska) Förlag AB C-34/95, and *TV-Shop* i Sverige AB C-35/95 and C-36/95 regarding the same TV directive and equivalent articles 30 and 59 EC. The *De Agostini* case and the *TV-Shop* are analogous to the EFTA Cases in the way that a national law of an EEA State (Norwegian and Swedish) prohibited TV commercial which were specifically targeting children, running contrary to the EEA law\(^{158}\).

Theses cases therefore regard interpretation of the Directive 89/552/EEC (the TV Directive) ‘Television broadcasting activities’ and articles 11, 13 and 36 of the EEA are articles 30 and 59 of the EC.

**Factual Circumstances**

The Marketing Council in Norway prohibited TV commercial broadcasted from UK via satellite as it was contrary to the Marketing Act\(^{159}\), which states that no act may be performed which is unreasonable in relation to consumers, and that the Broadcasting Act provides prohibition of advertisements that are targeting children and further may not be broadcasted in connection with children’s programmes\(^{160}\).

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\(^{156}\) Also described as the “television without frontiers’ directive” which was adopted on the basis of articles 57(2) and 66 of the EC Treaty.

\(^{157}\) pursuant to article 34 of the SCA Agreement. The Markedsrådet was admitted to request the Court for an advisory opinion as it is an independent body applying the law, seing as “a court or tribunal” as held in the Case E-1/94, the Restmark case (paras 12-16 of the Joined Cases E-8/94 and E-9/94).

\(^{158}\) Joined Cases C-34/95, C-35/95 and C-36/95.

\(^{159}\) Section 1 of Markedsforingsloven no. 47 of 16.06 1972 read in conjunction with Section 3-1 2nd of Kringkastingsloven (the Broadcasting Act no. 127 of 04.12 1992), Joined Cases E-8/94 and E-9/94, para 4.

The TV3 is a parent company situated in the United Kingdom with subsidiary companies in Denmark, Sweden and Norway. Television programmes were broadcasted via satellite from the UK to each of the Nordic receiving States in the language of the region concerned. The commercials were broadcasted on TV3 in Norway in autumn 1993. The Mattel commercial showed girls playing with Barbie Motor-home with songs played in the background and the Lego commercial the ‘Lego Town’ and a ‘Magic Dragon’ were build. In both commercials there where characters animated and speaking with the impression to audiences to sense them playing. Mattel is a distribution and a sales company located in Norway and is part of a multinational group which produces and markets toys where commercial material are usually developed in USA. Lego is a Danish company which markets its products in 135 countries, differently if necessary, depending on each market. The EFTA Court was asked three questions, (1) whether the TV Directive was compatible with the Norwegian national law which prohibited television commercial targeting children, (2) is article 36 EEA “[…] on the freedom to provide services…” incompatible with the national law of the receiving state (Norway) by prohibiting a commercial that target children broadcasted from another EEA State? Thirdly, are articles 11 and 13 EEA compatible with “[…] Section 1 of the Marketing Act, in conjunction with Section 3-1 of the Broadcasting Act, concerning quantitative restriction on import”.

De Agostini is a Swedish company and part of an Italian group described “[…] as encyclopaedic magazine about dinosaurs”, producing model of dinosaurs to be collected. The TV-Shop is also a Swedish company belonging to an International group where subsidiaries are established all over Europe. In all those three EJC joined cases, TV ads were retransmitted via satellite from UK and broadcasted on TV3 and TV4, all of them running contrary to national legislation. In the De Agostini commercial children were encouraged to buy a certain number of magazines to complete a dinosaur model. The TV-Shop commercial, children were encouraged to buy every two weeks magazine to collect the dinosaur models.

161 Ibid, para 2.
162 Ibid, para 3.
163 Ibid, para 8.
164 Case C-34/95, para 16.
165 Ibid, para 18.
166 Cf. ch. 2.7.2., above.
167 Case C-34/95, para 16.
The questions asked in form of a preliminary ruling, were whether articles 30 and 59 and the TV Directive to be interpreted as (1) preventing a Member State from broadcasting television ads targeting children and (2) preventing application of article 11(1) of the Swedish law ‘Radiolag’, which prohibits television commercial targeting children\(^{168}\).

**RELATED LAW**

According to Norwegian law, Section 1(1) of the Markedsføringsloven (the Marketing Act, no. 47 of 16 June 1972) and Section 3-1(2) of the Kringkastingsloven (The Broadcasting Act, no 127 of 4 December 1992) prohibiting commercials which are targeting children. The Marketing Act prohibits practices which are “[…] unreasonable in relation to consumers…” and the Broadcasting Act “[…] provides that advertisements may not be broadcasted in connection with children’s programmes, nor may advertisements target children specifically”\(^{169}\).

In the ECJ Cases regarding Swedish law, article 2(1) of the Marknadsföringslag (1975:1418), the ‘Marketing Practices Law’ prohibits unfair commercial practice towards consumers or others which also applies to television broadcasts. According to article 11 of the Radiolag (1966:755) (the ‘Broadcasting Law’) prohibits commercial attracting children less than 12 years of age\(^{170}\).

The TV Directive was adopted on the basis of articles 57(2) and 66 EC (ex. arts. 73c and 73n) EEC), free movement of television broadcast within the Community, and furthermore on case law\(^{171}\), i.e. to ensure freedom to provide television broadcasting services. The objectives of the Directive is twofold, firstly focusing on jurisdiction of broadcasters and secondly laying down minimum standard of reception and control by Member States, prohibiting subjecting of broadcasts from another Member States. Recital 12 bound broadcasters to comply with nation law from where they broadcast and Recital 14 aims at the Member States to respect nation law from where the broadcasts take place and furthermore Recital 15 ensures “[…] free movement of

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\(^{168}\) Joined Cases 34-36/95, para 22.


\(^{170}\) Joined Cases 34-36/95, paras 7-9.

\(^{171}\) Case C-412/93, Société d’Importation Édouard Lecerc-Siplec v TF1 Publicité SA and M6 Publicité SA, para 28.
broadcasts without secondary control on the same grounds in the receiving Member State”. Jurisdictions of the each Member State are an important element in the Directive as according to recital 27, Member States have the right to set stricter rules to go further in protecting viewers. ‘The Transmitting State Principle’, the cornerstone of the Directive, states in article 2(1) that “[…] each Member States shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction…” and according to article 2(2) the “[…] receiving Member State may only provisionally suspend broadcasts in certain specified cases”172. Moreover according to article 3(1) Member States have the right to follow stricter rules in their jurisdiction173. Article 22 is directed towards ‘Protection of Minors’ that Member States are obligated to ensure that programmes may not include subject that might “[…] seriously impair the physical, mental or moral development of minors [or that it contain] incitement to hatred on grounds of race, sex, religion or nationality…”174. Protection of minors is stated in article 16, it provides in (a) “[…] it shall not directly exhort minors to buy a product or a service by exploiting their experience or credulity; (b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised…”

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On one hand it was argued by the Norwegian, Sweden and Greece Governments and ESA that they were of the opinion to allow application of national provision that goes further than the TV Directive in prohibit commercial targeting children175. On the other hand it was argued by Mattel, Lego and the Commission that they are not allowed to apply those provisions. The argument of Mattel and Lego were based on Norway international agreement obligation (the EEA Agreement), hence could not hold the Marketing Act or the Broadcasting Act to prevent distribution of advertisement via TV3176. The first question made by the Marketing Council was whether an EEA State is allowed to prohibit an advertisement broadcaster from another EEA State that is

172 Joined Cases 34-36/95, para 26.
173 Ibid, para 27.
174 Ibid, para 30.
176 Ibid, para 7.
targeted to children according to national law and whether that ban is compatible with the TV Directive\textsuperscript{177}. An answer to this question by Norway, Sweden, Greece and ESA was that they are permitted to do that but the Commission, Mattel and Lego had the opposite opinion\textsuperscript{178}.

The Commission argued that a restriction on advertiser also restricts broadcasters, as the latter in more difficult way to include certain advertisements in its programmes\textsuperscript{179}, therefore restricting advertising practise of broadcasters. The Court rejected the argument that the TV Directive was excluding rights and obligations upon advertisers, furthermore it was argued that supporting distinction of advertisers and broadcasters based on circumventing the rules before the Court, was rejected\textsuperscript{180}.

Arguments by De Agostini, TV-Shop and the Commission pointed out that advertising restriction has an impact on television broadcasts and that a State cannot control jurisdiction of broadcasters\textsuperscript{181}. Additionally, De Agostini argued that it’s upholding practice where the only effective method to reach its target group, i.e. children and parents\textsuperscript{182}.

**Cases Conclusion**

Both the EFTA Court and the ECJ reach the same conclusion, i.e. interpreting EEA law as allowing Member States to prohibit advertisement targeting children, based on their national law\textsuperscript{183}. The EJC based its ruling, *inter alia*, on the Keck rule\textsuperscript{184}, i.e. firstly, national measure “[...] restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States...” and are not covered by article 30 EC, secondly, “[...] so long as those provisions apply to all relevant traders operating within the national territory...” and thirdly, “[...] so long as they affect in the same manner, in law and in fact, the

\textsuperscript{177} the freedom to provide services is laid down in art 36(1) EEA (identical to art 59 EC Treaty) and in Annexes IX to XI of the EEA Agreement, the TV Directive 89/552/EEC is interacted to the agreement (para 19) and is to be read in accordance with Protocol 1 of the EEA “On Horizontal Adaptations” (para 20).

\textsuperscript{178} Joined Cases E-8/94 and E-9/94, para 18.

\textsuperscript{179} Ibid, para 44.

\textsuperscript{180} Ibid, para 45-46.

\textsuperscript{181} Joined Cases 34-36/95, para 36.

\textsuperscript{182} Ibid, para 43.

\textsuperscript{183} Ibid, para 47.

\textsuperscript{184} Joined cases C-267/91 and C-268/91 *Keck and Mithouard*, para 16.
marketing of domestic products and of those from other Member States”\textsuperscript{185}. In this case at hand, according to the Keck rule, accept first condition which were fulfilled, it was in a grey area, whether an outright ban on one State would have a greater effect on imported products from other Member States. Regarding the second question, a Member State may under no circumstances apply national provisions which specifically state a control by the receiving State, as it would require secondary control on the broadcasting State\textsuperscript{186}.

**EFTA Court effect on the case law**

The ECJ makes a reference, in paragraph 37, to the EFTA Court case paragraphs 54-56 and 58. The very fact that the ECJ acknowledges the EFTA Court ruling as such is likely based on how similar those cases were and hence based on same provisions. Even though, as the ECJ emphasized in its Opinion\textsuperscript{187}, i.e. on the importance of the Community Courts autonomy and the EEA Agreement does not state that mutual effect of article 3(2) SCA, i.e. the Community institutions are not bound to take notice of judgements or opinions of the EFTA Court. The ECJ showed in these joined cases that an ‘outside’ Court can affect its case law. If the EFTA Court ‘ruling’ had been brought after the judgement of the joined cases, *De Agostini* and the *TV-Shop*, one might question whether the results would have been as the Advocate General opinion, i.e. prohibiting Member States to pursue nation law further than the TV Directive?

\textsuperscript{185} Ibid.

\textsuperscript{186} Joined Cases 34-36/95, paras 60-63.

5.3 **STATE LIABILITY**

5.3.1 **The cases E-9/97 Sveinbjörnsdóttir and C-140/97 Rechberger and Greindle**

At the EFTA side, the case E-9/97 *Erla María Sveinbjörnsdóttir v the Government of Iceland*, the EFTA Court was asked to interpret article 6 EEA and articles 1(2) and 10 of the Council Directive 80/987/EEC, i.e. protection of employees in the event of insolvency of their employer.

At the EC side, the case C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and other v Republic of Austria*, the matter was on article 7 of the Directive 90/314/EEC, i.e. protection of consumers when travel organisers become insolvent.

Those two cases therefore are related as they both involve individuals preserving their rights because of companies’ insolvency. Both cases concern incorrect implementation of a directive and the question is whether the State concern is liable for compensation.

**FACTUAL CIRCUMSTANCES**

The plaintiff, Ms. *Sveinbjörnsdóttir*, was dismissed from her position and three months later the company was declared insolvent. *Sveinbjörnsdóttir* claimed payment of wages but was rejected on the grounds that she was a sister of the holder owning 40% shares in the company. According to Icelandic Insolvency Act (no. 21/1991 art. 3) and the Wage Guarantee Fund Act (art. 5(1) and art. 6) she is too close to the company owner and hence her claim was not recognized as a privileged claim. The matter concerned deals with the interpretation of relations through “[…] direct decent or collateral relation”.

In the two questions brought before the EFTA court the matters regarded whether Directive 80/987/EEC should be interpreted to mean that if an employee who is of a “[…] family relation to an owner of 40% of the share in an insolvent company”, in this case collateral, i.e. does a claim by siblings be privilege? Moreover, the second question deals with whether the principle of State Liability was part of the EEA Agreement.

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189 E-9/97, paras 1-4.
190 Ibid, para 7.
The ECJ case concerned whether it was a serious breach of the Community law when a Member State, Austria in this case, did not implement article 7 of the Directive 90/314 and hence whether the State concern was liable. The directive contains package travel, package holidays and package tours. Because of failure of the Austrian Government to transpose the entire Directive into national law, it prevented plaintiffs the right to claim reimbursement from an organiser who had become insolvent\(^{191}\). The case, concerning the subject of this thesis, is the question no. 3, referred to the ECJ for a preliminary ruling, “[…] (a) in view of the fact that the Republic of Austria became part of the European Economic Area on 1 January 1994, and (b) taking into account the accession of the Republic of Austria to the European Union on 1 January 1995.”\(^{192}\)

For the State Liability principle to take effect, as noted above\(^{193}\), three conditions have to be fulfilled in the process to take effect when a directive has been incorrectly implemented. The requirements are (1) the content and the provisions of the directive in question has to confer rights on individuals, (2) the breach must be sufficiently serious by the State concern and (3) “[…] there must be a causal link between the breach of the State’s obligation and the loss and damage suffered by the injured parties”\(^{194}\).

**Arguments**

The pre-matter in this case regarded the wording “direct relative”, i.e. whether it included a sibling which was the main argument by the Icelandic Government. According to Icelandic legislation it was stated that siblings are excluded. The EFTA Court noted that perhaps this matter was overlooked at the negotiation stage of the EEA Agreement as when Icelandic Government notified ESA of the directive implementation a reference was not made to the Icelandic Insolvency Act\(^{195}\).

Arguments by the Republic of Austria were whether (1) the plaintiffs did fall within the scope of the directive and (2) there had not been serious breach of the Community law because of the date of entry into force of the directive and a failure of ‘only’ a single

\(^{191}\) C-140/97, paras 1-2, and 17.
\(^{192}\) Ibid, para 18.
\(^{193}\) Cf. ch. 2.7.2., above.
\(^{194}\) E-9/97, para 66.
\(^{195}\) Ibid, para 30-31.
article of the Directive\(^{196}\). It has to be noted that in the *Dillenkofer case C-190/94*\(^{197}\) the Court gave ruling of article 7 of the directive, which confer rights upon individuals\(^{198}\). This case therefore deals, *inter alia*, with the question whether it fulfils the requirement of the principle of State Liability.

**Cases Conclusion**

In the ruling of the EFTA court it was taken into account that the EEA Agreement is ‘*sui generis*’, meaning that the international treaty is of a special kind and the EEA/EFTA contracting parties remained its distinct legal order. Furthermore, the EEA Agreement does not go as far and deep as the EC Treaty. Nevertheless the court emphasised on the scope of the EEA Agreement and its homogeneity objective which goes further than usually is the case with agreement under public international law\(^{199}\). Regarding whether siblings are part of direct relative, was based on Greek and Latin language, with the conclusion of not interpreting siblings as direct relative. This finding had a powerful meaning, both regarding siblings’ rights but it called for a clearing of whether EEA/EFTA States are liable for breach when a directive is incorrectly implemented into national law. The Court then evaluated all the conditions for State Liability which was fulfilled and it was left to the competent court to consider the level of infringement and the damage caused\(^{200}\). The Court based its advisory ‘ruling’ on that the EEA Agreement strongly states individual and economic operators’ rights, equal treatment and opportunities. That meaning was interpretive as transferring the “[…] *obligation to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive*”\(^{201}\). This ruling of State liability being part of the EEA Agreement, developed by the *Restmark* case, can be characterised as “*quasi direct effect*”\(^{202}\).

There are two main results from the ECJ case. Firstly, the ECJ found that Austria actions were seriously enough to breach the Community law, even though ‘only’ one

\(^{196}\) C-140/97, para 17.

\(^{197}\) Joined Cases C-178/94, C-179/94,0C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845.

\(^{198}\) C-140/97, para 23.

\(^{199}\) E-9/97, para 59.

\(^{200}\) Ibid, para 69.

\(^{201}\) Ibid, para 60.

article had not been transposed correctly into national law. The Directive implementation process was by 1st of January 1995 but it was stated in the Austrian law203 "[...] with departure date of 1 May 1995 or later"204. Therefore, the time limit for implementation was ‘manifestly’ incompatible with the directive and sufficiently serious to infringe the Community law to attract liability205.

Secondly, and more importantly, this case enters the field of whether the ECJ has jurisdiction to give ruling because it concerns Austria breach before accession under the EEA Agreement and following accession under the EC Treaty206. The ECJ found that it had no jurisdiction to rule whether a Member State was liable under the EEA Agreement, prior to its accession to the EU207, its jurisdiction takes effect if “[…] travellers booked package travel after 1 January 1995”208.

**EFTA Court effect on the case law**

The ECJ makes a reference to the EFTA Court case E-9/97 Sveinbjörnsdóttir regarding State Liability209. The ruling in the EFTA case was very important in this case because it was then clear that the principle of State Liability of the EEA/EFTA Contracting Parties is part of the EEA Agreement. That ruling by the EFTA Court and because the ECJ ruled Austria implementation of the Directive incompatible hence gave the national court a clear interpretation and outline to rule in the case.

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203 Reg. on security provided by travel agencies, BGB1. No 881 of 15 November 1994, p. 6501, C140/97, para 8.
204 C-140/97, para 10.
205 Ibid, paras 2, 40-41 and 45.
208 C-140/97, paras 38, 40 and 43.
209 Ibid, para 39.
5.4 International Exhaustion of Trade Mark Rights

5.4.1 E-2/97 Mag Instrument and C-355/96 Silhouette International

The EFTA court judged in the case E-2/97 regarding the art. 7(1) of the first Council Directive 89/104/EEC\(^{210}\), hereafter “the Trade Mark Directive”, i.e. exhaustion of trade mark. The Trade Mark Directive is referred to in Annex XVII point 4(c) of the EEA Agreement, pursuant to article 65(2) EEA\(^{211}\). A Norwegian City Court in Fredrikstad made a request for an advisory opinion in a case brought before it by the plaintiff \textit{Mag Instrument Inc.}, California, USA, against California Trading Company Norway, \textit{Ulsteen}, Norway\(^{212}\).

At the Community side the ECJ judged in the case C-355/96 \textit{Silhouette International Schmied GmbH & Co. KG v. Hartlauer Handelgesellschaft mbh}. Regarding the same article of the Directive 89/104/EEC.

\textbf{Factual circumstances}

At the EFTA side, \textit{Ulsteen} had practiced parallel imports from USA to Norway for sale of Maglite lights which were produced by \textit{Mag Instrument Inc} in USA. The plaintiff had not given its consent to that import and therefore claimed to have exclusive trade mark rights. Therefore, claimed to have the right to prohibit the defendant from selling Maglite lights in Norway\(^{213}\) based on “[…] section 4 of the Norwegian Trade Mark Act and article 7(1) of the Trade Mark Directive”\(^{214}\). The case therefore raced the question of whether the trade mark rights of the plaintiff were exhausted or not and whether the EEA regional exhaustion applied in Norway. \textit{Mag Instrument Inc.} brought two questions to the Court, i.e. (1) whether article 7(1) should be interpreted as a trade mark owner can prevent an import from a country not within EEA, which took place without his consent and\(^{215}\), and (2) should article 7(1) be interpreted “[…] to the effect that

\(^{211}\) E-2/97, paras 2 and 21.
\(^{212}\) Ibid, para 1.
\(^{213}\) Ibid, paras 5-7.
\(^{214}\) Ibid, para 8.
\(^{215}\) Ibid, para 10.
exhaustion of the trade mark right may either be limited to national exhaustion nor
expended to include international exhaustion? »216.

At the Community side, Silhouette was selling to Bulgaria more than 21,000 spectacles
that had run out of fashion217. Partners were given the instruction that they could only
sell them in Bulgaria and former USSR and not to other markets218. Hartlauer bought
those goods and imported them for sale in Austria. Silhouette brought an action against
Hartlauer claiming that its trade mark right had not been exhausted219. The ECJ was
asked (1) the same as the first question in the EFTA case, stated above (2) May the
proprietor of the trade mark on the basis of Article 7(1)... alone seek an order that the
third party cease using the trade mark for goods which have been put on the market
under that mark in a State which is not a Contracting State?»220.

Related Law

The principle of exhaustion of trade mark rights is laid down in article 7 of the Trade
Mark Directive, which is worded in general terms221. Article 7 contains exhaustion of
the rights conferred by a trade mark, which states:

1. The trade mark shall not entitle the proprietor to prohibit its use in relation to
goods which have been put on the market in the Community under that trade mark
by the proprietor or with his consent.

2. Paragraph 1 shall not apply where there exist legitimate reasons for the
proprietor to oppose further commercialization of the goods, especially where the
condition of the goods is changed or impaired after they have been put on the
market.

Article 7(1) of the directive concerned was based on case law222, which was decided
upon before the signature of the EEA Agreement223, hence from part of the agreement.

216 Ibid.
217 C-355/96, para 8.
219 C-355/96, para 10.
220 Ibid, para 14.
221 E-2/97, paras 15 and 17.
222 Case 16/74 Centrafarm v Winthrop [1974] ECR 1183, and C-9/93 HIT Internationale Heiztechnik v Ideal
according to E-2/97, para 15.
Case law concerning free movement of goods and protection of a trade mark has given the ruling that a Member State cannot prevent an import which has been put on the market in another Member State, with or without the consent of the trade mark owner. The national exhaustion does therefore not apply and the ECJ “ [...] established Community-wide exhaustion as a minimum standard”. It was therefore not clear whether the principle of international exhaustion could be maintain or introduced by an EEA/EFTA State.

The ECJ gave ruling in case law that an owner of a trade mark cannot rely on a national law of a Member State. It is stated in the first recital in the preamble of the Directive the importance to harmonize national legislation to facilitate free movement of goods, articles 28-30 EC, and freedom to provide services, article 39 EC, otherwise it could distort competition within the internal market. Neither national law nor trade mark right can therefore be isolated from the Community law.

Regarding the Community external relations, the Directive were adopted based on article 100a EC Treaty but the ECJ stated that it is not a regulating relationship between Member States and third countries. Article 7 of the Directive does not give the trade mark owner the right to prohibit third parties from using the goods outside the EEA if it has been put outside the EEA market. On the other hand, if the trade mark products have been put on the market outside the EEA, the trade mark owner looses his exclusive right which is stated clearly in article 5 of the Directive.

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223 Cf. ch. 2,4., above.
224 Cf. fn.198.
225 Ibid, para 16.
226 Ibid, para 21.
228 Prohibition of quantitative restrictions between EU Member States. those provisions are laid down in article 11-13 of the EEA Agreement and only applies to goods originally from the EEA.
230 C-355/96, para 2.
231 Ibid.
ARGUMENTS

The plaintiff in the EFTA case argued “[…] that national law cannot properly be limited to national exhaustion nor provide for a general principle of international exhaustion”\(^\text{232}\). The defendant argued that “[…] the rule of international exhaustion of trade mark rights has continued to apply after the implementation of the Trade Mark Directive”\(^\text{233}\). EFTA Surveillance Authority and the Government of Liechtenstein argued that article 7(1) is not relevant to resolve this case because the goods are imported from a third country and the trade mark owner is from an EEA/EFTA State\(^\text{234}\). The Norwegian Government arguments was from an economy perspective, i.e. if the exhaustion is more limited than international exhaustion it could create price discrimination, segment the markets and hinder price competition\(^\text{235}\). The Government of France and United Kingdom, the Federal Government of Germany and the Commission argued against reading article 7 in favour of international exhaustion because same goods may be subject to parallel imports into one State and not into another\(^\text{236}\).

Hartlauer argued that since Silhouette did not stated any prohibition of re-importation into the Community the action should be dismissed\(^\text{237}\). The Austrian, French, German, Italian and United Kingdom Governments and the Commission all agreed to the interpretation of the Directive as preventing the principle of international exhaustion\(^\text{238}\). The Swedish Government relied on case law on the role of trade marks, i.e. consumer chance to identify the origin of goods, furthermore, “[…] would bring substantial advantages to consumers, and promote price competition”\(^\text{239}\). Those opponents of international exhaustion relied on third recital of the Directive, argued that the internal market would be distorted directly and even though the Directive does not impose total harmonization, what is left is limited and should carefully be specified\(^\text{240}\).

\(^{232}\) E-2/97, para 12.
\(^{233}\) Ibid, para 9.
\(^{234}\) Ibid, para 13.
\(^{235}\) Ibid, para 14.
\(^{236}\) Ibid, para 24.
\(^{237}\) C-355/96, para 11.
\(^{238}\) Advocate General Opinion, C-355/96, para 42.
\(^{239}\) Ibid, para 48.
\(^{240}\) Ibid, para 38.
CASES CONCLUSION

Because of the differences between the Community and the EEA Agreement, the EFTA court based its ruling on that the EEA Agreement established a free trade area not a customs union\(^{241}\). Secondly, the principle of free movement of goods (art. 11 – 13 EEA) only applies to goods originating in the EEA\(^{242}\). Thirdly, according to article 13 EEA, common commercial policy is excluded which “[…] would impose restraints on EEA/EFTA Contracting Parties in their third country trade relations”\(^{243}\). It was therefore EEA/EFTA legislators or courts to “[…] decide whether they wish to introduce or maintain the principle of international exhaustion of rights conferred by a trade mark with regard to goods originating from outside the EEA”\(^{244}\).

The ECJ ruled that the purpose of the Directive is to ensure the “[…] safeguard the functioning of the internal market”, and moreover a Member State cannot “[…] provide in their domestic law for exhaustion of the rights conferred by a trade mark in respect of products put on the market in non-member countries”\(^{245}\).

The main rule of the Community international exhaustion is therefore (1) the owner of trade mark does not hold his rights if the product is sold and marketed in a Member State (the main principle in the internal market). (2) From the wording of article 7(1), exhaustion would take place only if the goods had been put on the market within the EEA\(^{246}\). (3) If the owner of a trade mark sells and markets its product outside the EEA he holds his rights.

\(^{241}\) E-2/97, para 25 and Opinion 1/91, cf. ch. 2,4., above.
\(^{242}\) E-2/97, para 26.
\(^{243}\) Ibid, para 27.
\(^{244}\) Ibid, para 28.
\(^{245}\) C-355/96, paras 24, 26-27.
EFTA Court Influence on Case Law

Both cases were dealing with the same issue, article 7(1) of the Directive, but came to different findings, nevertheless an effect was made and hence an analyses appropriate.

The ECJ did not make a reference to the EFTA case but on the other hand the Opinion\textsuperscript{247} by Mr. Advocate General Jacobs, a reference is made to paragraph 43 and 44, to the conclusion of the EFTA Court opinion, i.e. the purpose and scope of the EEA Agreement and the Community Treaties are different, and furthermore he pointed to the ECJ Opinion 1/91\textsuperscript{248}. Hence, the principle exhaustion of trade mark rights is to be a sign of these differences. Mr. Jacobs further stated that even though provisions are identically worded it doesn’t mean they cannot be “[…] construed differently in different contexts…”\textsuperscript{249}.

Considering the differences between the Community law and the EEA law, the possibility for parallel import via EEA/EFTA State cannot be overseen. As Mr Jacobs notes, the EFTA Court did not consider if products were originally from an EEA State\textsuperscript{250}. In the EFTA case the products were originally produced in the USA by a Norwegian firm and imported by a Norwegian company. Practising circumvention is therefore possible through EEA/EFTA States, i.e. based on national courts ruling on maintaining the international exhaustion rights.

\begin{itemize}
\item \textsuperscript{247} Delivered on 29\textsuperscript{th} of January 1998 [61996C0355].
\item \textsuperscript{248} OJ [1991], 14 December, E.C.R. I-06079, cf. ch. 2,4., above.
\item \textsuperscript{249} Advocate General Opinion, C-355/96, para 61.
\item \textsuperscript{250} C-355/96, para 44.
\end{itemize}
6 CONCLUSION

The EFTA Court has given advisory opinion in several cases on matters of its first kind, i.e. no analogues cases, at that time, had been ruled upon on the Community side. The analyses performed in this thesis shows important case law effect made by the EFTA Court. However, there are differences between the cases regarding importance of scale as well as how often the ECJ acknowledge their ‘judgements’. The very fact that the Community institutions have no obligations whatsoever to be affected by EFTA institutions rulings or opinions, nevertheless doesn’t necessarily denote the Community Courts from being ‘EFTA friendly’.

In the cases analysed, the ECJ made a reference in the Mattel/Lego case and the Sveindbjörnsdóttir case. In the Restmark case and the Mag Instrument case the ECJ did not referred to those cases but a reference were made by Advocate Generals. Perhaps it is of an equal importance, i.e. a reference made by Advocate General and the Community Courts; it nevertheless gives the impression of some value to the ECJ not to be effected by an ‘outside’ Court. It might also be interpreted in the way that the Community Courts dose takes notice, and hence are affected, but skips the reference part as judgements are published.

For this to continued, i.e. EFTA Court influences on EC case law, is based on that the EFTA Court most likely gives results earlier than the EC Courts, based on influences factors such as workload, jurisdiction and population thereof of the EFTA Court. When f.ex., a new legislation is adopted or current provisions amended gives an opportunity for conflicts on national stage.

It is also safe to conclude that a pressure is put on the EFTA Court when ruling in cases of its first kind, i.e. therefore giving precedent effect ‘on both sides’. If unsuccessfully interpreting provisions and hence not in conformity with judgements of the Community Courts will jeopardize the homogeneity principle.

The EFTA Court competence is mostly analogous to the ECJ, with ‘minor’ differences that mainly are reflected in cases of direct actions. More effective difference lies in the EEA/EFTA edition of preliminary ruling, i.e. advisory opinion, as its wording implies, lack the binding effect. If national court or tribunals would ignore the EFTA Court advisory opinion it calls for a breach of the EEA Agreement, therefore securing the
binding effect through provisions. These differences are explained by legislative bases of forming the EEA Agreement in its current appearance, both to be in harmony of the Community Treaties and the EEA/EFTA States keeping their sovereignty.

The EEA Agreement is ‘sui generis’ but lack its own personality for two reasons, firstly as provisions are mainly based on Community law and secondly as its institutions with great effects seek to ensure conformity interpretation of both provisions and case law made after the signature of the Agreement. It is of a reasonable development as the homogeneity principle is of a great importance, though especially towards EEA/EFTA Contracting Parties.

So far there are no differences regarding distinction of interpretation by the Community Court and the EFTA Court. Securing the homogeneous application of the EEA Agreement largely depends on judgments of the EFTA Court which therefore plays an important role in keeping the cooperation on current ground. Additionally, cooperation means at least two parties; it therefore also depends on current continuous relationship between the Community and EFTA institutions.

Whether the EU foresaw the long lived EEA Agreement is unknown but denying amendments in harmony with Maastricht, Amsterdam and Nice Treaties gives the impression of a push method towards the ‘rich’ countries to apply membership. If the Constitution Treaty will come to force without amending the EEA Agreement puts the main homogeneity principle on a slippery ground. That as well can then be interpreted as political message to be either ‘in or out’ the European Club.
7 FUTURE RESEARCHES

As noted in the introduction of chapter five, the analyses in this report is missing examination of case law effect by the EFTA Court on the Community Courts in four cases. Furthermore, the thesis subject is not of its end as there will most likely be increasing number to fall within corresponding research topic.

The analyses of the thesis excluded examination on EEA/EFTA national level, f.ex. EEA law effect on national legislation is worth researching.

A comprehensive research is lacking on the fact that the EEA Agreement and its cohesion Agreements have not yet been amended in accordance to Treaties signed after the signature of the EEA Agreement. Additionally, if leaders of the EU will succeed of signing a Treaty establishing a Constitution for Europe, as the draft implies, the legal effect on the EEA Agreement is worth researching.
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