



ARENA

Working Papers

WP 04/18

The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States

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Abstract

Establishment of the EEA with a court for the EFTA Countries ten years ago gives an opportunity to examine more facets of interrelations between courts and legal orders of different jurisdictions. The EEA differs from the Community legal order in that it is constructed as an agreement under public international law without the referrals of power included in the EC-treaty. On the other hand, the object of the agreement is to mirror the law of the Single Market into the relations between the EFTA states and the EC.

Formally, the EFTA Court has a position more of an international tribunal than that of a supranational Court. Figures from the first ten years do not reflect this difference between the EFTA Court and the ECJ. Differences between the two courts regarding matters like legal basis, history, recruitment, workload and duration of proceedings, at least taken together, do not seem to influence the supply of referrals from national courts. Other factors such as similarities between the Nordic countries and construction of the national legal order have greater explanatory potential than differences between the EEA and the EC and in the institutional arrangements of the two courts.

In the reception of the jurisprudence of the EFTA Court and the ECJ, the Norwegian Supreme Court does not distinguish according to legal obligations, but seems to take an approach similar to national courts in Member States of the EU.

Introduction

In this paper I discuss the effects of EFTA Court jurisprudence on the legal orders of the EFTA States. I do this by contrasting the EEA experience to the EU experience. I therefore start by pointing to the ways in which the position of the EFTA Court formally differs from the position of the ECJ. Because this is well known, this section will be brief. I then look at the EFTA Court cases in numbers and compare these numbers to the statistics of the ECJ. Then focus is turned to the national courts, more specifically the Supreme Court of Norway. I here assess the impact of the EFTA Court and the ECJ both quantitatively and qualitatively. An important part of the argument here is comparing the approach of the Norwegian Supreme Court to the approach of national courts in the Member states both as to how the courts relate to the Community Courts and how the Supreme Court has treated main features of Community law such as the loyalty obligation, supremacy and direct effect and the interpretation obligation. A main finding is that on such issues there seems to be surprisingly small differences between being a court in a Member State or being an EFTA-state court. The final part of the paper is therefore dedicated to a discussion of various factors that may explain how Community jurisprudence influences national legal orders. Although my focus is on the EEA and Norway, the contrast of two different systems may shed some more light on legal integration more generally.

The theme of the paper is effects of the *EFTA Court* jurisprudence. As we shall see, when assessing the effects of the agreement on national law, it is in many ways difficult to distinguish between effects of the EFTA Court and effects of the jurisprudence of the ECJ. I therefore include effects of the jurisprudence of the ECJ and draw some comparisons between the two courts. When speaking of both, I use the term the “EEA courts”. On the other hand, since the effects of the EEA agreement on the national legal orders is a question of national law, I will for practical reasons focus on the effects on the Norwegian legal order. I have not had the possibility to study sources of Icelandic and Liechtenstein law directly. This may limit the relevance of my contribution somewhat. On the other hand, the challenges posed by the agreement toward the national legal orders are the same, and the approach taken by actors of the national legal orders thus replies to the same questions. On this basis I hope an examination of the Norwegian experience may have a wider interest than the national audience itself.

The Legal Basis

In contrast to the European Community, the EEA was constructed as a regular agreement under international law. The EEA has no legal personality, and the contracting parties strived to maintain their formal sovereignty and at the same time mirror the legal effects of the single European market. This construction of the agreement also had consequences for the court set-up. Following the opinion 1/91 of the ECJ, there is no EEA court. The EFTA-states are according to the EEA-agreement Article 108(2) under an obligation to establish a court of justice. The EFTA court is set up in the SCA (Surveillance and Court Agreement) in compliance with this obligation. Article 108(2) states that the EFTA States shall establish a court of justice (EFTA Court). The Article further provides that the court in particular shall be competent for

- (a) actions concerning the surveillance procedure regarding the EFTA States;
- (b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority;
- (c) the settlement of disputes between two or more EFTA States.

We see here that the EEA agreement does not go further than to demand the establishment of a court with the functions often attributed to an international tribunal, which is disputes between states, and disputes with regard to actions of institutions established in an international treaty.

The jurisdiction of the court is defined in article 31(2) SCA which states that if a State concerned does not comply with a reasoned opinion of the EFTA Surveillance Authority, the latter may bring the matter before the EFTA Court, and in article 32 that the EFTA Court shall have jurisdiction in actions concerning the settlement of disputes between two or more EFTA States regarding the interpretation or application of the EEA Agreement, the Agreement on a Standing Committee of the EFTA States or the Surveillance and Court Agreement itself. Article 35 states that the EFTA Court shall have unlimited jurisdiction in regard to penalties imposed by the EFTA Surveillance Authority and Article 36 and 37 that the EFTA Court shall have jurisdiction in actions brought by an EFTA State or any natural or legal person against a decision of the EFTA Surveillance Authority or a failure on the part of the Authority to act in infringement of its obligations under the agreement.

In such matters as here described, the contacting states have given binding powers to the Court under international law. The EFTA States concerned by a ruling shall take the necessary measures to comply with the judgments of the EFTA Court and if an action against a decision the EFTA Surveillance Authority is well founded, the decision of shall be declared void.

Reaching further than the obligation under the EEA-agreement, the SCA agreement Article 34 states that the EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement. This type of procedure is modelled on Article 234 EC where the ECJ has jurisdiction to give preliminary rulings concerning the interpretation of community law. The main differences between the two procedures are that the ECJ gives *rulings*, and the fact that if any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the ECJ.

There is no provision in the EEA-agreement or the SCA-Agreement providing that the case law of the EFTA-Court should have status as precedents when deciding later cases of law. The doctrine of precedents in community law is not explicitly stated in the EC-treaty, but is generally inferred from Article 220 which states that the ECJ shall ensure that in the interpretation and application of the Treaty the law is observed and Article 292 where the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaty to any method of settlement other than those provided for therein. Read together these provisions state that the ECJ rules according to the law, and that it is for the Court alone to decide on the law.¹

¹ See more explicitly ECJ opinion 1/91 on the EEA Court, [1991] ECR p. I-06079: "Although, under the agreement, the Court of the European Economic Area is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement, the Court of the European Economic Area will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date. Consequently, the agreement's objective of ensuring homogeneity of the law throughout the European Economic Area will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law

It follows that in so far as it conditions the future interpretation of the Community rules on the free movement of goods, persons, services and capital and on competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community. As a result, it is incompatible with Community law."

The status of the ECJ Case-law as precedents and part of the *aquis* is reflected also in the EEA-agreement Article 6 which states that the provisions of the Agreement, in so far as they are identical in substance to corresponding rules of the EC Treaty shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the ECJ of the European Communities given prior to the date of signature of the Agreement.

The Figures

In its first ten years, 62 cases have been lodged before the EFTA-court; 18 direct actions, 42 requests for advisory opinions and 2 others (legal aid and suspension of measure). The composition of the cases differ substantially from the ECJ, where close to 60% of the cases lodged are direct actions.² This difference should not in my opinion be attributed to characteristics of the two courts, but rather to differences between the member states in how efficiently they implement their duties and how they relate to the Commission and the EFTA surveillance Authority. The Nordic countries are all similar in this respect and have few infringement cases before the courts.³ If we look at only the Nordic states, of a total of 238 preliminary rulings and actions for failure to fulfil an obligation, 25 percent of the cases are failure to act cases, a number corresponding very well with the composition of the cases before the EFTA court.⁴

In comparing the first 10 years of the EFTA-court with the first 10 years of the ECJ, we find that the case-load of the ECJ was higher and increased more rapidly. Starting with the entry into force of the EEC treaty in 1958, the ECJ received a total of 464 cases, that is 77 pr. Member state, compared to the 18 pr. Contracting Party received by the EFTA-court.⁵ A vast majority of the ECJ-cases were direct actions, many probably connected with the ECSC-treaty. As mentioned above, it has been shown in other studies that very few cases from the Nordic states end up being settled in the courts. There were only, in total, 19 actions for failure to fulfil an obligation against Denmark, Finland and Sweden was in the time period 1995–2001, which is less than for Italy alone for a single year! On this account, we get a better comparison of the two courts if we leave the direct action cases aside. If we only

² Source, Annual report ECJ 2003 table 15 p. 229.

³ Ulf Sverdrup, Compliance and Conflict Management in the European Union: Nordic Exceptionalism, Scandinavian Political Studies, Vol. 27 – No. 1, 2004 pp. 23-43.

⁴ Figures computed from Annual report ECJ 2003 table 16 (p. 230) and 18 (p. 232).

⁵ Austria, Finland and Sweden have been omitted in this figure.

compare requests for preliminary rulings/advisory opinions, the picture is different. The EFTA court received 37 requests from the three present EFTA-states, the ECJ 49 requests from the six Member States in the period from 1958 to 1967, meaning that the EFTA court received slightly more requests from each participating state in its first 10 years than the ECJ.

It could be argued, however, that also such a comparison is misleading since the system of preliminary rulings was a novelty to most jurisdictions in 1958, whereas it was well established and known as an institution of law also in the EFTA-countries in 1994. A closer look at the figures seems to confirm this. The ECJ had absolutely no requests in the first three years after the institution was established compared to the EFTA Court which received 14 requests. In this respect, one may say that the EFTA Court was given a “flying start”.

On this basis, more information can probably be had by comparing the situation for the ECJ regarding the old EFTA-states that joined the EU in 1995. Sweden and Finland are part of the Nordic states and are similar to Norway and Iceland in legal culture and structure.

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	1994-2003
Iceland				1	2		2	3		1	9
Liechtenstein					1		3	1			5
Norway	2	2	5	5	2	1	2	3	1		23
Austria		2	6	35	16	56	31	57	31	15	249
Finland	1		3	6	2	4	5	3	7	4	35
Sweden	3	7	4	7	6	5	4	4	5	4	49

Request for advisory opinions/preliminary rulings (Source EFTA Court and ECJ)

What is striking in this table is not a difference in the supply of cases to the two courts, but the way Austria differs from the other countries in the amount of requests for preliminary rulings. Although there seems to be a correlation between the number of requests and the population of a country, the number of requests from Austria far exceeds what can be explained by differences in the size of the population alone.

If we look at the other countries of the EU, we see that the number of preliminary rulings lodged before the Court, is not by any means evenly distributed between the Member states.⁶ Big players are above all Germany, but also the rest of the original six. Austria certainly belongs to this league although its total number of cases is low due to the small number of years it has been a member. On the other hand, a Denmark has a very low rate, averaging 3 cases a year, without any tendency pointing towards an increase in this rate in the latest years. Britain must be put in the same league with a very low number of cases when the size of the population is taken into account.

If we look at the EEA as a whole, we see clearly that the different states fall in different groups with one group characterised by a large and increasing amount of requests from the national courts, and another group with a constant low amount of requests. All the Nordic countries fall in the latter group. This conforms to what has been observed regarding they diverge in how the various EEA countries resolve conflicts with the Commission and the EFTA Surveillance Authority. In general, the larger member states have more conflicts and they use court rulings more frequently than the EU average in settling these conflicts. By contrast, the smaller states in general and in particular the Nordic states, have fewer conflicts and they resolve them at an earlier stage and less frequently through the use of court rulings.⁷ The findings also conform with previous studies on variations in the patterns of references to the ECJ from different Member states.⁸

The findings seem to suggest that differences between the two courts regarding matters like legal basis, history, recruitment, workload and duration of proceedings, at least taken together, do not seem to influence the supply of referrals from national courts. One could, for example expect that differences in legal rules such as the obligation of court or tribunal of a

⁶ I use data from the ECJ 2003 Annual Report and not the data of Stone Sweet and Brunell (note 8 below) to include the five years from 1998 to 2003. The last five years show that the increase in cases from UK and Denmark seen in their data has not continued, the annual number therefore stabilized. These developments remind us of the need to caution about making firm conclusions without very long time-lines, which of course, are lacking for the EEA.

⁷ Ulf Sverdrup, Compliance and Conflict Management in the European Union: Nordic Exceptionalism, Scandinavian Political Studies, Vol. 27 – No. 1, 2004 p. 25.

⁸ Alec Stone Sweet and Thomas L. Brunell, The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95, Jean Monnet Working Paper no 14/97 <http://www.jeanmonnetprogram.org/papers/97/97-14-.html> and Alec Stone Sweet, Integration and the Europeanisation of the Law Queen's Papers on Europeanisation No 2/2002. Stone Sweet and Brunell found in their studies a high correlation between levels of transnational exchange and references. Inclusion of the Nordic states may give a more nuanced picture as to the causes of the patterns in variations that can be observed.

Member State against whose decisions there is no judicial remedy to refer a case to the ECJ, where no such obligations exists before the EFTA court, would lead to a higher number of cases before the ECJ. On the other hand, with the differences in the duration of the procedure vastly in favour of the EFTA Court, one could expect national courts to be more inclined to refer cases to this court than to the ECJ. It could be argued that differences among such variables cancel each other out, and that institutional differences between the courts after all are important factors for the supply of cases. But this explanation cannot account for the similarities to be seen between the Nordic states across institutional boundaries, and the differences between the Nordic states and other states within the same institutional settings. The data from the Courts support conclusions that have been drawn from data from the implementation phase of community legislation:

“The data analysis shows that the Nordic states are performing more or less at similar levels regardless of their formal organizational ties to the EU (member or non-member) and regardless of that fact that some states have more experience as member states than others (Denmark versus Sweden and Finland). These findings indicate that there is a distinct Nordic exceptionalism in the implementation of legislation.” and “These observations support the conclusion that distinct institutional traditions and styles of decision making are important in accounting for variation in conflict resolution; more so than the enforcement capacity of the European regime and the voting powers of the member states in shaping Community legislation.”⁹

To the extent that the explanations can be found in social and institutional characteristics of the Nordic states, it should not be expected that the next 10 years of the EFTA Court in figures and composition of cases will differ much from its first 10 years.

It is also interesting to see more specifically from which level of national courts come requests for preliminary rulings/advisory opinions. Whereas 29 percent of all case referred to the ECJ come from courts or tribunals against whose decisions there is no judicial remedy, the equivalent figures from Norway and Iceland are 17 and 19 percent respectively. Broken up on different states, the figures are more nuanced:

⁹ Ulf Sverdrup, Compliance and Conflict Management in the European Union: Nordic Exceptionalism, Scandinavian Political Studies, Vol. 27 – No. 1, 2004 p. 39 and 25

	Denmark	Finland	Iceland	Norway	Sweden	Germany	UK	EU total
Court of last instance	19	44	10	17	44	42	16	29
Other Courts	81	66	90	83	66	68	84	71

Referrals from court or tribunal against whose decisions there are no judicial remedy and from other courts or tribunal. Percent of total. (All referrals from Lichtenstein are from a court of last Instance. EFTA-cases of Austria, Finland and Sweden not included)

A closer examination shows that there are no consistent differences between EU countries and EFTA countries. However, here the picture of the Nordic states as a separate, coherent group does not fit. A pattern that seems to emerge, however, is that there are higher amounts of referrals from courts or tribunals against whose decisions there is no judicial remedy from countries whose legal system operates with specialised courts and courts of last instance. In general, features of the national legal culture and structure of the court system condition the relationship between national courts and a supra-national tribunal.¹⁰ The pattern we see in referral ratio between higher and lower courts therefore fits well into the more general picture of factors determining the role of national courts in European integration.

From countries with a unified court system with only one court of last instance, like Denmark, Iceland, Norway and UK, the amount of references from the court of last instance is lower. This does not necessarily mean that these courts take their obligation to refer less seriously than more specialised appeal courts. It is likely that the total number of cases reaching a court of last instance is higher in a country with several, specialised appeal courts than in a country with only one, general supreme court. This is consistent with the thesis of Stone Sweet and Brunell: The more any given court deals with questions of EC law, the more that court is likely to interact with the ECJ in a constructive manner.¹¹ There are simply more high-level courts dealing extensively with community law in a specialized court system than

¹⁰ Se Walter Mattli and Anne-Marie Slaughter, Role of National Courts in European Integration in Slaughter, Stone Sweet and Weiler, The European Court and National Courts – Doctrine and Jurisprudence, Oxford 1998 on p. 272.

¹¹ Alec Stone Sweet and Thomas L. Brunell, The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95, Jean Monnet Working Paper no 14/97
<http://www.jeanmonnetprogram.org/papers/97/97-14-.html>

in a unitary court system. Comparisons should therefore be made between courts in similar institutional arrangements. From this point of view, it is not surprising that the Norwegian *Høyesterett* has as a large proportion of the total number of Norwegian referrals as the Danish *Høiesteret* has of the Danish cases and the House of Lords and Court of Appeal of the British cases. Differences in the legal obligation to refer a case to the European Court does not seem to have much influence on the actual behaviour of the highest courts.

The Norwegian Reception

In numbers

The Supreme Court of Norway (*Høyesterett*) has mentioned the EFTA Court in its judgements in 21 cases.¹² In 14 of these cases, the EFTA-court is mentioned in relation to procedural matters in internal Norwegian law (mostly legal standing, non referral of injunctions for interim protection and awarding of costs). This means that the Supreme Court refers to the jurisprudence of the EFTA-court as a source of law in 7 cases. In 3 of these, the EFTA-court had given an advisory opinion in the case.¹³ Of the remaining 4, 3 concern transfer of undertakings, where there is an extensive jurisprudence from both the EFTA-court and the ECJ which the court refers to.¹⁴ The last case is a case of the right of compensation of a commercial agent after termination of the contract of agency.¹⁵ The legal question involves interpretation of directive 86/653/EEC on the coordination of the laws of the Member State relating to self-employed commercial agents. The Supreme Court states that there is no relevant jurisprudence from the EFTA-court or the ECJ, and goes on to interpret Norwegian law on the background of article 17(2) of the directive. The Court has dealt with similar issues in two previous cases, without any mention being made of the two EEA-courts at all.¹⁶

We can compare these figures with the way by which the Supreme Court deals with the jurisprudence of the ECJ, which can be found in a total of 27 cases.¹⁷ In all cases where use is

¹² Based on searches made in the *Lovdata* data base September 2004 with search words “EFTA domstol”, “EF domstol”, “EØS”, “rådsforordning” and “rådsdirektiv”.

¹³ Case E-3/02 Paranova, case E-1/99 Finanger and case E 2/95 Eidesund, se Rt. 2004 p. , Rt. 2000 p. 1811 and Rt. 1997 p. 1965.

¹⁴ Rt. 1997 p. 1954, Rt. 1999 p. 977 and Rt. 2001 p. 248.

¹⁵ Rt. 2001 p. 1390.

¹⁶ Rt. 1999 p. 569 and Rt. 1999 p. 579.

¹⁷ Here excluded 12 cases concerning the Lugano convention which is outside of the jurisdiction of the EFTA-court, bringing the comparable number to 27.

made of jurisprudence from the EFTA-court, reference is also made to jurisprudence of the ECJ.

In 6 of the 27 cases, parties have argued from the jurisprudence on protection of fundamental rights that similar protection should be given within Norwegian law.¹⁸ The legal issues in these cases fall outside the scope of the EEA-agreement, and the argument has been that Norwegian courts should recognise similar rights in Norwegian law to what the ECJ has recognised in Community law. So far the Supreme Court has not been open to such arguments, and has dismissed them without a closer examination of the jurisprudence of the ECJ. In 3 cases, the ECJ is referred to as a source of Community law as foreign law.¹⁹

The number of cases where the Supreme Court refers to the ECJ as a source of interpreting EEA-law is therefore 17. As mentioned above, reference is also made to the jurisprudence of the EFTA Court in 7 cases, bringing the number of cases where the EJC is the sole reference to 10. Most of these cases concern the interpretation of various pieces of secondary legislation.²⁰ Two cases concern free movement of goods and services, one case concerns competition rules (article 53).²¹ All these three cases concerning rules of the main agreement were interim protection cases, where the Supreme Court held that a reference to the EFTA-court was unnecessary due to the time constraints and the preliminary nature of court decisions in such cases.

A closer examination of some of these cases reveals the approach taken by the Supreme Court towards the jurisprudence of the ECJ. Rt. 2004 p. 122 raised the question of interpreting the Norwegian product liability act § 2-1(1) implementing article 6 of the product liability

¹⁸ Rt. 1983 p. 430 and 2000 p. 2167 (legal privilege), Rt. 1994 p. 610 (self-incrimination in competition law procedure), Rt. 1994 p. 610 (proportionality review of administrative decisions, Rt. 1996 p. 624 (discrimination and mandatory requirements), Rt. 2003 p. 359 (retroactive effect of court rulings on individual rights).

¹⁹ Rt. 1996 p. 433 (Spain's accession Treaty), Rt. 2002 p. 618 (Recognition of movement and phytosanitary certificates originating from the part of Cyprus to the north of the United Nations Buffer Zone) and Rt. 2003 p. 223 (binding effect of a Norwegian interim decision within the EU).

²⁰ Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (Rt. 2004 p. 122), directive 89/104/EEC to approximate the laws of the Member States relating to trade marks (Rt. 2002 p. 391), directive 86/653/ on the coordination of the laws of the Member States relating to self-employed commercial agents (Rt. 1999 p. 569), directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Rt. 1995 p. 270, 1995 p. 1625 and 1999 p. 989), public procurement (Rt. 2004 p. 351) and regulation (EEC) 3820/85 on the harmonization of certain social legislation relating to road transport (Rt. 1999 p. 393).

directive. There is no jurisprudence from the ECJ concerning the interpretation of this provision, and the Supreme Court decided the matter based on internal Norwegian Sources. This case would evidently not satisfy the *acte clair* criteria of the ECJ.²² In Rt. 2002 p. 391 the issue was registration of a trade mark. The Supreme Court stated on the basis of homogeneity that rulings of the ECJ on the directive and Council Regulation (EC) No 40/94 on the Community trade mark are of great importance when interpreting Norwegian law. Despite the fact that the Court found no directly relevant ruling from the ECJ, the issue of referring the case to the EFTA-court was not raised in the premises of the Courts ruling.²³ In Rt. 1999 p. 569 there was no jurisprudence from the ECJ to refer to when interpreting the commercial agents directive. Instead the Court relied on the Norwegian *travaux préparatoires* and on German law as described in a report from the Commission. In Rt. 1999 p. 393 the Supreme Court cited a judgement from the ECJ and stated that even though the ruling did not cover the same matter as the case before the Supreme Court, it should have a “certain influence” on the deciding of the case.²⁴

Based on these examples, it seems that the Supreme Court takes the same approach to cases from the ECJ as to its own precedents according to the Norwegian theory of sources of law. If precedents are lacking, it investigates whether there are cases in issues similar to the one in hand, and seeks whatever guidance these give on aims and concepts of the relevant rules. In the total lack of cases, the issue is decided by reference to other national sources. Judged at face value, this seems to be an approach far from the one expected by a court of last instance under community law. It would in my view, not be unfounded to claim that the Supreme Court has shown a certain reluctance to refer issues to the EFTA Court under the advisory

²¹ Rt. 1996 p. 1569, 1995 p. 1789 and 1977 p. 1859.

²² “A court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has been established the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court of Justice or that the correct application of community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.” Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, [1982] ECR p. 3415.

²³ “Som jeg skal komme tilbake til, foreligger det i EF en omfattende praksis om vilkårene for registrering av varemerker, men det foreligger ingen avgjørelse fra EF-domstolen som direkte gjelder det tolkingsspørsmål som foreligger til avgjørelse i vår sak. Det blir derfor et spørsmål hva man kan slutte seg til ut fra avgjørelser og premisser i saker som gjelder mer eller mindre likeartede spørsmål.”

²⁴ ”Selv om problemstillingen i saken for EF-domstolen var en annen enn i den sak Høyesterett her har til behandling, har dommen etter min oppfatning likevel en viss betydning for vår sak, idet EF-domstolen forutsetter at 24-timers perioden vanligvis løper fra det tidspunkt føreren aktiverer fartsskriven.”

opinion procedure. On the other hand, as seen above, the statistics show that the Norwegian Supreme Court is no more reluctant in its referrals than comparable courts in the EU Member states. This may indicate that the number of issues of community law before courts of last instance in member states like Denmark or UK is lower than the number of issues on EEA law in the Norwegian Supreme Court. If this explanation is not correct, then the answer must be that the inclination to refer to an EEA court is not dependant upon a legal obligation. Most probably it is a general trait within also the EU that national courts interpret and apply Community law more often than the two Community courts themselves.²⁵

In law

It has been shown above that the EEA-agreement has obligations directed towards the national courts of the EFTA-states regarding their relations to the EEA courts. It has been explicitly accepted by the unanimous Supreme Court in *Finanger* that the agreement addresses directly the courts, and that the Courts of the EFTA states under article 3 are under the obligation to “take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement” and to “abstain from any measure which could jeopardize the attainment of the objectives of this Agreement”.²⁶

Following this obligation, the Court has taken steps to strengthen the co operation between national Courts and the EEA Courts further if seen in relation to the more modest obligations entailed in the EEA agreement. This can be seen both in relation to the EFTA-court and the ECJ.

A main feature of the legal situation of the EFTA-court is that it is not provided with exclusive rights to interpret the EEA agreement in relation to the EFTA-states. As we have seen from the review of EEA cases by the Supreme Court, the Court regards itself both formally competent and substantially qualified to interpret provisions of EEA law. On the other hand, even not under a strict obligation to follow the advisory opinions of the EFTA Court, the Supreme Court has set the requirements to diverge from these opinions so strictly, that it in practise amounts to an obligation to follow them. After stating that national courts

²⁵ See John Temple Lang, The Duties of National Courts under Community Constitutional Law (1997) 22 E.L. Rev. pp. 3-18.

²⁶ Rt. 2000 p. 1811.

have a duty to assess independently whether or not to follow the opinion of the EFTA Court, the court in *Finanger* establishes that the opinion must have considerable persuasive effect, and the EFTA Court have significant authority.²⁷ In the recent judgment in *Paranova* the Court, under reference to *Finanger* states that “in my opinion it should take a lot for the Supreme Court to depart from the EFTA Court’s understanding of the EEA provisions, especially in a matter like this where Community law/EEA law is both specialised and developed.”²⁸

A similar approach has been taken towards the jurisprudence of the ECJ. As stated above, article 6 EEA obligates the Courts to interpret the Agreement in conformity with the relevant rulings of the ECJ of the European Communities given prior to the date of signature of the Agreement. Case law from after this date is not binding on the Courts of the Contracting Parties. The Supreme Court, however, in one of its first cases where it had to decide on the interpretation of an EEA provision, relied on the judgement of the ECJ in *Keck*²⁹ when interpreting article 11 EEA (article 28 EC) without any discussion of the relevance of this judgement in the light of article 6 EEA.³⁰ This approach has later been confirmed in a consistent line of cases. It must on this background be correct to state that in Norwegian law the distinction drawn in article 6 EEA has lost its meaning as Norwegian courts are instructed by the Supreme Court to interpret the provisions of the agreement in conformity with *all* relevant rulings of the ECJ.

Methodologically this entails that provisions of the EEA Agreement should be interpreted by Norwegian courts according to the approach and method utilized by the ECJ when interpreting and applying community law. This is in conformance with the line which the

²⁷ ”Men jeg finner samtidig at uttalelsen må tillegges vesentlig vekt. Dette følger etter min mening allerede av den omstendighet at EFTA-statene i samsvar med EØS-avtalen artikkel 108 nr. 2 ved inngåelsen av ODA-avtalen har funnet grunn til å opprette denne domstolen, blant annet for å nå frem til og å opprettholde en lik fortolkning og anvendelse av EØS-avtalen. Også reelle grunner taler for dette. Rettskildebruken innen EØS-retten kan avvike fra den nasjonale. Dette gjør at EFTA-domstolen med sin særlige kunnskap bør kunne uttale seg med betydelig autoritet.”

²⁸ ”Etter min mening skal det meget til for at Høyesterett skal fravike det (EFTA)domstolen uttaler om forståelsen av de EØS-rettslige bestemmelsene, og ganske særlig på et område som det foreliggende, hvor EU/EØS-retten er spesialisert og utviklet”, Rt. 2004 p. xxx. The case concerned parallel imports and trademarks.

²⁹ Joined cases C-267/91 and C-268/91 Criminal proceedings against Bernard Keck and Daniel Mithouard [1993] ECR p. I-06097.

³⁰ Rt. 1996 p. 1569.

Court has taken to interpretation of international obligations more generally, in several plenary judgements on the interpretation of the European Convention on Human Rights.³¹

Effects on the Legal order

Initially, the EEA-agreement was concluded as an agreement under international law. One of the basic aims of the agreement was to connect the EFTA states to the single European market without constructing supranational institutions and rules.³² The way the agreement has been developed both by the EFTA Court and national courts has brought the differences between the EEA solution and Community law in this respect to be more of degree than of a qualitative nature. One aspect of this is the relations of the national courts to the EEA courts, where we see that there are no great differences in the approach of the national courts.

The jurisprudence of the EFTA Court, however, also affects the legal order of the EFTA states in other ways. According to the EFTA Court, the EEA agreement is not merely a regional treaty under international law. The Court stated in Sveinbjörnsdóttir “that the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own ...less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.”³³ This legal order “is characterized by the creation of an internal market ... the protection of the rights of individuals and economic operators and an institutional framework providing for effective surveillance and judicial review.”³⁴ The EFTA Court has developed general principles of EEA law. When interpreting the agreement the objective of homogeneity must be borne in mind. For all practical purposes this interpretive principle eliminates the differences that could arise from the fact that community law must be interpreted with the aim of integration in mind.³⁵ The provisions of the agreement are to the benefit of individuals and

³¹ See for instance Rt. 2003 p. 359.

³² Se Hans Petter Graver: Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement" in European Foreign Affairs Review, Vol. 7, No. 1, Spring 2002, s. 73-90

³³ Case E-9/97 Erla María Sveinbjörnsdóttir and The Government of Iceland.

³⁴ Case E-2/03, Ákærvaldið (The Public Prosecutor) against Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson paragraph 28.

³⁵ As stated by the ECJ in Case C-286/02Bellio F.lli Srl v Prefettura di Treviso [2004] ECR p. ny paragraph 34: “It should be emphasised in this connection that, as Article 6 of the EEA Agreement states, the provisions of the agreement, in so far as they are identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of that Treaty, must, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court given prior to the date of signature of the EEA Agreement. Furthermore, both the Court and the EFTA Court have recognised the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly (Case C-452/01 Ospelt and

economic operators who must be able to rely on the rights before the courts. The national courts must consider any relevant element of EEA law, whether implemented or not when interpreting national law. The states are liable for damage suffered by individuals for breach of the state's obligations under the agreement. The agreement also contains other principles such as protection of fundamental rights and the principle of proportionality.³⁶

When the EEA agreement was new, it was debated whether the agreement could be characterised differently from a normal international treaty and whether it could be seen to include general principles not entailed by its express provisions.³⁷ Many of these questions may now be regarded as settled by the jurisprudence of the EFTA Court and by the Norwegian Supreme Court in *Finanger*. In this case the court stated that the principle of loyalty in article 3 EEA is applicable to the courts and that Norwegian courts should use the principle of presumption in a way “not less far-reaching” than the community interpretation obligation.³⁸ The majority of the Court in Finanger rejected the claim to give the directive direct effect contrary to the express wording of a Norwegian statute. But it is important to stress that the issue was one of horizontal effect between two private parties, which does not fall under the obligation to give direct effect in Community law. Even under these circumstances a large minority was of the opinion that the directive should prevail over national law, and the majority made it part of their reasoning that the facts were not a case of giving an individual rights in a claim against the state.

In the subsequent *Finanger II* case regarding the liability of the Norwegian State for incorrect transformation of the motor vehicle insurance directive, the State as defendant has admitted that the principle of state liability is part of the agreement and as such directly applicable before the Norwegian courts. In my view it is still open to question whether direct effect of a directive will be accepted in a “proper” Community setting, that is in a case where an

Schlössle Weissenberg Familienstiftung [2003] ECR I-0000, paragraph 29, and Case E-1/03 EFTA Surveillance Authority v Iceland, not yet published in the EFTA Court Reports, paragraph 27.”

³⁶ For more details and references to relevant cases see The EFTA Court, Legal framework, case law, and composition, Luxembourg 2004 pp. 23-40.

³⁷ See for instance chapters by Peter Christian Müller-Graff and Fredrik Sejersted in Müller-Graff and Selvig (eds.) *The European Economic Area – Norway’s Basic Status in the Legal Construction of Europe*, Berlin-Oslo 1997.

³⁸ For an overview of the principle of presumption also covering basic parts of Norwegian law see Søren Stenderup Jensen, *The European Convention on Human Rights in Scandinavian Law*, Copenhagen 1992. For an overview of the community interpretation obligation see Tomas Ojanen, *The European Way, The Structure of National Court Obligation under EC Law*, Helsinki 1998.

individual claims the rights of the directive in an action against the state. Direct effect and supremacy of the main part of the agreement is already established by the act implementing the agreement, and by the interpretive principles established in *Finanger*. If there is no open and clear legislative intent of non-compliance, a strong case could be made that an individual must be able to rely on obligations undertaken by the state in directives that have been become part of the agreement.

The fact that the Supreme Court has accepted that the loyalty obligation also applies to the courts is of crucial importance. This duty entails a duty to cooperate with the EFTA-Court, to apply EEA-rules in a loyal manner and, when necessary to ensure that other national authorities apply the agreement and comply with it. In Community law it can be held that basic features such as disallowing state authorities to rely on national laws which are inconsistent with Community obligations (direct effect and supremacy), the interpretation obligation and the duty to give effective remedies to breach of Community law all stem from the duties of national courts under article 10 EC.³⁹

The approach taken by the Supreme Court in *Finanger* is very similar to the approach House of Lords took to the sovereignty issue prior to *Factortame* by reading national provisions not by reference to ordinary rules of construction, but in a manner designed to effectuate the dictates of Community law.⁴⁰ The House of Lords, later in *Factortame* gave a general statement concerning the priority of Community law over national law in the event of a clash between the two. The facts here concerned the relations between new requirements of registration in the Merchant Shipping act of 1988 and primary rules of freedom of establishment. This conflict would in Norwegian law already have been solved in favour of the EEA rules by reference to § 2 of the EEA implementing act which states that legislation implementing EEA-rules has priority over other acts of legislation. There is therefore no need for a judicial construction to reach this result in Norwegian law.

³⁹ John Temple Lang, The Duties of National Courts under Community Constitutional Law (1997) 22 E.L. Rev. pp. 3-18.

⁴⁰ See P.P. Craig, Report on the United Kingdom in Slaughter, Stone Sweet and Weiler, The European Court and National Courts – Doctrine and Jurisprudence, Oxford 1998 on pp. 198-200.

It has been argued by president Baudenbacher of the EFTA Court that the described features form facets of an EEA constitutional order.⁴¹ It can certainly be argued that together with the surveillance powers of the EFTA surveillance Authority and the fact that the main part of the agreement are transformed into national law, the supranational qualities of the EEA do not lack far behind the EU in features, albeit quite different in scope. Supremacy of implemented rules is secured in accordance with protocol 35 of the agreement by the EEA implementation act. Supremacy of *non-implemented* rules follows from the solution of the question of direct effect. In Norwegian law, this question is more correctly framed as a question of supremacy, as there is no doubt that non-implemented rules are basis for valid legal arguments and will be followed by the courts in the absence of national rules barring such a result. As mentioned above I believe it is not unlikely that rights will be granted individuals according to non implemented EEA-rules in a case against the state, even in contradiction to national legislation if the conditions for direct effect are met. Economic rights follow from the fact that the obligation of state liability has been accepted. It is difficult to see what kind of arguments the government could use for *not* granting a right, apart from a general and principled argument of sovereignty and the fact that the agreement does not entail a transfer of legislative powers. Such arguments however, are of a very formal kind, when it is clear in law that the individual will be compensated for the non fulfillment of the obligation in any case. It is highly unlikely that a situation can arise, where the conditions for direct effect under EEA law are met in relation to a specific person, without the conditions for state liability also being met.

The crucial test, however, is how EEA-rules fare in conflict with legislative acts of Stortinget, where there is a clear legislative intent that the act shall prevail over an EEA obligation. In the community context, the House of Lords has made a contractual argument towards Community law: Joining the EU means joining on the terms that are made, and supremacy and exclusive competence of the ECJ are parts of these terms. This must entail that the state also in the capacity of legislator is bound by the terms, and therefore cannot pick and choose which obligations to subscribe to while still remaining in the Community.⁴² A similar argument could be made in Norwegian law in relation to the EEA Agreement. There is a clear

⁴¹ Carl Baudenbacher, Facets of an EEA Constitutional Order, in Colneric, Edward, Puissochet, Colomer (Hrsg.) Une communauté de droit, Festschrift für Gil Carlos Rodríguez Iglesias, Berlin Wissenschafts-verlag 2003 pp. 343-359.

obligation under the agreement to give effect and supremacy to EEA obligations. This follows from article 7 and protocol 35. There is no option under the agreement for the national legislator to pick and choose among the obligations. It is true that the agreement is implemented into Norwegian law by a legislative act by Stortinget, and as such, according to Norwegian constitutional law may be “unimplemented” by a simple legislative act. However, by implementing the agreement, also article 7 and protocol 35 are Norwegian law. The Storting is not bound by the agreement to give up its legislative freedom to revoke its obligations. The Agreement provides in article 127 for a right to withdraw from the Agreement. It could be argued that the Storting, by implementing the Agreement has accepted the obligation to legislate according to its obligations, ands must follow the provisions of the Agreement provided to exercise its sovereignty. This would mean that, apart from safeguard and emergency measures, contrary legislation could only be passed after a withdrawal and twelve months' notice in writing to the other Contracting Parties according to Article 127.

The traditional argument in Norwegian doctrine is different. Since the acceptance and implementation of the EEA agreement has been made according to provisions empowering the state to conclude such agreements and undertake such legislation in the Norwegian constitution, it must follow from a normal application of the Constitution that the Courts are bound by later decisions of Stortinget revoking these acts, in part or fully. What will Norwegian courts do should a question like this arise? It is in my opinion difficult to predict. Should the Courts protect the sovereignty of the Storting to legislate in contradiction to its clear obligations under the Agreement? It would be clear that by doing so, the Storting would be breaking the law. And since the agreement has been made part of Norwegian law, not only would it be an international obligation broken, but also an obligation under Norwegian law. And is it not the duty of the courts to uphold the law also in the face of unlawful acts by the legislator?

The Court could of course take the more withdrawn position indicated by the majority of the Supreme Court in *Finanger*; it is up to the legislator to fulfil its obligations to implement EEA rules and it must therefore also be up to the legislator to sort out any difficulties that may arise. In *Finanger* this was a viable position because no court is under the obligation to

⁴² See P.P. Craig, Report on the United Kingdom in in Slaughter, Stone Sweet and Weiler, The European Court and National Courts – Doctrine and Jurisprudence, Oxford 1998.

give horizontal effect to directives contrary to provisions under national law. Would it be viable in a case of express legislative disobedience? I believe it would. Under Community law, national courts are under the obligation to give effect to Community law, under certain conditions also in cases directly against the national legislator. Accepting this is part of the deal when joining the Community and the contractual argument applies. Under the EEA agreement, no such obligation on the courts exists. The national courts are therefore not under an EEA obligation to correct violations by the legislator. An obligation therefore must be constructed under national law, and here the traditional view will be powerful. The conservative prediction would therefore be that the Courts would apply legislation that expressly contradicts EEA-rules.

Also on this point there is correspondence between the Norwegian situation and the situation in the Member States of the EU. It seems to be a general trait that the courts are constrained in their relation to the Community by the shape and specific form of national law.⁴³

Perhaps the area where the situation within the Member States differ the most, is on the question of *kompetenz-kompetenz*. This is not a difficult issue in the EEA, since there is no provision on an exclusive competence for an EEA Court to rule on the validity of an EEA-rule. Nevertheless, it is not likely that Norwegian Courts will find an EEA-rule invalid based on a test of the validity of the underlying community rule or on the provisions of the EEA Agreement without requesting an opinion from the EFTA Court. Questions of limiting the scope of the Agreement are in my opinion another matter. The EFTA Court has already twice defined limits to the scope of the Agreement – in relation to the common commercial policy towards third countries and in relation to measures to the maintenance of the national identity of a State.⁴⁴ Where the role of the *kompetenz-kompetenz* issue in the EU is mostly theoretical due to the breath of areas over which the Union institutions have power, it is of a highly practical nature within the EEA. Here therefore lies a field where national courts can assert their independence and powers without seriously impairing the functioning of the agreement.

⁴³ Walter Mattli and Anne-Marie Slaughter, Role of National Courts in European Integration in Slaughter, Stone Sweet and Weiler, The European Court and National Courts – Doctrine and Jurisprudence, Oxford 1998 on p. 274.

⁴⁴ Case E-2/97 Mag Instrument Inc. and California Trading Company Norway, Ulsteen and Case E-1/01 Hörður Einarsson and The Icelandic State.

Assessment

Looking back 10 years, the EEA-agreement has elements today, which were lacking, or even rejected at the moment of its inception. The Agreement was created as an instrument under international law, and as a clear alternative to the supranational arrangement of the, at that time, European Communities. Basic elements of community law as a legal order, the subjects of which comprise not only Member States but also their nationals, with main characteristics such as the overall aim of integration, direct effect, state liability and the obligatory leading interpretive role of the ECJ, did not form part of the agreement.⁴⁵ Today the individuals and economic operators are able to rely on their rights before the courts, the aims of interpretation identical through the EEA aim of homogeneity, direct effect, supremacy and state liability established through interpretation and the leading role of the ECJ and the EFTA court accepted through the conduct of national courts.

Attaining the aims of the agreement, equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, was probably impossible within the political constraints given at the time of the negotiations. The provisions included in the agreement to secure homogenous interpretation have the form of a request, rather than an obligation on the cooperating national and international courts.⁴⁶ The response has been positive. The two EEA courts have actively been cooperating in forming a uniform legal order. National courts have by no means been passive recipients, but have actively participated by making references at the same level as courts in the EU member states, by adhering to the interpretations of the ECJ, taking no notice of the distinction made in article 6 EEA, and by setting the conditions for disregarding the advisory opinions of the EFTA Court so strictly that following them amounts to an obligation. In this way the development of the EEA agreement mirrors the development of Community law where the “rules of the game” for the courts to play have largely been developed by the ECJ and the national courts in concert.⁴⁷

⁴⁵ See to this respect opinion 1/91 [1991] ECR p. I-06079 and Müller-Graff and Selvig (eds.) *The European Economic Area – Norway’s Basic Status in the Legal Construction of Europe*, Berlin-Oslo 1997.

⁴⁶ In the words of Peter-Christian Müller-Graff in Müller-Graff and Selvig (eds.) *The European Economic Area – Norway’s Basic Status in the Legal Construction of Europe*, Berlin-Oslo 1997 p. 38.

⁴⁷ See Tomas Ojanen, *The European Way, The Structure of National Court Obligation under EC Law*, Helsinki 1998 p. 326 – 327.

Above it was shown that on the level of statistics, the role of the EFTA Court and its relation to national Courts is comparable to the situation within Community law. The variations one can see cannot be explained so much by formal differences in obligations and norms between Community law and the EEA-agreement as by other factors such as differences in social, cultural and legal structures between the different countries. The same can be said on the level of legal norms and doctrines. Although here one would expect legal differences between the two instruments of law; Community law and the EEA agreement to play a more significant role. After all, Community concepts of direct effect, supremacy etc. are required by law in the Community legal order, whereas they are not by the EEA agreement. The most basic explanation as for why the ECJ's vision of an integrated legal Community has prevailed in the Member States is it's the law.⁴⁸ How can then the seeming lack of difference between the situation in the EU and the EEA be explained?

Direct effect of primary law, state liability and the duty of the Courts to interpret national law in light of EEA obligations have been clearly and firmly accepted in national law by Norwegian Courts.⁴⁹ The same is the case with the principle of homogeneity as a leading interpretative aim, and the role of the ECJ and the EFTA Court as the proper Courts to establish precedents on the interpretation of Community and EEA law.⁵⁰ This development is despite the fact that the EEA Agreement was conceived as a political alternative to the supranational arrangement of the European Communities. Again, if we compare with the Community situation, what needs explanation is the degree of smoothness which characterises the acceptance of these supranational traits into the EEA-agreement. After all, the Community experience shows a certain degree of correlation between the rate of acceptance of core supranational features of Community law and national attitudes toward

⁴⁸ Alec Stone Sweet, Integration and the Europeanisation of the Law Queen's Papers on Europeanisation No 2/2002 p. 15.

⁴⁹ Direct effect of the main part of the EEA agreement was established by the EFTA Court in its first advisory opinion case E-1/94 Restamark and has been applied without discussion in Norwegian Courts. State liability was established in case E-7/97 Sveinbjörnsdóttir, and has been accepted by the Supreme Court in Iceland and by the Norwegian Government. It is therefore highly unlikely that the Norwegian Supreme Court will reject this in principle in defence of the state. The interpretation obligation is established clearly in case E-4/01 Karlsson and by the Supreme Court in Finanger.

⁵⁰ Se the review of Norwegian Supreme Court cases above.

European integration.⁵¹ Based on this, one would maybe expect a higher degree of reluctance in Norwegian courts.

One factor in the explanation is probably the traditional strong loyalty Norwegian Courts have towards the legislation of the Storting and the expressed will of the legislator. Paradoxically, this has brought the Courts into a position where they may question, and even disapply legislation passed by the same Storting. In *Finanger*, the court referred to the will of the legislator in the passing of the EEA implementation act as a strong argument for the duty of the courts to interpret Norwegian law in conformity with EEA obligations. Homogeneity is a strong legislative and political aim, and the EEA agreement the only viable alternative to achieve this. This places a responsibility also on the courts to ensure that this alternative functions.

Another factor is the familiarity of the Norwegian legal culture to the doctrine of precedents and to defining law according to the methods and reasoning of a court empowered to have the last word in a legal matter. It is a basic characteristic in the Norwegian theory of sources of law and legal methodology that the jurisprudence and mode of reasoning of the final Court should be paradigmatic to other lawyers. Since the development of Community law and EEA law, despite formal bindings or non-bindings in the EEA Agreement inevitably is performed by the Courts in Luxembourg, these Courts take the place of the paradigmatic court in matters on EEA law. The same pattern is formed in the relation to the European Convention for Human Rights, where the Supreme Court in several rulings has stated that the method of interpreting the convention must be based on the case-law and method of the Human Rights Court.⁵² Based on this, it is no great step in legal thinking to surpass the distinction made in article 6 EEA and treat the case law as such of the EEA courts as sources of law with the greatest authority.

A third factor that may have been playing in the *Finanger* reasoning is a desire to regain control over the legal relations between national law and the EEA agreement. The way the argument is framed in this case, the very strong compulsion to interpret, and even bend

⁵¹ Walter Mattli and Anne-Marie Slaughter, Role of National Courts in European Integration in Slaughter, Stone Sweet and Weiler, The European Court and National Courts – Doctrine and Jurisprudence, Oxford 1998 on p. 268.

⁵² See notably Rt. 2000 p. 996 and 2002 p. 557.

national law according to EEA obligations, follows from a doctrine of presumption in *national* law, and not from a community law or EEA law obligation of interpretation.

Finally, account must be taken of the more general picture under which the reception of the EEA Agreement has taken place within the Supreme Court. In the last decade the Supreme Court has been called upon to reformulate the relations between national law and international law more generally and specifically in relation to human rights. No less than three times did the Supreme Court meet in plenary sessions over the effects of the European Convention on Human rights in 2000-2002 in addition to the plenary treatment of the EEA in *Finanger*. There had been much uncertainty and disagreement, also among the judiciary itself on the effects of international obligations in Norwegian law and the method to construct and interpret both national and international rules in the event of a potential conflict. Strong voices, among them several former president of the Supreme Court had over the past decades propagated for leaving the traditional concept of dualism behind and for applying international fundamental rights directly in Norwegian law without any legislative implementation. Seen on this background, the result in *Finanger* can be seen as a middle-of-the-road compromise which is not very far reaching. It must be recalled that a large minority of the Court supported a result that would have amounted to giving the directive horizontal direct effect and supremacy over contradicting Norwegian legislation.

