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The Impact of EU Law on the Norwegian Law of Civil Procedure

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1. Introduction 2

2. The impact of EU secondary law based on Article 81 TFEU 4

3. The impact of EU secondary law based on provisions of the TFEU that fall within the scope of the EEA Agreement 7

4. The impact of the EU law principles of effectiveness and equivalence 11

4.1Acknowledging the principles of effectiveness and equivalence as part of EEA law 11

4.2Issues concerning legal standing 13

4.3Limitation deadlines 13

4.4Third-party litigation funding 14

4.5Prohibitively expensive judicial proceedings 15

4.6Ex officio application of EEA consumer protection law 16

4.7Evidence containing trade secrets 17

5. The impact of the general prohibition on discrimination on grounds of nationality 19

6. The impact of the EU Charter of Fundamental Rights 21

6.1Article 47(1) EUCFR as an expression of the principle of effective judicial protection 21

6.2Article 47(2) EUCFR as an expression of the right to a fair trial 22

6.3Other provisions of the Charter of potential relevance for Norwegian procedural law 24

7. Concluding remarks 24

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1. Introduction

Although Norway is not a member of the European Union, EU law influences the Norwegian law of civil procedure in several ways. The main basis for this is the 1992 Agreement on the European Economic Area (EEA),[1] which for more than 30 years has integrated three of the remaining member states of the European Free Trade Association (EFTA), namely Iceland, Liechtenstein and Norway, into the better part of the EU internal market.[2]

The object and purpose of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the participating EFTA States.[3] As made clear already in the Preamble, equal conditions for competition in a "dynamic and homogeneous European Economic Area" presupposes not only common rules, but also "adequate means of enforcement including at the judicial level".[4] Acknowledging this, the Court of Justice of the EFTA-pillar of the EEA (the EFTA Court) has repeatedly held that access to justice and effective judicial protection are essential elements in the EEA legal framework.[5] Furthermore, the objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EFTA and EU nationals and economic operators enjoy equal access to the courts in both the EU and EFTA pillars of the EEA to ensure their rights which they derive from the EEA Agreement.[6] Thus, as a starting point and main rule, the limitations on the procedural autonomy of the EU Member States developed by the CJEU through the EU law principles of equivalence and effectiveness apply also to the EFTA States parties to the EEA Agreement.[7]

In addition to the general limitations brought about by the principles of equivalence and effectiveness, the EEA Agreement includes numerous EU legal acts which contain procedural rules. Two particularly notable examples from the field of consumer protection law are Directive 2013/11 on alternative dispute resolution for consumer disputes (the ADR

[1] [1994] OJ L1/3. For a general presentation and analysis of the Agreement's achievements and future challenges, see Fredriksen (2026, forthcoming).

[2] The fourth remaining EFTA State, Switzerland, took part in the EEA negotiations of 1990–91, but Swiss voters rejected the EEA Agreement in a referendum in 1992. The remaining contracting parties nevertheless decided to retain the Agreement's many references to "the EFTA States", giving this term a specific meaning within the context of EEA law that is naturally confusing to outside observers. In the following, Iceland, Liechtenstein and Norway will be referred to jointly as the "EEA EFTA States".

[3] As explained by the CJEU in Case C-452/01, *Ospelt*, para. 29, and later reiterated on numerous occasions.

[4] Fourth recital of the Preamble to the EEA Agreement.

[5] See, e.g., Case E-10/23, *X v Finanzmarktaufsicht*, para. 70, with numerous references to previous judgments. The EEA Agreement establishes a two-pillar system with an independent EFTA Court for the EFTA-pillar, see Article 108 EEA.

[6] As stated, e.g., in Case E-11/12, *Koch,* para. 117.

[7] As recently confirmed by the EFTA Court in, e.g., Case E-3/24, *Kristjánsdóttir*, para. 53, Case E-11/23, *Låssenteret*, para. 44 and Case E-14/24, *Elmatica*, para. 29. For an early acceptance of this by the Supreme Court of Norway, see case Rt. 1996 p. 282, *Wilhelmsen*. For later conformations, see Rt. 2005 p. 597 *Allseas Marine Contractors*, Rt. 2010 p. 1500 *Elkem*, and HR-2023-1024-A *Alarmkundeforeningen*.

Directive) and Regulation 524/2013 on online dispute resolution for consumer disputes (the ODR Regulation), both of which were incorporated into the Agreement in 2016,[8] but the list is long and multifaceted (see Section 3 below).

However, there are limits to the scope of the EEA Agreement which need to be taken into account when assessing the impact of EU law on the Norwegian law of civil procedure. As the EEA Agreement was negotiated in 1990-91, its scope essentially reflects that of the EC Treaty as it stood prior to the Treaty of Maastricht.[9] Thus, the EEA Agreement knows of no parallel to Article 81 TFEU on judicial cooperation in civil matters. As a result of this, none of the EU legal acts based on Article 81 TFEU have been incorporated into the EEA Agreement. Importantly, as far as the Brussel I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[10] is concerned, this is largely remedied by the 2007 Lugano Convention.[11] However, Norway's interest in similar agreements concerning certain other parts of the EU rules on judicial cooperation in civil matters have so far not been acted upon by the EU.[12]

Furthermore, and more problematic to the functioning of the EEA Agreement, the fact that the EU rules on judicial cooperation in civil matters fall outside the scope of the EEA Agreement appears to have caused Norwegian authorities to believe that the influence of EU internal market law on the Norwegian law of civil procedure in general is more limited than its influence on the national law of civil procedure of EU Member States. Thus, also a number of EU legal acts based on the EU's competence to regulate the internal market (Article 114 TFEU in particular) have been held by Norwegian authorities to fall outside the scope of the EEA Agreement as they were considered to primarily deal with harmonization of national procedural law.[13] And even though the general limitations brought about by the EU law principles of equivalence and effectiveness were recognised by the Expert Committee that wrote the draft for the Norwegian Code of Civil Procedure (CCP)[14] of 17 June 2005 no. 90, the practical implications for Norwegian civil procedural law were indeed regarded as very limited.[15] However, during the last decades, Norwegian scholars have begun to challenge that

[8] EEA Joint Committee Decision No 194/2016 of 23 September 2016 amending Annex XIX (Consumer Protection) to the EEA Agreement, OJ L 322, 8.12.2016, p. 51.

[9] In order to maintain a level playing field with equal conditions, the Annexes to the EEA Agreement are continuously updated with new EU legal acts of EEA relevance, but the scope of the Agreement has not been widened to include new fields of EU law.

[10] Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognitioin and enforcement of judgements in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1–32.

[11] 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007 p. 3–41. The Convention replaced an earlier Lugano Convention of 1988, in order to reflect subsequent changes in what was then EC law, see further in section 2 below.

[12] See further in section 2 below.

[13] See further in section 3 below.

[14] In force since 2008. The code is regularly referred to in English as "the Dispute Act" despite the fact that it is a full-blown Code of Civil Procedure in the Continental tradition. An English translation of the Code is available at Act relating to mediation and procedure in civil disputes (The Dispute Act) - Lovdata accessed 18 February 2025. Note that the translation has not been updated since 2018, but the number of later amendments is fairly limited. For an informative introduction in the English language, see Backer (2007) and several of the contributions in Fredriksen and Lipp (eds) (2011).

[15] NOU 2001: 32, Rett på sak, pp. 154–155. See also the Ministry of Justice in Ot.prp. No. 51 (2004–2005), Om lov om mekling og rettergang i sivile tvister (tvisteloven), p. 32.

view and acknowledge the potential for a broader and more thorough influence of EEA law upon the Norwegian law of civil procedure.[16]

A more indirect example of EU influence upon Norwegian civil procedure is the EU Charter of Fundamental Rights (EUCFR) and CJEU case-law concerning the EU law principle of effective judicial protection as sources of inspiration for the European Court of Human Rights (ECtHR) when interpreting the European Convention of Human Rights (ECHR). Norway is a party to the ECHR, and the impact of the Convention's Articles 6(1) and 13 upon Norwegian civil procedural law has long been recognised by Norwegian courts and by the Norwegian legislator alike. To the extent that developments in CJEU case-law impacts upon the ECtHR's interpretation of Articles 6(1) and/or 13 ECHR, the result will thus be indirect and somewhat "hidden" influence of EU law on Norwegian law.[17]

In this contribution, we will provide an overview over the impact of EU law on the Norwegian law of civil procedure. We will start by presenting the impact of EU secondary law (sections II and III), followed by an analysis of the impact of the general EU law principles of equivalence and effectiveness (section IV) and the general prohibition of discrimination on grounds of nationality (section V). The impact of the EU Charter of Fundamental Rights will then be discussed (section VI), before the contribution is rounded off with some thoughts about the future influence of EU Law upon Norwegian civil procedure (section VII).

Accordingly, we will leave aside the specific consequences for Norwegian procedural rules brought about by the rather peculiar judicial architecture of the EEA Agreement, such as those related to the interaction between Norwegian courts and the EFTA Court. Whilst certainly interesting, this is strictly speaking not examples of EU law influence upon Norwegian law and in any event a specific matter that would require much more space than what we have available here.[18] We also leave aside the EEA rules on the right of lawyers from other EEA States to provide legal services from abroad or to establish themselves in Norway, although these rules naturally have an impact upon the rules in the CCP on the right and obligation to use counsel.[19]

2. The impact of EU secondary law based on Article 81 TFEU

The impact of EU secondary law on the Norwegian law of civil procedure depends greatly on whether the directives and regulations in question are considered to be of EEA relevance. As noted in the introduction, the scope of the EEA Agreement essentially reflects the scope of the

[16] See, e.g., Utgård (2005), pp. 131–140, Fredriksen (2008), pp. 289–359, Nylund (2011), pp. 131–133, Nylund (2014), pp. 31–51, Nylund (2016), pp. 101–114, Hjort (2019), Fredriksen/Strandberg (2021), pp. 573–593, Nylund (2023). See also Viken (2012), pp. 43–45 on EU law concerning evidential use of surveys in trademark and marketing practice litigation.

[17] As is well known, the "judicial dialogue" between the ECtHR and the CJEU goes both ways, but for our present purposes the point is that Articles 6 and 13(1) ECHR may serve as a vehicle for Norwegian reception of CJEU case-law concerning the principle of effective judicial protection and the right to a fair trial.

[18] On this, see Fredriksen (2009).

[19] Directives 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ L 78, 26.3.1977, p. 17–18 and 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998, p. 36–43 are both part of the EEA Agreement. See on this Hjort (2019), pp. 113–114).

EC Treaty as it stood prior to the Treaty of Maastricht. At the time of the negotiations (1990-91), the EFTA States and the Member States of what was then the European Community (EC) had just recently agreed on common rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters through the 1988 Lugano Convention[20], essentially mirroring the Brussels Convention of 1968.[21] Reflecting the European Community's lack of competence at the time to legislate on judicial cooperation in civil matters, such cooperation was left outside the EEA Agreement. This demarcation of the scope of the EEA Agreement was upheld when later developments of EC law called for an update of the Lugano Convention – the 1988 Convention was replaced by a new Lugano Convention in 2007, this time with the EC rather than its Member States as contracting parties on the EC side.[22] The fact that the largest of the remaining EFTA States, Switzerland, never ratified the EEA Agreement, left a new Lugano Convention outside the EEA framework as an obvious choice.

As a result of this, the EEA Agreement knows of no parallel to what is now Article 81 TFEU on judicial cooperation in civil matters. This again means that EU legal acts based on Article 81 TFEU are not considered to fall within the scope of the EEA Agreement, even though Article 81 itself states that measures concerning judicial cooperation in civil matters might be 'necessary for the proper functioning of the internal market', into which Norway and the other the EEA EFTA States are integrated by way of the EEA Agreement.

Notable examples of secondary EU law based on Article 81 TFEU include:

- Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes
- Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims
- Regulation (EC) No 1896/2006 creating a European order for payment procedure
- Regulation (EC) No 861/2007 establishing a European Small Claims Procedure
- Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)
- Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters
- Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
- Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I – recast)

[20] 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [1988] OJ L 319/9.

[21] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [1972] OJ L 299/32. The EC was not itself a contracting party to the convention, due to the lack of competence on judicial cooperation in civil matters.

[22] As a result of the Treaty of Amsterdam giving the EC competence to adopt measures in the field of judicial cooperation in civil matters, see CJEU Opinion 1/03 on the competence of the Community to conclude the new Lugano Convention, ECLI:EU:C:2006:81.

- Regulation (EU) 2015/848 on insolvency proceedings (recast)
- Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Brussels II – recast)
- Regulation (EU) 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (recast)
- Regulation (EU) 2020/1784 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (recast)
- Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters
- Directive (EU) 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings

As far as the Brussel I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is concerned, its exclusion from the EEA Agreement is, as already mentioned, largely remedied by the 2007 Lugano Convention. However, unlike the EEA Agreement, the Lugano Convention is static in nature – it has no simplified procedure to keep up with changes in EU law. As a result, the changes to the EU rules introduced by the recast Brussels I Regulation of 2012 are not reflected in the Lugano Convention, thus creating certain differences between the Lugano and the Brussels Regimes. For instance, "Italian torpedoes" are still an effective tactic against exclusive choice-of-court agreements under the Lugano Convention in contrast to the Brussels I recast, where such manoeuvres are ineffective due to the rephrasing of Article 31.[23] Apparently, the Lugano Convention's Standing Committee has not considered the divergences serious enough to justify a full revision of the Convention.

With a caveat for matters where there is no longer full parallelism between the Lugano and the Brussels Regimes, the Lugano Convention serves as an effective vehicle for the reception of CJEU case-law into Norwegian law. Through CCP Section 4-8, the entire Convention, protocols and annexes included, has the status of a Norwegian statute. This includes Protocol 2 on the uniform interpretation of the Convention, whose Article 1 obliges national courts to pay "due account" to, *inter alia*, CJEU case-law concerning the Brussels I Regulation.[24] Acknowledging this, the Norwegian Supreme Court regularly underlines that CJEU case-law is a weighty source for Norwegian courts faced with interpreting the Lugano Convention.[25] In practice, the effect of CJEU case-law concerning the EU rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is no different in Norway than in EU Member States.

[23] Strandberg (2023b), pp. 599–602.
[24] In theory, this Protocol applies also to the CJEU and obliges it to pay due account also to decisions from, *inter alia*, the Norwegian Supreme Court, but this is clearly not followed up by the CJEU in practice.
[25] See, e.g., HR-2017-1297-A *Bergen Bunkers*, para. 37 and case-law cited. This is in line with the Supreme Court's approach to CJEU case-law of relevance for the 1988 Lugano Convention, see Rt. 2004 p. 981 *Agrimann Norge*, para. 22 and Rt. 2011 p. 897 *Marin Alpin*, para. 35.

As to the other EU legal acts based upon Article 81 TFEU, Norway has shown an interest in at least some of them. There are reportedly ongoing negotiations between Norway, Denmark, Iceland and Switzerland on the one hand and the EU on the other concerning the Regulation taking of evidence in civil and commercial matters (Regulation 2020/1783). Norway is reportedly also interested in other agreements concerning e.g. service of judicial and extrajudicial documents (Regulation 2020/1784), but the EU has so far not followed up on this.

3. The impact of EU secondary law based on provisions of the TFEU that fall within the scope of the EEA Agreement

As is well known to EU lawyers, secondary law established on other legal bases than Article 81 TFEU might very well include provisions that affect the law of civil procedure of the Member States in various ways. A particular important legal basis for Norway as an EEA EFTA State is Article 114 TFEU, which confers on the EU the competence to regulate the internal market. Other important examples include Articles 40 on the free movement of workers, 42 on social security, 50 on freedom of establishment, 59 on freedom to provide services, 64 on free movement of capital, 103 on competition law, 109 on State aid, 153 on social policy and 192 on environmental policy.

The list of secondary law based on these provisions which affect national civil procedure is long and multifaceted. Some particularly notable examples from the field of consumer protection law are

- Directive 2013/11/EU on alternative dispute resolution for consumer disputes (Directive on consumer ADR)
- Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR)
- Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers

Other notable examples include the provisions on access to evidence found in legal acts such as:

- Directive 2004/48/EC on the enforcement of intellectual property rights
- Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union
- Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure
- Directive (EU) 2024/2853 on liability for defective products

As to the EEA relevance of these and other legal acts based on provisions of the TFEU that concern fields of substantive law that fall within the scope of the EEA Agreement, a natural starting point would be to assume that they all belong in the EEA Agreement. After all, the

object and purpose of the EEA is to fully integrate the participating EFTA States into the internal market. Indeed, the EU-legislator has labelled all of the legal acts listed above as 'Texts with EEA relevance'. However, as noted in the introduction, the EEA EFTA States in general and, reportedly, Norway in particular have been reluctant to accept novel legal acts which harmonize national civil procedural law. Directive 2004/48 on the enforcement of intellectual property rights is an (in)famous example. The substantive EU rules on intellectual property rights are part of the EEA Agreement (Annex XVII) and the EU side thus considered the rules on the enforcement of these rules to be of EEA relevance. Still, Norway refused to accept the EEA-relevance of the Directive due to its "procedural character":

> The Directive is not taken into the EEA Agreement, which means that Norway is not obliged to implement it. This is because the Directive contains a number of procedural rules. Such rules are outside the scope of the EEA Agreement.[26]

The EU apparently accepted Norway's stance; the opposition to the Directive was not raised as a matter of concern in the EEA Joint Committee.

A further example is Directive 2014/104 on actions for damages under national law for infringements of EU competition law. This Directive contains both substantive and procedural rules; the procedural rules are primarily several provisions on evidence. As the substantive EU rules on competition law are part of the EEA Agreement (Articles 101 f.), the EU side rather naturally considered the Directive to be of EEA relevance. In its proposal for the Directive, the Commission explained this as follows:

> The proposed Directive contributes to the proper functioning of the internal market as it creates a more level playing field both for the undertakings that infringe the competition rules and for the victims of this illegal behaviour. Due to these objectives in the fields of competition and the internal market, which form part of the EEA legal rules, the proposal is relevant for the EEA.[27]

However, a comment from the Standing Committee of the EFTA States suggests that the EFTA States see this otherwise:

> The EEA EFTA States do not want to prejudge the conclusion of whether the draft Directive is considered to be EEA relevant or not. A final position on the issue of EEA relevance can only be taken after the adoption of the Directive in its final wording. The EEA EFTA States would, however, strongly underline that provisions on civil procedure are, in general, not EEA relevant and fall outside the scope of the EEA Agreement.[28]

[26] Prop. 81 L (2012–2013) Endringer i lovgivningen om industrielt rettsvern m.m. (styrking av håndhevingsreglene), pp. 8–9.
[27] COM/2013/0404 final, *Proposal for a Directive of the European Parliament and of the Council on actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*.
[28] EEA EFTA Comment on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 13 November 2013.

Given the fact that the harmonization of national procedural law foreseen by both these directives is considered by the EU-legislator as necessary for the proper functioning of the internal market (Article 114 TFEU), this stance is, of course, not unproblematic.

Perhaps somewhat paradoxically, Norwegian authorities seem to have acknowledged this. Although Norway insisted that Directive 2004/48 was kept outside of the EEA Agreement, the relevant Norwegian statutes were subsequently amended in order to make sure that the enforcement of intellectual property rights in Norwegian law indeed meets the requirements set by the Directive.[29] The "autonomous" implementation of the Directive included the introduction of a new chapter 28A into the CCP on discovery, which essentially mirrors the right of information provided for in Article 8 of the Directive.[30] The Norwegian government explained this course of action as follows:

> The interests of Norwegian trade and industry still call for Norway as a part of the EEA market to have rules on enforcement of intellectual property rights that at least fulfil the minimum requirements of the Directive. Substantive EU-rules on industrial property rights that do not concern enforcement are a part of the EEA Agreement. It is important that the law is at least as favourable to right holders in Norway as in the EU also when it comes to enforcement. This has been normative for the shaping of the suggestion in the proposition.[31]

Thus, the Ministry of Justice recognized the problems that arise when Norway is obliged by the EEA Agreement to implement certain substantial EU rules but not the procedural rules constructed to effectuate those substantive rules. The reason for developing the new CCP Chapter 28A was to counterbalance the negative effects for Norwegian businesses. Still, such "autonomous" implementation has drawbacks, among them the fact that Norwegian courts cannot ask the EFTA Court to clarify the interpretation of EU rules that are not part of the EEA Agreement.[32] Somewhat paradoxically, this probably only increases the influence of CJEU case-law, as Norwegian courts will have to look directly to the CJEU for guidance on the interpretation of the Directive.[33]

On this background, it is hardly surprising that the Norwegian scepticism towards EU legal acts that harmonize national procedural law appears to have softened considerably in the recent years. As to the above-mentioned Directive 2014/104/EU, the Norwegian government now seems ready to accept its EEA-relevance only if the EU will let Norwegian competition authorities participate fully in the EU's European Competition Network and accept decentralised enforcement of the EEA competition rules also within the EU. The reason why the Directive still has not been incorporated into the EEA Agreement after more than ten years, is that it remains uncertain whether the EU is prepared to accept full and symmetrical decentralized enforcement of EEA competition law throughout the EEA and full participation

[29] See Act of 31 May 2013 No 25.
[30] The inclusion of a new sector-specific chapter in the CCP, has met critique, see Hjort (2016a), pp. 277–290 and Hjort (2019), pp 118–119.
[31] Prop. 81 L (2012–2013), p. 13 (our translation).
[32] The EFTA Court's jurisdiction under Article 34 of the Surveillance and Court Agreement is limited to giving Advisory Opinions on the interpretation of the EEA Agreement.
[33] As the purpose of creating at least as effective rules as in the EU for the enforcement of intellectual property rights clearly suggests that CJEU case-law is relevant for Norwegian courts when interpreting CCP Chapter 28A.

of the national competition authorities of the EFTA States (and the EFTA Surveillance Authority) in an "EEA-wide" European Competition Network.[34]

Furthermore, a number of EU legal acts that harmonize national procedural law have been incorporated into the Agreement in recent years, including Directive 2009/22 on injunctions for the protection of consumers' interests; Directive 2013/11 on alternative dispute resolution for consumer disputes and Regulation 524/2013 on online dispute resolution for consumer disputes. Moreover, a high number of EU legal acts dealing mainly with substantive matters but containing more specific procedural clauses have been taken into the EEA Agreement without any 'opt outs'.[35] For instance, the Norwegian Equality and Anti-Discrimination Act[36] Section 37 implements several EU legal acts requiring a shift of the burden of proof when an individual provides reasons to believe that he or she has been a victim of discrimination.[37] Another example is the requirements of effective remedy and other procedural rights found in the GDPR Chapter 8, which was incorporated into the EEA Agreement in 2018 and implemented into Norwegian law by the Data Protection Act of 2018.[38]

A clear example of a more pragmatic view on the EEA-relevance of legal acts which affect civil procedure concern Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. This Directive includes a provision on access to justice (Article 11), which implements into EU law the requirement of the 1998 Aarhus Convention that judicial review procedures in environmental matters shall be fair, equitable, timely and not prohibitively expensive. When this requirement was first inserted into one of the predecessors of the Directive, back in 2003, it took a very long time for the EEA EFTA States to accept its incorporation into the EEA Agreement and only after the EU side agreed to a Joint Declaration stating that the decision should be "without prejudice to the view that civil procedural rules are not part of the EEA Agreement".[39] The wording rather clearly suggested that the EU did not necessarily subscribe to this 'view', and when Directive 2011/92/EU was incorporated into the EEA Agreement only ten months later, no such Joint Declaration was to be found.[40]

Another example of this shift is the decision in 2019 to accept the Directive 2016/943 on the protection of trade secrets.[41] The procedural provisions of this directive are clearly inspired by those found in the above-mentioned Directive 2004/48 on the enforcement of intellectual property rights, which Norway fought to keep out of the EEA Agreement. In the

[34] See further on this Franklin, Fredriksen and Barlund (2016), pp. 665–691. Eight years on from this publication, the Directive is still stuck in the EEA Joint Committee.
[35] The EEA Joint Committee has the possibility to 'carve out' provisions of an EU legal act if those are considered to fall outside the scope of the EEA Agreement and this is regularly done e.g. with provisions related to the EU customs union and the common commercial policy.
[36] Act of 16th June 2017 no 51.
[37] Directive 2000/43/EC of 29 June 2000 on the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin Article 8, Directive 2004/113/EC of 13 December 2004 on the implementation of the principle of equal treatment between men and women in the access to and supply of goods and services Article 9 and Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal treatment of men and women in matters of employment and occupation Article 19(1).
[38] Act 15 June 2018 No 38, Section 1.
[39] Decision of the EEA Joint Committee No 28/2012 of 10 February 2012, OJ L 94, 10.3.2012 p. 44.
[40] See the decision of the EEA Joint Committee No 230/2012 of 7 December 2012.
[41] Decision of the EEA Joint Committee No 91/2019 of 29 March 2019, OJ L 121, 9-5-2019 p. 22.

preparatory works to the statute implementing Directive 2016/943 into Norwegian law, the Ministry of Justice acknowledged the similarities between these two directives, but without any comments on the differing assessments of the scope of the EEA Agreement.[42]

These developments suggest that the EEA-relevance of both Directive 2020/1828 on representative actions for the protection of the collective interests of consumers and Directive 2024/2853 on liability for defective products in the end will be accepted by the EEA EFTA States, although both directives are still under scrutiny by the EEA EFTA States.[43] In our opinion, this development is most welcome.

Nevertheless, certain divergences between EU and EEA law remain, both as a result of the scope of the EEA Agreement and the all to frequent delays in the incorporation of novel EU-legislation into the Agreement. A difficult and sensitive question in cases of such divergences is the extent to which they can be remedied by the general EU/EEA law principle of effectiveness. Many provisions of a procedural character in EU secondary law do arguably 'only' define and give concrete expression to the principle of effectiveness. Still, it is naturally a sensitive matter for any court – be it the EFTA Court or national courts – to deduce obligations from the general principle of effectiveness which parallels obligations flowing from EU legal acts that have not been made part of the EEA Agreement.[44]

4. The impact of the EU law principles of effectiveness and equivalence

4.1 Acknowledging the principles of effectiveness and equivalence as part of EEA law

Both the EFTA Court[45] and the Norwegian Supreme Court[46] acknowledge that the case law of the CJEU concerning the principles of effectiveness and equivalence applies *mutatis mutandis* in the EEA context. In its 2005-decision in *Allseas Marine Contractors*, the Supreme Court quoted with approval the following standard phrase from the CJEU's judgment in *Safalero*:

> As a preliminary point, it should be recalled that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively

[42] Prop. 5 LS (2019–2020) Lov om vern av forretningshemmeligheter (forretningshemmelighetsloven) og samtykke til godkjenning av EØS-komiteens beslutning nr. 91/2019 av 29. mars 2019 om innlemmelse i EØS-avtalen av direktiv (EU) 2016/943 (forretningshemmelighetsdirektivet).

[43] See https://www.efta.int/eea-lex/32020l1828 and https://www.efta.int/eea-lex/32024l2853, respectively.

[44] See further on this Fredriksen (2016), p. 109.

[45] See, e.g., Case E-3/24, *Kristjánsdóttir*, para. 53 and Case E-11/23, *Låssenteret*, para. 44, with further references to earlier decisions.

[46] See, e.g., Rt. 1996 p. 282 *Wilhelmsen*, Rt. 2005 p. 597 *Allseas Marine Contractors* and Rt. 2010 p. 1500 *Elkem*.

> difficult the exercise of rights conferred by Community law (principle of effectiveness).[47]

The applicability of the general requirements flowing from the CJEU's case law also in the EEA context implies that Norwegian judges will face similar procedural challenges as their colleagues from EU Member States. In cases concerning EEA rights, the principles of effectiveness and equivalence may come to influence any part of civil procedure law – everything from rules on standing and limitation periods to obligations of the courts to raise and consider points of European law of their own motion, evidentiary rules, costs, the right of foreign advocates to act as counsel in national courts, the conditions under which interim relief may be granted, the conditions under which leave to appeal to the higher courts may be granted and possibly even national rules on *res judicata* and reopening of decided cases, just as in the EU Member States.[48]

In *Koch*, the EFTA Court explained the principle of equivalence as follows, closely following CJEU case-law:

> […] the principle of equivalence requires that the national rule in question be applied without distinction, whether the infringement alleged is of EEA law or national law, where the purpose and cause of action are similar […].
>
> In other words, the principle of equivalence extends the general principle of equality to the law of remedies. National procedural law must remain neutral in relation to the origin of the rights invoked, under the conditions set out below.
>
> In order to establish whether the principle of equivalence has been complied with in the case in the main proceedings, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in national civil law, to consider the purpose, cause of action and the essential characteristics of allegedly similar domestic actions […].
>
> Moreover, every case in which the question arises as to whether a national provision is less favourable than those concerning similar domestic actions must be analysed by the national court by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies […].[49]

The EFTA Court then gave the following apt presentation of the principle of effectiveness, again closely following the CJEU's lead:

> […] as regards application of the principle of effectiveness, every case in which the question arises as to whether a national procedural provision makes the application of EEA law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes,

[47] Case C-13/01, *Safalero*, ECLI:EU:C:2003:447, para. 49, as quoted by the Norwegian Supreme Court in Rt. 2005 p. 597 *Allseas Marine Contractors*, para. 39.
[48] For an overview from the perspective of Dutch law, see Krans (2015), pp. 567–588.
[49] Case E-11/12, *Koch*, para. 122–125 (references to CJEU case-law omitted).

> account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure […].[50]

4.2 Issues concerning legal standing

For a long time, the practical application of the principle of effectiveness in Norwegian civil procedure law was dominated by issues concerning access to court, at least if we concentrate on the decisions by the Supreme Court.

Already in 1996, the Supreme Court (Interlocutory Appeals Committee) held in the *Wilhelmsen* case that national rules on standing must not make it excessively difficult to challenge the compatibility of a national provision with EEA law.[51] The case concerned several merchants who had lost their municipal concessions to sell beer with more than 4.7 % alcohol as a result of a legislative amendment in 1993 which reserved this right to a state-controlled monopoly. The merchants decided to bring an action directly against the State, but the Attorney General replied that they should have applied to the municipality for renewals of their concessions and, if none were issued, then sued the municipality. The claimants argued that such a course of action would have no purpose as it was obvious that the municipality was not allowed to issue any new concessions. The Supreme Court acknowledged that the outcome of an application to the municipality was given, but still concluded that this was the right course of action, presumably in order to avoid a self-standing action to challenge the compatibility of a statutory provision with the EEA Agreement. The statement as to the importance of access to court was nevertheless important because it made clear that the municipality, if and when a case was brought against it, could not argue that the case should rather have been filed against the State.[52]

The above-mentioned decision in the 2005 *Allseas Marine Contractors* case also concerned legal standing. The case was brought by a group of employees who argued that the tax authorities' decision that their employer – a Swiss company engaged in subsea activities on the Norwegian continental shelf – had to pay social security contributions to Norway even though they neither had nor wanted membership in the Norwegian national insurance system, violated the right to free movement of workers as guaranteed by the EEA Agreement. The Supreme Court held that the employees clearly lacked standing under the Tax Payment Act, but proceeded to assess whether they had to be given legal standing due to the EEA law principle of effectiveness. The answer was in the negative, however, as the tax decision was imposed on the company only and only had minor and indirect effects for the employees.[53]

4.3 Limitation deadlines

In the *Elkem* case from 2010, the Supreme Court once again acknowledged the general requirements of effectiveness and equivalence.[54] The case concerned the lawfulness of a

[50] Ibid, para. 132.
[51] Rt. 1996 p. 282 on p. 287.
[52] The merchants did indeed bring an action against the municipality, but they lost on the merits after the Oslo City Court referred the matter to the EFTA Court, which held the monopoly to be lawful, see Case E-6/96, *Wilhelmsen*.
[53] Rt. 2005 p. 597, para. 42–46.
[54] Rt. 2010 p. 1500, para. 65.

limitation period imposed by the Tax Payment Act. Citing CJEU case-law, the Supreme Court without further ado held that a limitation period of 6 months was in no violation of the principle of effectiveness.[55]

4.4 Third-party litigation funding

In 2023, the principle of effectiveness was discussed in a Supreme Court decision concerning third-party litigation funding,[56] more precisely whether modern commercial litigation funding was allowed for opt-out class actions. The case was a so-called follow-up damages litigation after the Norwegian Competition Authority had revealed that the two largest actors in the market for the provision of alarm services to residential customers had agreed not to sell alarm services to each other's customers through door-to-door selling, in violation of Norwegian and EEA competition law.[57] The illegal market sharing allegedly affected 400.000 consumers.

To pursue the claims for damages, an association (*Alarmkundeforeningen*) was established and funded by the Jersey-based third-party funder Therium Litigation Finance Atlas IFP IC. It was agreed that Therium should cover all costs for an action against the two companies while at the same time receiving three times their investment if the action was successful. Alarmkundeforeningen initiated an opt-out class action based on the Norwegian CCP Section 35-7 (1):

> The court can decide that persons who have claims within the scope of the class action shall be class members without registration in the class register, if the claims:
>
> a) individually involve amounts or interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions, and
>
> b) are not deemed to raise issues that need to be heard individually.

Alarmkundeforeningen was the class representative (qualified claimant) and required the opening of such a class action on the condition of a so-called Funding Agreement Approval Order which would secure Therium's success fee.[58]

The request for a class action was dismissed, however, by the district court, the court of appeals, and ultimately by the Supreme Court. The latter based its decision on an *e contrario* interpretation of a formal requirement set up in CCP Section 35-14 (1):

> Class members in actions pursuant to Section 35-6 are liable towards the class representative for costs imposed on him/her pursuant to Section 35-12 and for remuneration and coverage of disbursements determined pursuant to Section 35-13

[55] Ibid, para. 66.
[56] HR-2023-1034-A. The decision is discussed in detail in Strandberg (2023).
[57] The two fines imposed by the Competition Authority totaled approximately 120 million Euro. None of the fines were challenged in court.
[58] HR-2023-1034-A, para. 8–9.

> insofar as such liability is a condition for registration. Any amount that is not prepaid shall be paid to the legal counsel for the class.

While Section 35-13 opens for liability for the group members *vis-á-vis* the class representative of opt-in class actions so far as that was a condition for being registered, the Supreme Court held that such liability could not be established for group members in opt-out class actions. As opt-out class actions do not include any registration of group members, the claimants can neither reject nor accept the reduction of their claims that would be a consequence of the third party funder's success fee. The Supreme Court did not disallow commercial funding of lawsuits per se but concluded that such funding is not compatible with the requirements for certification of opt-out class actions.

Alarmkundeforeningen argued that the opt-out class action had to be approved in order to comply with the EU law principle of effectiveness and, further, that Directive 2020/1828 on representative actions for the protection of the collective interests of consumers required acceptance of third-party litigation funding. The Supreme Court emphasized that the directive had not yet been incorporated into the EEA Agreement, before proceeding to hold that it in any event did not require opt-out class actions. Indeed, most EU Member States do not allow such actions. Therefore, the court found that the principle of effectiveness could not require national law to accept such funding of an opt-out class action.[59]

The Supreme Court's line of reasoning is interesting as it exemplifies the indirect relevance of EU secondary law under the principle of effectiveness. However, the court's understanding of the principle of effectiveness comes across as somewhat abstract and fixated on the directive. A more convincing approach would have been to examine whether Norwegian law opens for other realistic alternatives than commercially funded opt-out class actions for cases entailing numerous consumers having suffered relatively small individual economic losses. Such alternatives are opt-in class actions, opt-out class actions funded by a consumer organisation or a public body, a representative action, or a traditional joinder of a high number of parties. Although none of these alternatives would have been as effective as an opt-out class action, they clearly suffice to fulfil the requirements set up by the principle of effectiveness (the alternatives are neither "practically impossible" nor "excessively difficult").

4.5 Prohibitively expensive judicial proceedings

A rather different but pressing issue of Norwegian civil procedure is the extremely high costs involved, which generally fall in their entirety on the losing party.[60] In a recent case where a rather small association in vain challenged the validity of a governmental decision allowing the building of a big wind farm, the 1998 Aarhus Convention[61] was applied to set aside a cost shifting order imposed by a Norwegian district court.[62] The Aarhus Convention as such is not incorporated into the EEA Agreement, but as mentioned in Section 3 above the Convention's requirement for judicial review procedures that are fair, equitable, timely and not prohibitively expensive (Article 9(4)) has been implemented by the EU-legislator through

[59] HR-2023-1034-A, para. 72–77.
[60] CCP Section 20-2.
[61] 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, [2005] OJ L 124/4.
[62] LF-2021-101193.

legal acts that are of EEA-relevance which indeed have been made part of the Agreement. In addition, Norway and the other EFTA States are all parties to the Convention in their own right. The Court of Appeals for Mid-Norway did not dwell on this somewhat complicated background as it simply cited and applied CJEU case-law.[63] According to the Court of Appeals, the District Court had not properly assessed whether the proceedings were prohibitively expensive for the claimant, as required by the CJEU. Although the principle of effectiveness was not explicitly mentioned, the test provided by the CJEU for the national courts to review the national provisions on costs is rather similar. In our view, the prohibition on prohibitively expensive proceedings ought simply to be considered as an expression of the principle of effectiveness.[64]

4.6 Ex officio application of EEA consumer protection law

Although not yet present in the jurisprudence of Norwegian courts, a debate on CJEU's case law concerning *ex officio* application of EU consumer law by national courts has emerged in the legal literature.[65] As is well known to EU lawyers, the CJEU ruled already in *Oceano Grupo Editorial* from 2000 that national courts must have the power to apply EU consumer protection law on their own motion.[66] In later cases, the CJEU has made clear that national courts are obliged to make use of these powers.[67] Since the relevant parts of EU consumer protection law are part of the EEA Agreement, the EU law obligation on national courts to apply them *ex officio* must apply also to Norwegian courts. However, a transformation of these obligations into Norwegian civil procedure law is far from straightforward.

Although Norwegian judges, pursuant to the *iura novit curia*-principle contained in the Norwegian CCP Section 11-3, are under an obligation to apply any relevant substantive or procedural rule of law, difficulties arise when the CJEU appears to require national courts to apply EU consumer protection law even if this demands inclusion of different facts than those pleaded by the parties.

One way for Norwegian judges to fulfil the CJEU's requirements within the existing system of Norwegian civil procedure, is by regarding EEA-related consumer protection cases as cases where public policy limits the parties' rights of disposition.[68] In such cases, a judge is not bound by the parties' dispositions on facts and evidence,[69] and is "under a duty to ensure that the presentation of evidence provides a sound factual basis for the ruling".[70] Regarding EU consumer protection law as a matter where the parties' rights of disposition are limited by public policy considerations clearly fulfil the obligations of judge-activity fronted by CJEU. One may argue, though, that such a move is an unnecessarily drastic limitation of the

[63] Case C-260/11, *Edwards v Environment Agency*, ECLI:EU:C:2013:221.
[64] As noted by AG Kokott in her opinion in the case, see para. 23 and 62.
[65] See Robberstad (2002), pp. 195–223, Fredriksen (2008), pp. 326–328, Giertsen (2021) pp. 263–265, Skoghøy (2022), pp. 600–603, Nylund (2014), pp. 107–108, Eldjarn (2016) pp. 237–243, Fredriksen and Strandberg (2019), Wold and Omland (2021) and Nylund (2023), pp. 408–414.
[66] Joined Cases C-240/98 to C-244/98, *Oceano Grupo Editorial and Salvat Editores*.
[67] E.g. Case C-473/00 *Cofidis*, Case C-168/05 *Mostaza Claro*, Case C-243/08 *Pannon¸* Case C-618/10 *Banco Español de Crédito*, Case C-497/13 *Froukje Faber*, Joined Cases C-698/18 and C-699/18 *Raiffeisen*, C-495/19 *Kancelaria Medius*, C-600/19 *Ibercaja Banco* and C-869/19 *Unicaja Banco*.
[68] Skoghøy (2022), pp. 600–602.
[69] CCP Section 11-4.
[70] CCP Section 21-3(2) first sentence.

autonomy of consumers, especially because it deprives consumers of the possibility to settle the case.

A preferable alternative within the existing system of Norwegian civil procedure is to regard EU consumer protection law as a matter on which a Norwegian judge is obligated to provide active guidance to the weaker party. Inspired by German rules on *materielle prozessleitung*,[71] Section 11-5 of the Norwegian CCP contains rules on judges' guidance to the parties on procedural and substantive matters. However, the Norwegian rules, in contrast to the German ones,[72] only provide judges with the competence to guide on substantive matters. A judge is under an obligation to provide such guidance only if extraordinary circumstances occur, for instance if especially important values are at stake for a party and he or she lacks the knowledge, skills or resources necessary to present his case.[73] An obligation to provide guidance on matters of EU consumer protection law will widen these obligations, but it is not a drastic change. In our view, such a modification is preferable because active guidance will enlighten a consumer of his or her rights, and at the same time respect the choices made by an enlightened or well-informed consumer.[74]

However, the obligation to apply consumer protection law *ex officio* also meet institutional hurdles as most consumers are dealt with not by the courts but rather by complaints boards. Since the proceedings before these complaint boards are rather informal and simplified compared to litigation before the courts, application of substantive law on the board's own motion may be challenging. Still, the members of these boards are highly specialised, and they are accompanied by even more specialised secretariats who prepare the cases and are in contact with the parties. In some recent decisions, individual members of some of the Norwegian complaint boards have indeed applied EU consumer law *ex officio*, but so far without convincing their colleagues to follow suit.[75]

While the principle of effectiveness first and foremost affects the national court's interpretation and application of national procedural law, the CJEU's judgments based on that principle may also necessitate new legislation. An example of such an effect, is the recent modernisation of the Norwegian legislation on insurance contracts. In order to comply with the CJEU's application of the principle of effectiveness in C-449/13 *Consumer Finance*, a provision on the shift of the burden of proof was introduced into the Norwegian Insurance Contracts Act in 2022.[76]

4.7 Evidence containing trade secrets

A final example of the increasing impact of EU law on Norwegian civil procedure concerns the protection of trade secrets, or rather the CJEU's balancing of the right to the protection of

[71] *Zivilprozessordnung* § 139, *German Code of Civil Procedure*.
[72] Braun (2014) pp. 597–598 and Haas (2011), pp. 99 and 100–104.
[73] NOU 2001: 32 p. 709, Schei et al. (2013), p. 416.
[74] Fredriksen and Strandberg (2019), pp. 176–186.
[75] See case ELKN-2022-1533 from the Norwegian Complaints Board for Consumer Electricity Contracts (Elklagenemnda), 29 January 2024, and case FINKN-2024-719, 23 August 2024, and FINKN-2025-39, 13 January 2025, from the Norwegian Financial Services Complaints (Finansklagenemnda).
[76] Section 21-1 of Act No 69 of 16 June 1989, as amended by Act No 37 of 8 February 2022. See further Prop. 234 L (2020–2021) Endringer av forsikringsavtaleloven, pp. 118–122.

trade secrets, which the CJEU has acknowledged as a general principle of EU law,[77] and the requirements of effective judicial protection and the rights of defence of the parties to the dispute. In *Varec*, the CJEU held that this balancing was to be conducted on a case-by-case basis by the national courts, which therefore 'must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets'.[78] The Grand Chamber of the CJEU confirmed this finding in 2021 in *Klaipėdos*, where it was stated that the adversarial principle does not mean that the parties are entitled to unlimited access to all information relating to a procurement procedure and that the national court hearing the case "must be able to decide, if necessary, that certain information in the file should not be communicated to the parties or their lawyers".[79]

The CJEU's approach in these cases is not easily reconciled with Section 11-1(3) CCP, which states that the court cannot base its ruling on facts which the parties have not had the opportunity to comment on, nor with Section 14-1 on parties' right of access to (all) documents relating to the case.[80] Of course, a Norwegian court that has to decide on whether the exemption in Section 22-10 CCP for evidence of trade or business secrets applies or not will have to have the evidence at its disposal. However, if the judge concludes that the evidence can indeed be exempted, he/she will have to consider whether to recuse himself/herself from the case because of the knowledge of evidence that cannot be revealed to both parties. The CJEU's lack of similar concerns is striking.

In *Låssenteret*, the EFTA Court essentially followed the CJEU's lead in *Varec* and *Klaipėdos*.[81] Directive 2016/943 applies only to cases concerning violation of trade secrets,[82] but it has been 'over-implemented' by the Norwegian legislator, establishing confidentiality arrangements that are applicable to all civil cases involving trade secrets, cf. CCP Section 22-12 (3) and (4). Pursuant to that Section, the court may order disclosure of trade secrets while imposing a duty of confidentiality on all persons present, closing the proceedings to the public (presentation of the evidence in camera), and even limiting the number of attending co-counsels. The EFTA Court emphasized that general EEA principles oblige Norwegian courts to strike a balance between the protection of trade secrets, the right to a fair trial, and the right to effective remedies also when applying Section 22-12 for cases outside the scope of the Directive.[83]

In *Elmatica*, the EFTA Court clarified that neither the Trade Secrets Directive nor other parts of EEA law places an obligation on national courts to obtain and examine all disputed evidence which may contain trade secrets in order to determine whether that evidence is to be adduced in the proceedings.[84] It is sufficient that national courts may, at their own discretion, obtain the evidence in question in those cases where they deem it necessary in

[77] Case C-53/85, *AKZO,* para. 28 and C-36/92, *SEP,* para. 37.
[78] Case C-450/06, *Varec*, ECLI:EU:C:2008:91, para. 53.
[79] Case C-927/19, *Klaipėdos*, ECLI:EU:C:2021:700, para. 127–133.
[80] As noted by the Ministry of Justice in its Opinion JDLOV-2010-8882 of 25 October 2010.
[81] Case E-11/23, *Låssenteret*.
[82] Case E-11/23, *Låssenteret,* para. 34–38.
[83] Case E-11/23, *Låssenteret,* para. 44–62.
[84] Case E-14/24, *Elmatica.*

order to conduct a proper assessment of whether the evidence is to be adduced, as long as this discretion is exercised in accordance with general principles of EEA law.

5. The impact of the general prohibition on discrimination on grounds of nationality

Article 4 of the EEA Agreement includes a general prohibition on discrimination on grounds of nationality, essentially mirroring what is now Article 18 TFEU. As is well known by EU lawyers, this prohibition also applies to civil procedural law, limiting the procedural autonomy that the EU Member States enjoy in the absence of EU rules governing procedural matters.[85] In *Kottke*, the EFTA Court confirmed that this applies equally in the EEA as in EU law:

> In the absence of EEA rules governing the matter, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EEA law. Nevertheless, EEA law imposes certain limits on that competence (see, for comparison, Data Delecta, cited above, paragraph 12; Case C-323/95 Hayes [1997] ECR I-1711, paragraph 13, and Case C-122/96 Saldanha and MTS [1997] ECR I-5325, paragraph 19). In particular, legislative provisions on national procedure may not discriminate against persons to whom EEA law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by EEA law (see, for comparison, Case C-186/87 Cowan [1989] ECR 195, paragraph 19).[86]

This case was about a Liechtenstein rule that required plaintiffs residing in another EEA State to lodge security for legal costs. Unlike the other EFTA States parties to the EEA Agreement, Liechtenstein has not acceded to the Lugano Convention (neither the original one from 1988 nor the new one from 2007). This forced the EFTA Court to concede that a requirement to lodge security for legal costs in civil proceedings may be justified even though such a rule would, in the context of EU law, fall under the general prohibition on discrimination on grounds of nationality now found in Article 18 TFEU.[87] However, the EFTA Court tried to limit the consequences of this finding by stressing that such security could not be required in a manner disproportionately affecting the interests of a non-resident plaintiff in being able to commence legal proceedings.[88] The fact nevertheless remains that Liechtenstein's decision not to sign up to the Lugano Convention may serve to justify discrimination which cannot be justified in an EU law context.

Norwegian law now recognizes the impact of Article 4 EEA on rules concerning security for costs. Traditionally, Section 182 of the 1915 Code of Civil Procedure made clear that any litigant not resident in Norway could be ordered to provide security for the other

[85] See, e.g., Case C-186/87, *Cowan,* ECLI:EU:C:1989:47 and Case C-43/95, *Data Delecta*, ECLI:EU:C:1996:357.
[86] Case E-5/10, *Kottke*, para. 27.
[87] The relevant difference in legal context is that within the EU, the Brussels I-regulation makes sure that a cost award can be enforced in the plaintiff's home state. As long as this is the case, the indirect discrimination entailed by national provisions requiring a plaintiff from another EEA State to provide security for costs cannot be justified.
[88] Case E-5/10, *Kottke*, para. 52.

party's legal costs. After the entry into force of the EEA Agreement in 1994, the compatibility of this provision with the EEA Agreement's general prohibition on discrimination on grounds of nationality was a matter of dispute between the EFTA Surveillance Authority and the Norwegian Ministry of Justice.[89] In the end, Norwegian authorities gave in and agreed to amend the CCP so that security could no longer be required if the claim in dispute fell within the scope of the EEA Agreement.[90] Acknowledging this, the new CCP of 2005 included the following provision on security for costs in its Section 20-11(1):

> The defendant may demand that a claimant who is not habitually resident in Norway shall provide security for his potential liability for costs in the current instance. Security cannot be required if it would violate an obligation in international law on equal treatment of parties resident abroad and parties resident in Norway, or if it would seem disproportionate in view of the nature of the case, the relationship between the parties and other circumstances.

The intention of the second sentence was to ascertain that security of costs was not required if such an order would violate the EEA Agreement, but the wording was kept general and unspecified so that other binding international agreements were also included, for instance if Norway had entered into a treaty with a particular state to which the party is a citizen.[91] Unfortunately, however, the less clear wording of Section 20-11(1) resulted in a number of court decisions in which security for costs were imposed upon claimants from other EEA States and where the compatibility of these orders with Article 4 EEA was questionable at best.[92] Thus, acting upon a complaint, the EFTA Surveillance Authority raised the matter with the Norwegian government and concluded that Section 20-11(1), or at least parts of the jurisprudence based on it, violated Article 4 of the EEA Agreement.[93]

The Ministry of Justice replied that it was of the opinion that Section 20-11(1) was in line with Norway's obligations under the EEA Agreement, but that it nonetheless would amend the provision in order to clarify this. Two alternatives were proposed; Section 20-11(1) was either to be amended to the effect that a plaintiff could not be asked to provide security for legal costs if the subject under dispute fell within the scope of the EEA Agreement ("first alternative") or that plaintiffs resident within the European Economic Area should not be required to furnish security for costs of legal proceedings before Norwegian courts, where no such requirement is imposed on plaintiffs residing in Norway ("second alternative").[94] The choice between these two alternatives caused a somewhat heated discussion between the

[89] See, e.g., the EFTA Surveillance Authority's Letter of Formal Notice to Norway of 7 December 1999 (Doc No 99-8844-D) as well as the Norwegian Ministry of Justice's presentation of the matter (in the Norwegian language) in Ot.prp. No. 63 (2000–2001), om lov om endring i tvistemålslova (trygd for sakskostnader) .
[90] Act of 15 June 2001 No 58, amending Section 182 of the 1915 Code of Civil Procedure.
[91] NOU 2001: 32, pp. 937–938.
[92] Mostly decisions from lower courts, but also one from the Supreme Court, see the order in Rt. 2008 p. 1459, where an Icelandic company was required to provide security for costs when bringing a matter concerning a petition for seizure of a specific company's property, following the alleged failure of that company to attend to a pecuniary claim linked to the purchase of fishing equipment.
[93] See the EFTA Surveillance Authority's letter of 5 November 2014 (Doc No 727963), Letter of formal notice of 24 June 2015 (Doc No 749608) and Reasoned Opinion of 13 July 2016 (Doc No: 807176), all of which can be obtained from the Authority's Public document database (http://www.eftasurv.int/press--publications/public-documents/).
[94] Letter to the EFTA Surveillance Authority of 4 December 2015 (Doc No 784247).

Ministry and the EFTA Surveillance Authority. The Ministry of Justice argued that the first alternative would suffice to meet Norway's EEA law obligations, whereas the EFTA Surveillance Authority opined that such a rule would make it "at best" more cumbersome for a national of another EEA State to bring an action before the Norwegian courts.[95] According to the EFTA Surveillance Authority, it was "possible and/or likely" that the first alternative would result in security for costs being demanded much more frequently from EEA plaintiffs than from Norwegian nationals. In the Authority's opinion, EEA States cannot subject non-citizens or non-residents to systematically different rules on security for costs. The Ministry of Justice disagreed but still opted for the second alternative as it became clear that most of the respondents in the consultative round preferred this for reasons of legal clarity and predictability.[96] Parliament agreed, so that CCP Section 20-11(1) second sentence now reads:

> Security cannot be required if the claimant is resident in an EEA State, if it would violate an obligation in international law on equal treatment of parties resident abroad and parties resident in Norway, or if it would seem disproportionate in view of the nature of the case, the relationship between the parties and other circumstances.

Thus, security for costs can no longer be required if the claimant is resident in an EEA State, regardless of whether the claim in dispute is within the scope of the EEA Agreement or not. If a claimant resident in an EEA State is party to a case that is not affected by substantial EEA law, for instance an inheritance case, the prohibition against a requirement for security still applies. Arguably, this is not an obligation under the EEA Agreement; it is a spillover effect of such an obligation.

6. The impact of the EU Charter of Fundamental Rights

6.1 Article 47(1) EUCFR as an expression of the principle of effective judicial protection

Article 47(1) EUCFR states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. The provision is inspired by Article 13 of the ECHR, but the protection offered is more extensive since it guarantees the right to an effective remedy before a court (not only before "a national authority").[97] Even more importantly, Article 47(1) EUCFR extends the right to an effective remedy well beyond the rights and freedoms as set forth in the ECHR – it encompasses all rights and freedoms guaranteed by EU law.

The Charter has not been made part of the EEA Agreement or in any other way been formally recognized by Norway or the other EFTA States. This matters little, however, as far as the right to an effective remedy is concerned. As noted already in the introduction, the EFTA Court has repeatedly held that access to justice and effective judicial protection are

[95] EFTA Surveillance Authority´s letter to Norway of 2 February 2016 (Doc No 789453).
[96] Prop. 42 L (2016–2017), Endringer i tvisteloven (sikkerhet for sakskostnader), pp. 7–8.
[97] See the Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union C 303/17, 14 December 2007; Explanation on Article 47.

essential elements of the EEA legal framework. For more than 30 years now, the EFTA Court has demonstrated its willingness to do everything within its power to achieve and maintain homogeneity between EU and EEA law.[98] It may thus be safely assumed that the EFTA Court will develop the EEA law principle of effective judicial protection in line with the CJEU's interpretation of Article 47(1) EUCFR.

In general, the right to an effective remedy expressed in Article 47(1) EUCFR is unlikely to add much to Norwegian procedural law. Since 2014, Article 95(1) of the Norwegian Constitution guarantees everyone the right "to have their case tried by an independent and impartial court within reasonable time".[99] The scope of this provision is neither limited to certain fundamental rights (such as Article 13 ECHR) nor limited to EEA law (such as the EEA law principle of effective judicial protection). Both ECtHR case-law concerning Article 13 ECHR and, which is more important for our present purposes, CJEU case-law concerning Article 47(1) EUCFR must be presumed to be relevant sources of inspiration for the Supreme Court in the future development of the effective remedy clause of the Constitution, although the Supreme Court has also made very clear that it is for it to decide on the interpretation of the Constitution.[100]

6.2 Article 47(2) EUCFR as an expression of the right to a fair trial

Article 47(2) EUCFR states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. As suggested by its wording, this provision is essentially taken over from Article 6(1) ECHR. However, through the case-law of the CJEU it may develop in ways which does not fully concur with the interpretation of Article 6(1) ECHR favoured by the ECtHR.[101]

As noted above, the Charter has not been made part of the EEA Agreement or in any other way been formally recognized by Norway. Still, all of the EU and EFTA States parties to the EEA Agreement are also parties to the Convention and there is a general agreement in case-law and literature that provisions of the EEA Agreement are to be interpreted and applied in a manner which is consistent with the Contracting Parties' obligations under the Convention.[102]

The EFTA Court has referred to Article 6 ECHR in several cases. In *Posten Norge*, a case about the public enforcement of competition law, the EFTA Court for the first time also included a reference to Article 47 EUCFR:

> The principle of effective judicial protection including the right to a fair trial, which is *inter alia* enshrined in Article 6 ECHR, is a general principle of EEA law. It may be noted that expression to the principle of effective judicial protection is

[98] See in detail Ellingsen (2024).
[99] The full text of the provision is as follows: "Everyone has the right to have their case tried by an independent and impartial court within reasonable time. Legal proceedings shall be fair and public. The court may however conduct proceedings in camera if considerations of the privacy of the parties concerned or if weighty and significant public interests necessitate this."
[100] E.g. Rt. 2015 p. 93 *Maria,* para. 57.
[101] The complex interaction and coexistence between the CJEU and the ECtHR falls outside the scope of this contribution. For present purposes, it suffices to note that there is no formal hierarchy between the two and that diverging interpretations of Article 47 EUCFR and Articles 6 and 13 ECHR cannot be excluded.
[102] For a recent analysis, see Einarsson (2025).

> now also given by Article 47 of the Charter of Fundamental Rights of the European Union […].[103]

It is worth noting that the reference to Article 47 was couched in a way that plays down the potential 'added value' of the Charter,[104] but also that the EFTA Court portrays both Article 6 ECHR and Article 47 EUCFR as mere expressions of a general principle already recognized by EEA law. By this, the EFTA Court may have laid the groundwork necessary to keep up with CJEU case law even beyond the scope of the Convention.

To Norwegian civil procedure, the potential importance of Article 47(2) EUCFR in EEA-related matters further complicates the legal landscape where a number of abstract "over-arching" minimum criterions have been developed. In addition to Article 6(1) ECHR, a reform in 2014 added a new provision to the Norwegian Constitution which *inter alia* declares that "[l]egal proceedings shall be fair and public".[105] The provision was inspired by Article 6,[106] and the Committee preparing the constitutional reform recommended that ECtHR case-law should be "relevant" for its interpretation.[107] Acknowledging this, the Norwegian Supreme Court regards case-law from the Strasbourg Court as an important source for the interpretation of the new human rights provisions of the Norwegian Constitution.[108] However, as noted above, the Supreme Court has also made very clear that it is for the Supreme Court itself to decide on the interpretation of the Constitution.[109]

There is a chance, then, for future development of the "fair trail" standard in Article 95 of the Constitution which deviates from both the one advocated by the ECtHR under Article 6(1) ECHR and by the CJEU under Article 47(2) EUCFR. It may be that the right to a fair trial has a somewhat different meaning when interpreted by the Strasbourg court in a wide European context, by the CJEU within an integrationist and market-oriented EU law context, or by the Norwegian Supreme Court in a combined domestic and European context. Further complexity is brought about by the older Norwegian principle of "sound proceedings" which was developed by the Supreme Court and is now codified in Section 1-1(1) of the CCP.[110] Whether this principle still has any practical importance after the 2014 constitutional amendments is a matter of discussion,[111] but it cannot be excluded that this "home-made" principle still has a role to play in addition to the constitutional and international standards.

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[103] Case E-15/10, *Posten Norge*, para. 86.
[104] As noted by Wahl (2014), p. 291.
[105] Article 95(1) of the Norwegian Constitution. The full text of the provision is reproduced in footnote 101 above.
[106] Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven, Dokument 16 (2011–2012), pp. 121–125.
[107] Ibid, p. 122. The Committee did not comment upon the potential impact of EU and EEA law in this regard.
[108] E.g. Rt. 2014 p. 1292, para. 21.
[109] See Section 6.1 above (fn. 102 and accompanying text).
[110] In English translation, CCP Section 1-1(1) makes clear that the purpose of the act is to "provide a basis for hearing civil disputes in a fair, sound, swift, efficient and confidence inspiring manner through public proceedings before independent and impartial courts".
[111] Compare Skoghøy (2022), pp. 571–574, Robberstad (2024), pp. 27–28 and Fredriksen/Strandberg (2021) p. 595.

6.3 Other provisions of the Charter of potential relevance for Norwegian procedural law

Although Article 47 is clearly the most significant provision of the Charter as seen from a civil procedure perspective, other articles may also be of importance.

Firstly, it is well known that also the presumption of innocence in Article 6(2) ECHR affects cases concerning administrative sanctions that are criminal charges under the Convention but not defined as such under national law. In such cases, the Norwegian Supreme Court has held that Article 6(2) requires a relatively high standard of evidence – at least a qualified preponderance of the evidence.[112] Article 48 EUCHR corresponds to Article 6(2) ECHR, but may perhaps prove to offer "added value" if the ECtHR's margin of appreciation-doctrine leaves the ECHR Contracting Parties with more discretion than the CJEU and the EFTA Court, with their focus on equal conditions for competition throughout the EU and the EEA, are prepared to offer to the EU/EEA Member States. The EEA-relevance of the presumption of innocence is clearly demonstrated by the fact that two of the cases where the Supreme Court discussed the matter were cases concerning the public enforcement of EEA competition rules.[113]

Secondly, the right to privacy in Article 7 EUCFR and the right to the protection of personal data in Article 8 EUCFR can be relevant for, *inter alia*, the interpretation and application of national rules concerning access to evidence. The corresponding provision in the ECHR – Article 8 ECHR – has been considered in this regard by the Norwegian Supreme Court[114] and has proven to be especially relevant when access to evidence is required in a pre-trial stage under the rules in the Norwegian CCP Chapter 28.[115] It may well be questioned whether Articles 7 and 8 EUCFR offer any "added value" as compared to Article 8 ECHR, but the CJEU's judgments in a number of high-profile data protection cases in the last couple of years may suggest an answer in the affirmative.[116]

7. Concluding remarks

The understanding of the impact of EU law on the Norwegian law of civil procedure is gradually emerging in Norway. In many ways, the combined effect of the EEA Agreement and the Lugano Convention is that Norwegian judges often find themselves in a situation rather similar to that of their colleagues from EU Member States. Still, as explained above, there are limits to both the EEA Agreement and the Lugano Convention which complicates

[112] See Rt. 2007 p. 1217 *ulovlig fiske* (dissent 3-2), Rt. 2008 p. 1409 *tilleggsskatt* (dissent 6-5), Rt. 2011 p. 910 *Tine* and Rt. 2012 p. 1556 *Gran & Ekran* (dissent 3-2). Note, however, that it is far from clear that the Strasbourg court in fact requires such a standard of evidence in these cases, see for instance the Swedish case *Lucky Dev v Sweden* (Application no. 7356/10), para. 65–69, where a standard of evidence called "sannolikt" ("probable") did not constitute a violation of Article 6(2). See also Strandberg (2017), pp. 115–134.
[113] Rt. 2011 p. 910 *Tine* and Rt. 2012 p. 1556 *Gran & Ekran*.
[114] Rt. 2012 p. 1819 para. 35, Rt. 2014 p. 1084 para. 12–13 and HR-2014-962-U. See also the ECtHR's judgment in *Bernhard Larsen Holding AS and others v Norway*, Application no. 24117/08.
[115] Hjort (2016b), pp. 224–231.
[116] See Joined Cases C-293/12 and 594/12, *Digital Rights Ireland,* ECLI:EU:C:2014:238; Case C-131/12, *Google Spain*, ECLI:EU:C:2014:317; Case C-362/14, *Schrems,* ECLI:EU:C:2015:650; Joined Cases C-203/15 and 698/15, *Tele2 Sverige,* ECLI:EU:C:2016:970 and Opinion 1/15, *EU-Canada transfer of passenger name record data*, ECLI:EU:C:2017:592.

matters. So far, however, this has not caused considerable problems to the functioning of either agreement, but future developments in EU law may of course alter this assessment.

After more than 30 years, the need for a major overhaul of the EEA Agreement is growing. New EU legal acts which harmonise or otherwise impact upon Member States' law on civil procedure is not the main reason for this, but the scepticism towards such acts does contribute to increasing divergences between EU and EEA law. Given the importance of the EEA Agreement for Norway and the stated will of the government to do its outmost to protect it in an unruly geopolitical situation, the futile attempt over the last decades to keep rules harmonising civil procedure out of the Agreement ought finally to be abandoned.

In the event of a bigger overhaul of the EEA, a thought worth pursuing may be to expand the scope of the EEA Agreement to include, among other things, judicial cooperation in civil matters. This would allow for Norwegian participation in all of the EU law instruments in this field through an agreement with a simplified procedure to keep up with future changes in EU law.

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