Norway (including Iceland and Liechtenstein)

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1 Introduction

The present report on the enforcement of EU law by Norwegian courts will be seen to differ quite a bit from the national reports of the EU Member States. Firstly, since Norway is not a Member State of the EU, we will be focusing on the enforcement of European Economic Area (hereafter "EEA") law, with all the various peculiarities and qualifications that this might entail. Secondly, the report will not only aim to provide insights into the practice of Norwegian courts, but also to include some perspectives from Iceland and Liechtenstein. The idea being to provide a broader picture encompassing all three of the European Free Trade Association States (hereafter "EFTA States") party to the EEA Agreement.[1]

In the following, we have therefore decided to split the main body of our report in a way which broadly follows the questionnaire's set-up. We firstly examine the notions of direct effect and supremacy (Section 2), before looking at the application of the principle of consistent interpretation (Section 3). Some examples of the delicate balancing act to be carried out between ensuring effective judicial protection of EEA rights and national procedural autonomy are then ventured (Section 4), before finally looking at the broader issue of judicial cooperation between the EFTA Court and national courts in the EFTA States under the Advisory Opinion procedure (Section 5). In order to avoid unnecessary repetition, each section will be prefaced by a general introduction, explaining how the principles apply (or not) and have been developed in their EEA setting. Following the introductions to each section, subheadings are then devoted to each EFTA State: Norway, Iceland and Liechtenstein.

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1 Agreement on the European Economic Area, *OJ 1994, L 1/3*. Although a member of EFTA, Switzerland is not part of the EEA Agreement. For pure sake of convenience, however, the three EEA EFTA States will be simply referred to as "the EFTA States" in the following.

In order to understand the role of national courts in the EFTA States in enforcing EEA law, and their reception and application of the many principles covered in this report, readers should be wary of a few idiosyncrasies of the EEA legal system from the very outset. Whilst the Main Part of the EEA Agreement largely mirrors the EC rules on the four freedoms and competition law anno 1994, the scope of the EEA Agreement's objectives are limited to elements primarily connected to economic integration.[2] Key for the dualist EFTA States was that EEA participation would not involve any transfer of sovereign powers to the EC/EU. Keeping up to speed with the underlying EU law has been largely ensured in practice by the fundamental EEA principle of homogeneity, according to which the Contracting Parties (i.e. the EU and its institutions, the EU Member States and the EFTA States) must strive to ensure that identical rules under EU and EEA law – including certain unwritten principles of EU law – are interpreted and applied in a uniform manner.[3] As we shall see, however, although homogeneity certainly looks a lot like the EU principle of uniformity, the EEA principle appears to have clearer (and/or different) limits in practice.

Since taking part in the EEA was not to involve any transfer of legislative or judicial sovereignty for the EFTA States, the institutional set-up of the EEA is also markedly different from that of the EU. Whilst the EFTA States were unwilling (and arguably unable, constitutionally) to submit full authority and control of EEA matters to the EU institutions, the EU for its part could not accept a situation whereby the EFTA States would be free to monitor their own compliance with the provisions of the Agreement. As a compromise, a unique two-pillar structure for decision-making, monitoring and enforcement of EEA obligations was constructed – with the EU acting collectively under the one pillar, and the EFTA States acting collectively under the other.[4] Several common EEA institutions were further established to act as a bridge between the two pillars, yet notably with no common court or supervisory body.[5] The Agreement therefore presumed the establishment of a system for supervising and enforcing EEA obligations which would be indigenous under each pillar. Whilst the European Court of Justice (ECJ) and the Commission are charged with doing so under the EU pillar, the EFTA Court and the EFTA Surveillance Authority (ESA) act under the EFTA pillar to this end.[6] The principle of homogeneity formally obliges the EFTA Court to interpret EEA provisions in conformity with relevant rulings of the

2 As can be seen in several of the Preamble recitals, and also highlighted in Art. 1(1) EEA, the aim of the Agreement is to "promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules".

3 Arts. 1 and 6 EEA, and e.g. recitals 4 and 5 of the EEA Agreement's Preamble.

4 For an overview, see e.g. the EFTA website: www.efta.int/eea/eea-institutions.

5 Indeed, the idea of a common EEA court was ruled out altogether following the ECJ's *Opinion 1/91 (EEA Agreement)*, ECLI:EU:C:1991:490.

6 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice *OJ 1994, L344/3* (SCA).

ECJ.[7] This has been integral in establishing and developing certain legal principles as a matter of EEA law. And in order to keep up to speed with legislative developments in the EU's internal market, the EEA Joint Committee was established and charged with taking consensus-based decisions to incorporate novel EEA-relevant EU secondary measures (primarily regulations and directives) into various Annexes to the EEA Agreement.[8]

2 Direct Effect and Supremacy

As mentioned above, the EEA Agreement is based on a fundamental principle of homogeneity. Homogeneity nevertheless has its limits. First and foremost amongst these is that since EEA membership was not to entail any transfer of legislative sovereignty by the EFTA States, there is no requirement of direct effect or primacy of EEA law – at least not as these principles are understood under EU law,[9] the EFTA Court has on many occasions confirmed that although the EFTA States naturally remain free to apply such a principle of their own accord, the EEA Agreement does not require direct effect of non-implemented EEA provisions in the EFTA States.[10] The fact that the ECJ's general approach to direct effect of certain provisions in certain international agreements to which the EU is a party has led it to conclude in several cases that provisions of the EAA Agreement may have direct effect under the EU pillar does not change this.[11] And when we speak of (quasi-)primacy of EEA law, it is of a rather different nature than the EU principle of primacy. Unlike the situation under EU law, where regulations are of direct applicability and only directives require implementation at national level, all directives *and* regulations incorporated into the Annexes of the EEA Agreement require national implementation – at least in the dualist EFTA States of Norway and Iceland.[12] The sole provision in Protocol 35 to the EEA Agreement – which is considered equally binding and of the same legal value as the Main Part of the Agreement – therefore goes on to provide

7 Although article 6 EEA provides that the EFTA Court must interpret EEA provisions in conformity with the relevant case-law of the ECJ rendered prior to the date of signature of the Agreement (i.e. 2 May 1992), the EFTA Court's practice reveals that it has consistently taken into account relevant rulings of the ECJ also after this date. See e.g. Joined Cases E-9/07 and E-10/07 *L'Oréal* [2008] EFTA Ct. Rep. 258, para. 28. Whilst the ECJ also routinely takes EFTA Court practice into account in its own case-law, there is little denying the formal and practical hierarchical relationship between the two.

8 Art. 92 EEA.

9 Contrary to certain misguided statements made by the ECJ clearly implying that EEA regulations are directly applicable. See e.g. Court of Justice EU 26 September 2013, Case C-431/11, *UK v. Council*, ECLI:EU:C:2013:589, para. 54; and Court of Justice EU 8 July 2014, Case C-83/13, *Fonnship*, ECLI:EU:C:2014:2053, para. 24.

10 See e.g. Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, para. 122.

11 See e.g. Court of Justice EU 22 January 1997, Case T-115/94, *Opel Austria,* ECLI:EU:T:1997:3.

12 Art. 7 EEA – the situation concerning implementation is naturally different in the monist EFTA state of Liechtenstein.

that "[f]or cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases". National law which implements EEA directives and regulations is accordingly to be afforded primacy over all other conflicting provisions of national law, thereby giving precedence to national law which is EEA-conform over national law which is not. At least in theory – in the following subsections, we shall look to see how the EFTA States have implemented the requirements flowing from Protocol 35 itself.

Concerning the emphasis in the questionnaire on the (direct) enforcement of general principles of EU law and the EU Charter of Fundamental Rights (hereafter "Charter"), it is also important to recall that the EU Charter has not been incorporated into the EEA Agreement or recognised formally by the EFTA States to date. This can naturally pose certain problems from the perspective of homogeneity, such as where for example the ECJ interprets an EEA-relevant provision in the light of the Charter. The EFTA Court has nevertheless proven remarkably adept in bridging the gap between EU and EEA law on this front, relying on other sources (e.g. ECHR provisions reflecting Charter provisions; principles deemed inherent to the EEA Agreement and/or common to the democratic traditions of the EFTA States) so as to arrive at the same results in practice.[13] Looking beyond fundamental rights, many other (general) principles of EU law have also been recognised by the EFTA Court as forming part of EEA law, to the extent that this has been considered necessary in order to secure homogeneity in the EEA. It follows from the above, however, that whilst the possible direct effect and/or primacy of general principles of EU law recognised under EEA law may vary according to the monist/dualist approach of the EFTA State concerned, and the manner in which the dualist states of Norway and Iceland have chosen to implement Protocol 35 in national law, there is generally no requirement to this end under the EFTA pillar of the EEA legal construct.

2.1 Norway

Norway maintains a strong, predominantly dualist view on the relationship between international and national law. Section 26 of the Norwegian Constitution implies a dualist approach in that international obligations must first be made part of Norwegian law before they will be deemed to impose obligations or create rights which individuals may rely on

13 For more, see H.H. Fredriksen and C. Franklin, "Of Pragmatism and Principles: The EEA Agreement 20 Years On" 52 (2015) 3 *Common Market Law Review*, pp. 629-684, with further reference to e.g. Case E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, and Case E-7/12 *DB Schenker (No 2)* [2013] EFTA Ct. Rep. 356.

before national courts.[14] This is the case notwithstanding the international law principle that a state cannot invoke its national law as a reason for non-fulfilment of its international obligations – which also goes some way to explaining why Norway is not party to the Vienna Convention on the Law of Treaties.[15] To mitigate the lack of direct effect, however, the entire Main Part of the EEA Agreement has been incorporated into Norwegian law by Section 1 of the Norwegian EEA Act (NEA).[16] According to Art. 7(a) EEA, all regulations incorporated into the EEA Agreement are also to be made part of Norwegian law as is (i.e. by incorporation as opposed to transformation). The lack of direct effect is therefore more likely to be an issue where EEA directives are concerned, as Norwegian authorities enjoy discretion under Art. 7(b) EEA as to how to implement them at national level.

Notwithstanding the general rules that apply on how new EEA-relevant EU legal measures are given effect under Norwegian law, Norwegian authorities may nevertheless prove willing to make certain exceptions in practice. Section 2 of the Norwegian Statutory Instrument on Personal Data, which serves to implement some of Norway's obligations following incorporation of the General Data Protection Regulation (GDPR) into the EEA Agreement, provides a somewhat solitary example in this regard.[17] According to Section 2(1), certain EU Commission decisions under articles 45 and 46 GDPR concerning the level of privacy protection in third states and international organizations and standard privacy rules, will apply in Norway *as soon as they are incorporated into the EEA Agreement by the EEA Joint Committee* – thereby making such unimplemented EEA Joint Committee Decisions directly applicable in Norway. Section 2(2) goes even further than this, by providing that if the EU Commission decisions in question have not been incorporated into the EEA Agreement by the time they start to apply in the EU Member States, then the decision will apply in Norway *as soon as it applies in the EU Member States* – unless Norwegian authorities expressly decide otherwise. Providing for direct applicability and (potential) direct effect of certain EU Commission decisions in Norway in this way nevertheless represents a rather radical departure from the norm.

As far as (quasi-)primacy is concerned, Protocol 35 of the EEA Agreement is specifically implemented by Section 2 NEA, which provides that:

14 The Norwegian Constitution, and several other important pieces of Norwegian legislation, are available in English at https://lovdata.no/register/loverEngelsk.

15 Arts. 27 and 46 of the Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. See nevertheless the Court of Appeal's rather interesting decision in LB-2014-26876; UTV-2015-953 (*Hallquist*), where it appears to accept Art. 27 as an expression of customary international law, and hence binding for Norway.

16 *Lov 27. nov 1992 nr. 109 om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS)*.

17 EEA Joint Committee Decision no. 154/2018 of 6 July 2018; Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

> Provisions of law that serve to fulfil Norway's obligations under the [EEA] Agreement shall, in the event of conflict, take precedence over other provisions regulating the same conditions. The same applies if a statutory instrument that serves to fulfil Norway's obligations under the [EEA] Agreement is in conflict with another statutory instrument, or conflicts with a later law (author's translation).

The first point to note is that this provision does not give precedence to EEA law over Norwegian law, but provides instead for primacy of Norwegian law which is EEA-compliant over Norwegian law which is not. The first sentence provides that Norwegian statutory provisions that serve to fulfil EEA obligations shall take precedence over other "provisions", with the latter reference generally understood as meaning "provisions" of both Norwegian statutes and statutory instruments. The second sentence further states that a statutory instrument that serves to fulfil Norway's obligations under the EEA Agreement will have precedence over other statutory instruments which are not in accordance with EEA law. Neither of these rules seems particularly contentious from the perspective of general Norwegian legal methodology. Much more problematic is the contention implied by the first sentence and expressly stipulated in the second, that a statute or statutory instrument that serves to fulfil Norway's obligations under the EEA Agreement should have priority over later (i.e. more recent) statutory provisions. The rule would seem to impose a significant restriction on the Norwegian Parliament's legislative sovereignty, contrary to the Norwegian Constitution. It is therefore disputed in Norwegian legal theory whether Section 2 NEA can be taken at its word on this point.[18] Whether this means that Norwegian authorities have thereby failed to implement Protocol 35 of the EEA Agreement correctly seems a more open question, and one well overdue more detailed research. The potential for bypassing the requirements of Protocol 35 by implementing EEA norms through statutory instruments which must give way to later statutes or statutory amendments is certainly present.

Section 2 NEA almost certainly fails to meet the requirements of Protocol 35 to the EEA Agreement on another point, however, by not specifically providing for EEA-compliant statutory instruments to prevail over conflicting statutory provisions pre-dating the statutory instrument in question. In such situations, the general rules for resolving norm-conflicts under Norwegian legal method – including the principle of *lex superior* – would apply, according to which the older statutory rules would take precedence over a more recently adopted EEA-compliant statutory instrument.

18 See e.g. H.H. Fredriksen and G. Mathisen, *EØS-rett* (3rd ed. 2018, Fagbokforlaget), p. 397 with further references.

Although the scope of Section 2 NEA seems relatively clear in theory, its full effects nevertheless remain a somewhat unknown quality in practice. The reason being that the provision has only been referred to in a handful of decisions by Norwegian courts to date. Where conflicts between Norwegian law and provisions in the Main Part of the EEA Agreement arise, the lack of a full primacy requirement seems less problematic. In such cases, the combined effect of Sections 1 and 2 NEA will presumably lead to provisions of Norwegian law being set aside in favour of provisions of the Main Part of the EEA Agreement. Such as for example in *Fokus Bank*, where the Court of Appeal accepted that certain provisions in Norwegian tax legislation had to be set aside in favour of article 40 EEA concerning the free movement of capital, as interpreted by the EFTA Court.[19]

Certain Norwegian statutes also provide for so-called "sector-monism", by including provisions stipulating that the statute in question will apply unless Norway's international obligations provide otherwise. Such provisions are found in many different Norwegian statutes, including the Criminal Code, Criminal Procedure Act, Civil Procedure Act and Human Rights Act.[20] The application of such provisions may lead to direct effect and primacy being afforded to unimplemented EEA regulations and directives over conflicting provisions of the statutes in question. One (perhaps the only) example of this can be seen in *Tele 2 News*, which concerned the interpretation and application of Section 211 of the Norwegian Criminal Code, criminalising the negligent dissemination of pornographic material.[21] Since Section 2 of the (now repealed) Criminal Code of 1902 provided for sector-monism, the key question facing the courts was whether Directive 2000/31 on E-commerce which prohibited the imposition of penalties for the negligent dissemination of such material could be applied instead.[22] According to the Court of Appeal, the fact that the Directive had not been implemented on time by Norwegian authorities was of no concern. As a binding obligation of international law from the moment the EEA Joint Committee had decided to incorporate it into the EEA Agreement, and given that it would lead to a more favourable outcome for the defendant in the case, the Directive was given precedence over the Criminal Code. The Court of Appeal's decision seemed to be made easier by the fact that the prosecution decided to drop the charges against *Tele 2* during the appeal. Yet the Court also expressed certain doubts as to whether the conclusion it had reached was the correct one in the end, which goes at least some way in illustrating how deeply rooted the reluctance of Norwegian courts to set aside national law actually is.

19 RG-2005-1542.

20 *Lov av 20. mai 2005 nr. 28 om straff (§1); Lov av 22. mai 1981 nr. 25 om rettergangsmåten i straffesaker (§2); Lov av 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (§1-2); Lov 21 mai 1999 nr 30 om styrking av menneskerettighetenes stilling i norsk rett (§2).*

21 RG-2003-1268.

22 Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Section 2 NEA may also apparently be used to secure primacy of Norwegian statutory provisions implementing EEA rules over conflicting national law implementing other international obligations. *Giettâdit* concerned criminal proceedings following the slaughter of a reindeer without anaesthetic according to a Sámi (lapplander) custom.[23] Finding in favour of the prosecution in a majority ruling (3-2), and basing its decision in part on Section 2 NEA, the Supreme Court seemed to indicate that primacy would be afforded to a provision of the Norwegian Animal Protection Act implementing Directive 93/119,[24] over Art. 8 of ILO Convention 169 on Indigenous Tribes and Peoples as viewed in combination with the sector-monism clause in the (now repealed) Norwegian Criminal Code of 1905.[25] The fact that giving precedence to the EEA-conform Norwegian legislation at issue was clearly detrimental to the defendant's position in the case was not discussed by the Supreme Court.

Other cases reveal certain misconceptions in the understanding of the requirements of Protocol 35 (and hence also Section 2 NEA) in practice. Such as for example in *KLM*, where Norwegian authorities successfully argued before the Oslo District Court that Section 2 NEA had to be interpreted as not affording primacy to an EEA-conform statutory instrument,[26] over a subsequent plenary decision of the Norwegian Parliament concerning differentiated air passenger charges for domestic and international flights.[27] The decision has been criticised in academic circles as leading to a result contradictory to the requirements of Protocol 35 EEA, and hence Section 2 NEA as interpreted in the light thereof.[28] Referring to a Supreme Court decision from 1935,[29] the District Court held that Section 75 of the Norwegian Constitution prevented Parliament from restricting its own tax authority through law. Following a teleological interpretation of Protocol 35, however, the distinction drawn as a matter of Norwegian law between Parliament's legislative acts and plenary tax decisions would seem irrelevant. And Section 2 NEA must naturally be interpreted in accordance with the obligations flowing from Protocol 35 EEA. On appeal, the Norwegian authorities formally acknowledged that the passenger charges constituted discrimination contrary to the EEA agreement and that the State was obliged (in principle)

23 HR-2008-2183-A.

24 *Lov av 20 des. 1974 nr. 73 om dyrevern;* Council Directive 93/119 on the protection of animals at the time of slaughter or killing.

25 International Labour Organisation, Indigenous and Tribal Peoples Convention, *C169*, 27 June 1989.

26 *Forskrift om gjennomføring og håndheving av EØS-avtalen på luftfartens område* (FOR-1994-07-15-691), which correctly implemented Regulation 2408/92 on access for Community air carriers to intra-Community air routes.

27 04-000806TVI-OTIR/07.

28 See e.g. H.H. Fredriksen, "EU/EØS-rett i norske domstoler", *Rapport no. 3, Europautredningen, Utvalget for utredning av Norges avtaler med EU* (2011).

29 Rt-1935-358.

to repay the charges in question, thereby leading further proceedings in the case to focus on other issues.

Finally, the Court of Appeal's decision in the *Wullum Amcar*-case provides an interesting (albeit contentious) example of a remarkably strained EEA-conform interpretation of Norwegian law providing the basis for disapplication of another conflicting rule of national law, thereby leading to an EEA-conform result in the case.[30] The Court of Appeal's efforts to stretch the meaning of the Norwegian provision(s) at issue, effectively affording primacy to an EEA-conform exception to a non-conform general rule, should nevertheless be compared with the stauncher approach of the Norwegian Supreme Court in *Finanger I*.[31] Faced with the opposite situation – of whether to afford primacy to an EEA conform *general rule* over a non-conform *exception*, in contradiction to normal conflict resolving principles (i.e. *lex specialis*) – the Supreme Court decided that Section 2 NEA could not be stretched thus far.

2.2 Iceland

In light of the fact that the principles of direct effect and primacy do not form part of EEA law, the authors have taken the liberty to modify the questionnaire with respect to the specific characteristic of EEA law and recent developments in Iceland. As will be demonstrated by looking into national case-law, Iceland's undertaking in Protocol 35 seems to be entirely ineffective in the national legal system, resulting in the subordination of EEA law. This led the European Surveillance Authority (ESA), on 13 December 2017, to take the unprecedented step of commencing infringement proceedings against Iceland for failing to adopt rules to ensure that Protocol 35 is complied with.[32]

2.2.1 Protocol 35

It is incumbent upon the EFTA States, under Protocol 35, to ensure via statutory provisions, if necessary, that "implemented" EEA rules prevail in cases where conflicts occur between EEA rules and national rules. States must therefore introduce national legislation in order to ensure the prevailing character of implemented EEA law in relation to conflicting internal legislation. In line with this, Protocol 35 only applies to conflicts between EEA law and "other statutory provisions". This form of words would seem to exclude

30 LF-2010-21736, concerning a conflict between a Norwegian statutory instrument (*Forskrift om tekniske krav og godkjenning av kjøretøy, deler og utstyr (kjøretøyforskriften* – FOR-1994-10-04-918)), and Directive 97/27 relating to the masses and dimensions of certain categories of motor vehicles and their trailers.

31 HR-2000-49-B (*Finanger I*) – this case is set out in more detail in Section 3.1 below.

32 The letter is publicly available at the ESA's website: http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=4071.

constitutional provisions. The EFTA Court has repeatedly held that it follows from Protocol 35 EEA that implemented EEA law must prevail over conflicting internal provisions, provided that the former are unconditional and sufficiently precise.[33]

The purpose behind Protocol 35 was that implemented EEA provisions (such as the Main Part of the EEA Agreement – roughly corresponding to the TFEU Internal Market provisions – which has been implemented in all EFTA States), must have a similar standing in the EFTA States and EU Member States.[34] In light of the lack of direct effect and primacy, it was considered crucially important for the homogeneity objective that the EFTA States should faithfully absorb and apply this undertaking.

2.2.2 Iceland's implementation of Protocol 35

Iceland implemented Protocol 35 with Art. 3 of Act No. 2/1993 on the European Economic Area (IEA), which incorporated the EEA Agreement into domestic law. This provision stipulates that: "Statues and regulations shall be interpreted, as far as appropriate, in conformity with the EEA Agreement and the rules laid down therein." On the face of it, Art. 3 IEA therefore appears to be a mere rule of interpretation, requiring national rules to be interpreted in conformity with EEA law. As such, Art. 3 of the EEA Act merely codified the already established principle of consistent interpretation in Icelandic law, i.e. that domestic law should be interpreted in conformity with international obligations undertaken by the Icelandic state.

Yet, in contrast with the very wording of article 3 IEA itself, the preparatory works to this provision stipulate that implemented EEA law should be considered as "special law" and on that basis they should prevail over other incompatible subsequent legislation, unless the legislature has specifically stated that it intended to deviate from the implemented EEA rule. Consequently, it appears that article 3 IEA contains two types of rules, i.e. i) a rule requiring consistent interpretation, and ii) a rule requiring priority of EEA rules based on *lex specialis*. The latter is strictly speaking not a rule of interpretation as such, but a rule to solve conflicts between norms.[35]

However, as is the case with direct effect and primacy of EU law, the real effect of Protocol 35 is, in practice, subject to its acceptance by national courts. Thus, the question

33 Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, para. 50; Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep 1092, para. 122; Case E-11/12 *Koch and Others* [2013] EFTA Ct. Rep 272, para. 119; Case E-6/12 *EFTA Surveillance Authority v Norway* [2013] EFTA Ct. Rep 618, para. 66; Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534, para. 54 and Case E-12/13 *EFTA Surveillance Authority v Iceland* [2014] EFTA Ct. Rep. 58, para. 73.

34 For information on the reasons that resulted in the formulation on Protocol 35, see F. Sejersted, 'Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA-Agreement', *The European Economic Area – Norway's Basic Status in the Legal Construction of Europe.* (Berlin: Berlin Verlag Arno Spitz, 1997), p. 58; and L. Sevón, 'Primacy and Direct Effect in the EEA. Some Reflections', *Festskrift til Ole Due* (C.E.C. København; Gads Forlag, 1994), pp. 350-351.

35 D.Þ. Björgvinsson, *EES-réttur og landsréttur* (Codex Publishing, 2006), p. 130.

becomes: do directly applicable provisions within the EEA survive transposition into legal systems of the EFTA States? Are national courts in the EFTA States able to secure the effectiveness of implemented legislation?

In Iceland, inconsistencies between national law and EEA law have come to light through litigation before national courts on a number of occasions. In its practice the Icelandic Supreme Court is strongly disinclined to grant EEA rules that have been correctly implemented precedence over purely Icelandic law.

2.2.3 ESA's letter of formal notice

The above led ESA, on 13 December 2017, to take the unique step of commencing infringement proceedings against Iceland for failing to adopt rules to ensure the obligation in Protocol 35 is complied with.[36] This failure was also considered a violation of the loyalty obligation in article 3 EEA (largely corresponding to article 4(3) TEU).

The ESA's competence to commence such infringement proceedings is based on article 31 SCA, which is similar to the European Commission's role under article 258 TFEU. It is apparent from the letter of formal notice that in the ESA's view the case-law of the Supreme Court gave rise to doubts as to whether Iceland's legislation was in accordance with Protocol 35.

ESA cited the relevant case-law of the EFTA Court concerning Protocol 35 and observed that the EFTA Court had confirmed that the effectiveness and priority of implemented EEA rules over other national law had been confirmed as an inherent part of the EEA Agreement. Furthermore, the ESA stated that the EFTA Court had relied on the loyalty obligation in article 3 EEA to require national courts to give effect to this principle of priority of implemented EEA law. Next, ESA noted that Protocol 35 had been implemented in Icelandic law by article 3 IEA and cited the preparatory works accompanying it.

The ESA noted in its letter that the actual wording of article 3 IEA, which implemented Protocol 35 EEA, does not contain "a statutory provision to the effect that EEA rules prevail in cases "of possible conflicts between implemented EEA rules and other statutory provisions", as prescribed by Protocol 35. According to its wording, the provision is merely a rule of interpretation which provides that domestic law shall be interpreted in conformity with EEA law."[37]

ESA stated that according to the preparatory works accompanying the IEA, implemented EEA rules should also be considered as "special" law, as explained above. As this *lex specialis* principle was not reflected in the text of article 3 IEA, the ESA explored the Supreme Court's case-law on the provision and concluded that it appeared that this principle had

36 The case is at the stage of a letter of formal notice, which is publicly available: http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=4071.

37 ESA's letter of formal notice, p. 4.

only been applied once, in the Supreme Court's first case dealing with Protocol 35.[38] However, in the ESA's view, it could not be deduced from this judgment with certainty that article 3 IEA was understood as being more than a rule of interpretation, since the Icelandic act in question pre-dated article 14 EEA and thus the *lex posterior* doctrine could also have been applied.

Even though the ESA, in its proceedings, is turning against the national legislator and not the judiciary, it does not limit its critique to the wording of article 3 IEA. As legislation must be seen in the light of the interpretation given to it by national courts, the bulk of the letter is dedicated to examining case-law of the Supreme Court. The ESA identified 13 cases in which it found that the Icelandic Supreme Court disregarded the substance of implemented EEA law since the conflicting national law did not give scope for interpretation.

An exhaustive and detailed discussion of each individual case identified by ESA would exceed the scope of this study, therefore only the general tendencies will be outlined here. ESA mentioned in its letter of formal notice that in early cases regarding prohibitions on the advertising and marketing of tobacco and alcohol,[39] the Supreme Court: "… simply declares, without making any reference to article 3 of the IEA Act or Protocol 35, that it will not disregard national legislation which is incompatible with the EEA Agreement, i.e. implemented EEA legislation." In more recent cases, the Court has been more outspoken and stated that "purely" Icelandic law will prevail if it is not possible to interpret it in accordance with the provisions of a correctly implemented EEA rule.[40]

The ESA identified several other cases in which issues on conflict of laws and Protocol 35 had risen, such as the *Commerzbank* and *De Nedelandsche Bank* cases No. 552/2013 and 120/2014 where ESA in a letter of formal notice of 6 July 2016 had already concluded: "that by not ensuring a derogation from the general principle that the law of the home EEA State shall apply, in order to secure that the creditors' rights of set-off and netting are not undermined in circumstances such as those described above, Iceland has failed to fulfil its obligations arising from … Protocol 35 to the EEA Agreement."

Lastly, in cases concerning criminal law,[41] and cases between private parties,[42] the Court has in some instances refused to interpret the implemented EEA rules, stating that article 3 IEA could not lead to *contra legem* interpretation of national law, the dispute was between "private parties" and was to be resolved on the basis of "Icelandic law" or, in criminal cases, the defendant's liability depended on "Icelandic law".

38 *Einarsson*, Case No. 477/2002.
39 Supreme Court judgment in cases Nos. 220/2005, 274/2006, 60/2008, 491/2007, 143/2008 and 649/2008.
40 Here, the ESA referred to, Supreme Court Cases No. 79/2010, No. 10/2013, No. 306/2013 and 92/2013.
41 See cases No 429/2014 and No 291/2015.
42 See cases No. 10/2013 and No. 306/2013.

The ESA observed in particular that in a number of cases the Supreme Court had itself expressed the opinion that article 3 IEA is a mere rule of interpretation and that an interpretation on the basis of article 3 "cannot secure the priority of implemented EEA legislation" in cases of conflict with other national legislation.[43] In the light of article 3 IEA being a mere rule of interpretation and as confirmed in the Supreme Court's case-law, the ESA concluded that the Icelandic State had failed to fulfil its obligation under Protocol 35 and article 3 EEA. The critique put forward is therefore not couched in terms of an accusation concerning a failure on part of the Icelandic courts to respect Protocol 35. The ESA argued that the Icelandic rule, implementing Protocol 35,[44] as well as the Supreme Court's application of this rule, infringed the Protocol.

2.2.4 Comments

As noted above, the case is at the stage of a letter of formal notice and as of today, no response from Iceland to the ESA's allegations has been made available on the ESA's website. The ESA's letter of formal notice against Iceland indicates that there are real problems with Iceland's obligations under Protocol 35. The letter is cautious in its approach and shows respect for the independence of the judiciary by basing the proceedings on the legislator's responsibility. Indeed the undertaking in the sole article of Protocol 35 was believed to have been fulfilled by the Icelandic legislature with the enactment of a simple interpretation obligation. In this respect, it is interesting to note that in contrast to the approach taken in Iceland, Norway, as well as in the former EEA/EFTA States (Sweden and Finland), enacted a rule of precedence in order to fulfil the requirements of Protocol 35. The Finnish EEA Act seems to take into consideration the principles of direct effect and primacy, as developed in the case-law of the ECJ, and gave a clear rule on both direct effect and the hierarchically superior status of EEA law vis-à-vis conflicting domestic legislation.[45] Norway[46] and Sweden,[47] however, simply enacted a provision to secure the precedence of implemented EEA law.

Case-law in Iceland, however, shows that the obligation of Protocol 35 is not easily transferable to this interpretation rule that, crucially, does not import such a "primacy provision". As identified in ESA's letter of formal notice to the Icelandic government, shortcomings of the wording of article 3 IEA have not been remedied by the case-law of

43 ESA's letter of formal notice, p. 12.

44 Article 3 of the Icelandic EEA Act No. 2/1993. The ESA's grievance was that the provision contains a rule requiring conform interpretation to the EEA Agreement. It does not, by its wording, require that implemented EEA rules should prevail when they conflict with national rules.

45 Priority of EEA rules over conflicting provisions of law of purely national origin and their direct effect was provided for in Sections 2 and 3 of the Finnish EEA Act (1504/1993).

46 Section 2.1 above.

47 Section 5 of the former Swedish Act on the European Economic Area, *Lagen om ett europeiskt ekonomiskt samarbetsomrade (EES)* SFS 1993:1317.

the Icelandic Supreme Court. Thus, the letter of formal notice from ESA indicates that national law and practice will need to be adjusted to Protocol 35. Thus, an issue that remains to be addressed by the legislature, and ultimately the Supreme Court, is how implemented EEA law may be applied while derogating subsequent contrary unilateral legislation, as required by Protocol 35.

Indeed, it seems that the Icelandic legislation and practice poses great risks to the effectiveness of EEA law in Iceland. It makes it very difficult to uphold not only the Agreement but also implemented directives and regulations, because the domestic courts are prevented from applying such laws as soon as the provisions of such implemented directives and regulations are contradicted by subsequent national laws. The cases identified by the ESA show that the Supreme Court deems the applicability of EEA norms as irrelevant at the outset if it is in conflict with subsequent unambiguous Icelandic statutory norms.

2.3 Liechtenstein

It is undisputed that the principles of direct effect and supremacy are not made part of the EEA Agreement as such. However, they cannot be ignored either.[48] There is sufficient proof from the EEA negotiations that direct effect and precedence were amongst the EU's top priorities.[49] The issue was partly addressed by introducing Protocol 35 to the EEA Agreement.

Undoubtedly, Liechtenstein has no problem with the concept of direct applicability of EEA law. Liechtenstein follows, with regard to incorporating international law, a monist tradition. I.e., international law is automatically made part of Liechtenstein's national legal order upon its being subscribed to by the constitutionally competent bodies (parliament, prince and government as well as the people in case of referenda).[50]

The Courts apply EEA law in the same way as national law. In its report of 11 December 1995, the Constitutional Court stated that EEA law and international law generally have "direct applicability".[51] The Constitutional Court later specified that the EEA Agreement is directly applicable where the four freedoms are concerned.[52]

In its report from 1995, it also declared that the provisions of the EEA Agreement may be directly applicable, as may regulations and, under certain conditions, directives. This is the case if they are sufficiently clear and unconditional, if they shape the legal positions

48 C. Baudenbacher (ed.), *The Handbook of EEA Law* (Springer, 2016), p. 39.

49 Ibid. p. 39.

50 G. Baur, "Kohärente Interpretationsmethode als Instrument europarechtskonformer Rechtsanwendung – eine rechtspolitische Skizze", in *25 Jahre Liechtenstein-Institut (1986-2011)* (Schaan, 2011), pp. 47-63.

51 Staatsgerichthof, StGH 1995/014, Gutachten, LES 1996, 119, 11.12.1995.

52 P. Bussjäger, "Einführende Bemerkungen zur liechtensteinischen Verfassung", in Liechtenstein-Institut (ed.), *Online-Kommentar zur liechtensteinischen Verfassung*, www.verfassung.li (2016), paras. 143-144.

of private individuals *vis-à-vis* the State and if the Member State is in default of transposition or has not properly transposed the Directive.[53] In a tax recovery case,[54] the Constitutional Court did not have any objections to the direct applicability of EEA law in connection with an ESA decision.[55] If and when there is no national legal basis or the latter is contrary to EEA law.[56]

This statement from the Constitutional Court in 1995 also implies that the direct applicability counts too regarding the decisions of the EEA Joint Committee amending the Annexes to the EEA Agreement. This is supported by the system of the EEA Agreement, from which the direct effect of the decisions of the Joint Committee is derived. Protocol 35 to the EEA Agreement states that the parties must ensure that EEA law takes precedence over national law.[57]

This view is supported by the subsequent case-law of the Constitutional Court. By properly ratifying an international agreement, its norms automatically become national law. In this context, the Liechtenstein courts adhere to Kelsen's theory of the hierarchy of the legal order.[58] According to this, each act must have its legal basis in a higher instrument and thus the direct effect applies to all subsequent or related acts and not only to the EEA Agreement. If the directly applicable text is unclear, the national judge is asked to close these gaps.[59] The Constitutional Court has decided in its judgment *StGH 1998/41* that the EEA Regulation in question is to be regarded as an integral part of the EEA Agreement and thus becomes part of Liechtenstein law.[60] It is therefore directly applicable, from which can be concluded that EEA law is the subject of legislation and is thus incorporated into the case-law of the courts. The same principle applies to the concept of primacy,[61] which includes compliance with the ECJ's case-law.[62]

Also, the Administrative Court, which is the Court that decides most cases having a link to EEA law, has developed a very EEA-friendly attitude. It not only accepted supremacy and direct effect, at least in the national context, but also quite regularly asks the EFTA Court for Advisory Opinions.

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53 StGH 1995/014 (n. 51).

54 Staatsgerichtshof, StGH 2013/196, K AG v VGH (*tax recovery*), 27.10.2014.

55 S. Schirmer and E. Steiner, "Liechtenstein", in ESA - EFTA Surveillance Authority, *Study on state aid private enforcement by national courts in the EFTA EEA states* (2019), pp. 34-50.

56 StGH 2013/196.

57 T. Bruha (ed.), *Liechtenstein - 10 Jahre im EWR Bilanz, Herausforderungen, Perspektiven; Symposium am Liechtenstein-Institut, 9. und 10. Juni 2005* (2005), p. 114.

58 See e.g. A. Kley, "Hans Kelsen als politischer Denker des 20. Jahrhunderts, Ein Beitrag zu „Wesen und Wert der Demokratie", in *Liechtensteinische Juristenzeitung* (LJZ) 2000, pp. 16-26.

59 G. Baur (n. 50).

60 T. Bruha, (n. 57), p. 114., StGH 1998/41, not published.

61 Staatsgerichtshof, StGH 2013/044, K AG v VGH, 16. December 2014, para 3.4.2.

62 Staatsgerichtshof, StGH 2011/200 A v K Treuhand AG (vormalige L Treuhand AG) 7.2.2012.

The issue of precedence is somewhat more complicated. Generally, Liechtenstein sees itself as an international law-friendly jurisdiction, i.e. the Liechtenstein courts not only refer to the neighbouring jurisdictions, but also readily apply norms stemming from international treaties.[63] However, the problem arises as soon as there is an internal conflict of law, i.e. if EEA law should replace withstanding national law or if there is incorrect or no transposition at all of EEA legal acts.

In theory and from the point of view of procedural law setting aside national law in order to give way to EEA law, it has been argued that a procedure for constitutional review (*Normenkontrollverfahren*) with the Constitutional Court needs to be launched.[64] To the best of our knowledge, however, this was never done in the context of applying EEA law.

Even without referring to the disputed argument of (quasi-)direct effect in the EEA,[65] it seems quite clear that there are limits to the procedural autonomy of the EEA EFTA States' courts. These are seen as the principles of effectiveness and equivalence based on article 3 EEA and article 2 SCA.[66] It would, hence, be quite unacceptable for the EEA EFTA States to obstruct the rights of citizens by imposing obstacles.[67]

3 Consistent Interpretation

The EU principle of consistent interpretation – according to which national authorities must interpret the whole of national law, as far as possible, in line with EU obligations – was first established by the ECJ in the seminal *von Colson* case in 1984,[68] with the EFTA Court making its first mention of the corresponding EEA principle in *Karlsson* almost 20 years later.[69] Unlike its EU counterpart, however, the EEA principle is naturally rooted in distinct EEA/international law authorities, and is deemed inherent in the objectives of the EEA Agreement itself.[70] As a matter of EU law, the principle is generally considered to be

63 A. Batliner, "Erfahrungeneines Richters", in *LJZ* 2004, p. 140.

64 H Wille, "Das EWR-Abkommen und das Verfassungs- und Verwaltungsrecht", in T. Bruha, Z. Pállinger and R. Quaderer (eds), *Liechtenstein—10 Jahre im EWR* (Schaan, Liechtensteinische Akademische Gesellschaft, 2005) p. 132.

65 See StGH 2013/196.

66 H.H. Fredriksen, *Europäische Vorlageverfahren und nationales Zivilprozessrecht* (Tübingen, Mohr Siebeck, 2009) p. 89, referring to A. Robberstad, 'Norske dommeres plikt til aå veilede om EØS-retten' (2002) *Lov og Rett* p. 201.

67 Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, para 41.

68 Court of Justice EU 10 April 1984, Case 14/83, *von Colson*, ECLI:EU:C:1984:153.

69 Case E-04/01 *Karlsson* [2002] EFTA Ct. Rep. 240, para. 28.

70 The ECJ has set out (and developed) its view as to the bases of the EU principle many times, referring to Art. 289 TFEU, the principle of effectiveness and the principle of sincere cooperation (Art. 4 TEU) – see e.g. Court of Justice EU 5 October 2004, Joined Cases C-397–403/01, *Pfeiffer,* ECLI:EU:C:2004:584. The EFTA Court has similarly set out its views concerning the legal bases of the EEA principle in several cases, although on distinct legal authorities – including the EEA principle of sincere cooperation (Art. 3 EEA),

the least invasive mechanism for ensuring the effectiveness of EU law at national level, at least when compared to the principles of direct effect and state liability, as ultimately it will involve an application (as opposed to the substitution or exclusion) of national law to resolve the issue.[71] However, given the lack of direct effect and (full) primacy under EEA law explained in the previous section, and the inability of state liability to remedy a situation beyond compensation, the principle of consistent interpretation may arguably be seen to play an even more important role in EEA enforcement than it does under EU law. It is also worth bearing in mind that although the EU principle is primarily applied in relation to directives, the EEA principle applies equally to EEA regulations, which are not directly applicable under EEA law and must be incorporated into national law according to Art. 7(a) EEA.

In light of the demands of homogeneity, the EFTA Court has developed the EEA principle along much the same general lines as provided by the ECJ.[72] In spite of the many similarities, however, it is important to note that the EFTA Court has not elaborated on the more specific scope and boundaries of the EEA principle to anywhere near the same extent as the ECJ. For example, although the case-law of both courts show that the principles will apply in cases involving both classic vertical (individual v. state) and horizontal (individual v. individual) party constellations,[73] the question as to whether they are to apply with *equal force* in both vertical and horizontal situations seems more open. The ECJ's case-law is somewhat unclear on the point,[74] and the issue has not been ventured at

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the public international law principle of effectiveness, the objectives of the EEA Agreement, and the objectives sought by Art. 7 and Art. 104 EEA (i.e. the duty to implement EEA directives and regulations into national law). See e.g. E-01/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, para. 39; E-6/13 *Metacom* [2013] EFTA Ct. Rep. 856, para. 69; E-25/13, *Engilbertsson* [2014] EFTA Ct. Rep. 524, para. 159; E-28/13, *Merrill Lynch* [2014] EFTA Ct. Rep. 970, para. 42. Both courts nevertheless seem to be largely content today to merely reiterate that the principles are inherent in the EU Treaties and EEA Agreement.

71 See e.g. S. Prechal, *Directives in EC Law* (2nd ed. 2005, OUP) p. 180.

72 For more on how, see e.g. C.N.K. Franklin (ed.), *The Effectiveness and Application of EU and EEA Law in National Courts – Principles of Consistent Interpretation* (2018, Intersentia).

73 See e.g. Court of Justice EU 10 April 1984, Case 14/83, *Von Colson,* ECLI:EU:C:1984:153 (vertical); Court of Justice EU 10 April 1984, Case 79/83, *Harz,* ECLI:EU:C:1984:155 (horizontal); and Case E-01/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246 (vertical); Case E-28/13 *Merrill Lynch* [2014] EFTA Ct. Rep. 970; and Case E-06/13, *Metacom* [2013] EFTA Ct. Rep. 856 (horizontal).

74 Whilst the ECJ in certain (earlier) decisions (e.g. Court of Justice EU 26 September 1996, Case C-168/95, *Arcaro,* ECLI:EU:C:1996:363, para. 42; Court of Justice EU 5 July 2007, Case C-321/05, *Kofoed,* ECLI:EU:C:2007:408, para. 45) appeared to indicate that application of the principle could not lead to the imposition of civil obligations on private parties, other decisions show how the effects of applying the principle could (and did) lead to precisely such a result (e.g. Court of Justice EU 13 July 2000, Case C-456/98, *Centrosteel,* ECLI:EU:C:2000:402; Court of Justice EU 11 September 2014, Case C-291/13, *Papasavvas,* ECLI:EU:C:2014:2209). There seems to be general academic consensus today that consistent interpretations may (and often will) lead to the imposition of obligations which otherwise would not have existed – even in cases involving private parties. Without definitive clarification by the ECJ, however, the question as to whether a distinction should be drawn between various types of legal disadvantages (i.e. "obligations" as

all by the EFTA Court to date. Little guidance has been provided by the EFTA Court on other important issues, too – such as e.g. the possibility for inverse vertical application of the principle (i.e. state v. individual), and concerning the various limits to application of the principle found in general principles of law. In light of the significantly lighter caseload of the EFTA Court as compared to the ECJ, and the relatively low number of referrals made to it by national courts of the EFTA States (see Section 5 below), the lack of guidance from the EFTA Court may not seem very surprising.[75] Coupled with the fact that the EFTA Court's Opinions are not formally binding in any event, the national courts of the EFTA States have arguably enjoyed a somewhat free(r) hand than national courts in the EU Member States in their reception and understanding of the EEA principle of consistent interpretation. It has therefore been questioned whether certain developments of the EU principle by the ECJ expose differences between the EU and EEA legal constructs of such magnitude as to warrant a different approach under EEA law (i.e. that the limits to homogeneity are reached).[76] One example in this regard is the ECJ's decision in *Ajos*, where it held that national courts cannot validly claim that it is impossible to interpret national provisions in a manner that is consistent with EU law by mere reason of the fact that they have consistently interpreted such provisions in a manner that is incompatible with EU law in the past – in such cases, they are obliged to change their case-law in order to arrive at result consistent with their countries' EU law obligations.[77] Although the EFTA Court for its part has yet to say anything explicitly on this point, the fundamental EEA principle of homogeneity leads to a presumption that the same must apply under EEA law.[78] It remains to be seen whether national courts in the dualist EFTA States would agree.

One final point to be mentioned before turning to national perspectives concerns the relation between the principle of consistent interpretation and notions of primacy under EU and EEA law. Some confusion seems to exist as to whether primacy is to be understood as part of the legal basis of the EU/EEA principles, and what this might mean in terms of how far one must go in seeking to achieve consistent interpretations. Notwithstanding the fact that the ECJ has never explicitly said that this is the case as far as the EU principle is concerned, certain decisions of the ECJ have nevertheless gone quite far in instructing

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opposed to "mere adverse repercussions") in applying the principle in cases involving private parties, remains open.

75 See Section 5 below.

76 H.H. Fredriksen and G. Mathisen, *EØS-rett* (Fagbokforlaget, 2018), p. 382.

77 Court of Justice EU 19 April 2016, Case C-441/14, *Ajos,* ECLI:EU:C:2016:278, para. 33, with further ref. to Court of Justice EU 13 July 2000, Case C-456/98, *Centrosteel,* ECLI:EU:C:2000:402, para. 17; confirmed in Court of Justice EU 8 November 2016, Case C-554/14, *Ognyanov,* ECLI:EU:C:2016:835, para. 67; and Court of Justice EU 5 July 2016, Case C-614/14, *Ognyanov*, ECLI:EU:C:2016:514, para. 35.

78 See C.N.K. Franklin, "The EEA Principle of Consistent Interpretation (or something that looks like it) and Norwegian Courts", in C.N.K. Franklin (ed.), *The Effectiveness and Application of EU and EEA Law in National Courts – Principles of Consistent Interpretation* (2018, Intersentia), pp. 317-361.

national courts as to the interpretative results to be achieved.[79] As far as the EFTA Court is concerned, in one case it has referred to the quasi-primacy requirements in Protocol 35 of the EEA Agreement in the same breath as the duty to perform consistent interpretations.[80] Unlike the ECJ, however, the EFTA Court– whilst not remiss in reminding national courts of the general duty to perform consistent interpretations – has generally refrained (to date) from requiring particular interpretative outcomes in cases referred to it by national courts under the Advisory Opinion procedure.

3.1 Norway

The reception and application of the EEA principle of consistent interpretation by Norwegian courts reveals something of a mixed bag.[81] On the one hand, the Norwegian Supreme Court has willingly accepted (in theory, at least) that this unwritten principle is inherent in the EEA Agreement itself, and therefore legally binding for Norway – notwithstanding the dualist approach to international obligations under Norwegian law.[82] On the other hand, however, Norwegian courts have never (to date) expressly applied the EEA principle to resolve alleged conflicts between Norwegian and EEA law in practice. In the few cases where a specific principle is referred to as potential grounds for arriving at a particular interpretative conclusion in line with Norway's international or EEA obligations, Norwegian courts rely instead on the national principle of presumption of compliance with international law (*presumsjonsprinsippet* – hereinafter referred to simply as the "principle of presumption"). And in many cases, no express mention of any principle is actually made, even though it seems apparent from the results and/or reasoning in the

79 See e.g. Court of Justice EU 13 November 1990, Case C-106/89, *Marleasing*, ECLI:EU:C:1990:395; Court of Justice EU 12 October 1993, Case C-37/92, *Vanacker*, ECLI:EU:C:1993:836; Court of Justice EU 14 July 1994, Case C-32/93, *Webb,* ECLI:EU:C:1994:300; Court of Justice EU 13 July 2000, Case C-456/98, *Centrosteel*, ECLI:EU:C:2000:402; Court of Justice EU 10 May 2001, Case C-203/99, *Veedfald*, ECLI:EU:C:2001:258; Court of Justice EU 23 October 2003, Case C-408/01, *Adidas-Solomon,* ECLI:EU:C:2003:582; Court of Justice EU 16 June 2005, Case C-105/03, *Pupino,* ECLI:EU:C:2005:386; Court of Justice EU 17 April 2008, Case C-404/06, *Quelle*, ECLI:EU:C:2008:231; Court of Justice EU 21 October 2010, Case C-242/09, *Albron,* ECLI:EU:C:2010:625;. Court of Justice EU 28 June 2012, Case C-7/11, *Caronna,* ECLI:EU:C:2012:396; Court of Justice EU 4 September 2014, Case C-162/13 *Vnuk,* ECLI:EU:C:2014:2146; Court of Justice EU 16 April 2015, Case C-3/14, *T-Mobile Polska,* ECLI:EU:C:2015:232.

80 See Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paras. 122–23.

81 For practical purposes, the following presents only a short summary of these findings – more details on the cases mentioned in this section can be found in C.N.K Franklin, "The EEA Principle of Consistent Interpretation (or something that looks like it) and Norwegian Courts" (n. 78).

82 See e.g. HR-2000-49-B (*Finanger I*), p. 1827.