10

The Supreme Court of Norway and the EFTA Court through 30 Years

TORIL MARIE ØIE AND HENRIK BULL*

I. INTRODUCTION

It is generally accepted that one of the most important developments in law in the last few decades has been the internationalisation of legal sources. No longer do international rules almost exclusively regulate the relationship between states; they also regulate the relationship between the state and its own citizens and enterprises, and to some extent also between private entities. This means that national courts must take them into account to a much larger extent than they have previously been accustomed to doing. By extending a large part of the EU's internal market law to Norway, Iceland and Liechtenstein (the EEA/EFTA States), the EEA Agreement – EEA law – is by far the most important development in this regard for these three states. By limiting the states' right to regulate economic activity, EEA law also poses new challenges for national courts with regard to what was previously thought of as 'political' rather than 'legal' questions and considerations.

The internationalisation of legal sources is not limited to the impact of the provisions of the various international instruments as such. Some of these instruments establish their own bodies that interpret the instruments, sometimes in the form of purely advisory bodies,[1] but also – and more pertinent to the topic of this chapter – as regular international courts with varying powers, such as the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU) and, as the youngest of these three courts, the EFTA Court. The relevance, and relative weight compared to other sources, of decisions by such bodies is also a question that national courts have to deal with, both from a principled and a more practical point of view.

The growing importance of human rights for EU law and EEA law also means that the ECtHR on the one hand, and the CJEU and the EFTA Court on the other hand

* The authors thank law clerk Fredrik Lilleby for his invaluable help in preparing this chapter.

[1] For instance, the Human Rights Committee established by the International Covenant on Civil and Political Rights, or the Committee on the Rights of the Child established by the Convention of the Rights of the Child.

may, directly or indirectly, come to address the same questions. This poses particular problems to national courts.

The possibility to refer questions of interpretation of EEA law to the EFTA Court in cases pending before national courts provides a forum for dialogue that is unique, even compared to the parallel system of preliminary rulings within the EU system. All national courts may ask the EFTA Court for guidance on the interpretation of EEA law. However, this dialogue has a special significance for national supreme courts, whose most important task is to provide guidance to other courts within the national judicial system. It is this dialogue that we will seek to explore in this chapter.

II. ADVISORY OPINIONS AS A 'PARTNER-LIKE' RELATIONSHIP

According to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), any 'court or tribunal' in an EEA/EFTA State may request the EFTA Court to give an advisory opinion on the interpretation of the EEA Agreement if such interpretation is necessary to enable that national court or tribunal to give judgment in a case pending before it.[2] This means that, unlike the situation in the EU, there is no obligation on national courts of last resort to make a reference to the EFTA Court. As the EFTA Court pointed out in *Irish Bank Resolution Corporation Ltd*, this in turn means that the relationship between the EFTA Court and national courts of last resort is 'more partner-like'.[3] However, the EFTA Court then went on to point out that when considering whether to refer a question to the EFTA Court, national courts of last resort must take account of the duty of loyal cooperation as laid down in Article 3 EEA.

Furthermore, and again unlike the system in the EU, the EFTA Court gives 'advisory opinions' rather than binding judgments to national courts. This also makes the system 'more partner-like' by opening a possibility of dialogue between the EFTA Court and national courts. As we shall see in section VI below, this dialogue often centres on the understanding of CJEU case law.

III. WHEN TO ASK? THE DISTINCTION BETWEEN INTERPRETATION AND APPLICATION

In Norwegian law, the possibility to ask the EFTA Court for advice is provided for in section 51a of the Courts of Justice Act.[4] Unlike the situation in Iceland described

[2] Article 34 allows the EFTA-EEA States to limit the right to request advisory opinions to courts and tribunals against whose decisions there is no judicial remedy. However, none of the EFTA-EEA States has done so, although Norway has barred its 'conciliation boards' (*forliksråd*) from requesting advisory opinions. These boards consist of laypeople. As the name suggests, their principal task is to facilitate amicable solutions to small-claims legal disputes between private parties, but they may also render judgment in such cases, provided they do not raise any complicated legal issues, typically non-disputed money claims. This means that such claims may become enforceable through a cost-efficient procedure and without burdening the regular courts.

[3] Case E-18/11 *Irish Bank Resolution Corporation Ltd*, para 57.

[4] Lov 13 august 1915 nr 5 om domstolene, with later amendments.

in *Irish Bank Resolution Corporation Ltd*,[5] a decision to ask, not to ask or how to ask may not be appealed. There is no requirement to give reasons for the decision. However, if the parties, or one of them, have argued in favour of submitting questions to the EFTA Court, it would often be natural for the court to give reasons for a decision not to do so. One example of the Supreme Court giving reasons for not asking is found in the *Gaming Machines* case, where the Appeals Selection Committee stated that the limits to regulating the market for games of chance had been clarified through rather extensive case law from the CJEU, and that concrete application of that case law to the factual and legal issues of the case at hand was a task for the national court.[6]

This distinction between interpretation on a more general level and concrete application plays an important role in Norwegian procedural law, as appellate rulings by the courts of appeal on orders and decisions by district courts may only be appealed on a point of law to the Supreme Court provided that the appeal concerns the general interpretation of a written rule.[7] In other words, the role of the Supreme Court is to safeguard the correct application of the law on a general level, not to substitute the view of lower courts with that of its own on the consequences of a correct interpretation for a concrete set of factual circumstances. For Norwegian courts, particularly the Supreme Court, it is natural to see the task of the EFTA Court in giving advisory opinions in the same light. This is even more so because the EFTA Court cannot rule on the evidence or the correct meaning of national law when dealing with a request for an advisory opinion, and it may have to give its advisory opinion at a stage of the case where the national court is yet to rule on evidence and national law. Thus, an advisory opinion that is too closely tied to the specifics of the case, as they seem to be at the time of the referral to the EFTA Court, may turn out to be less helpful than the EFTA Court intended.

On the other hand, an advisory opinion that is too general and abstract may also turn out to be less helpful than anticipated. Often, there is no clear dividing line between general interpretation and concrete application. Further, it may be that the description of the facts of the case and of national law provided by the national court – which are not necessarily either unclear or in dispute – demonstrates to the EFTA Court that the national court may make good use of an answer

[5] Case E-18/11 *Irish Bank Resolution Corporation Ltd*, paras 36–38.

[6] HR-2005-1630-U. From 2016, the traditional mode of referring to judgments by the Supreme Court underwent a change as the paper-based publication Norsk Retstidend (Rt) was discontinued at the end of 2015. From 2016, referrals are made to the Supreme Court's own decision numbers: 'HR-[year]-[number]-[either "A" for judgments by the Supreme Court, or "U" for decisions by the Supreme Court's Appeals Selection Committee, which also rules on certain others matters than leave to appeal, or "F" for decisions by the a single justice]'. For judgments and decisions prior to 2016, referrals are to 'Rt-[year]-[page]' if published in Norsk Retstidend; if not, as with HR-2005-1630-U, the decision number is used. Some Supreme Court judgments have become known under a specific name; in which case this name is used. Other judgments are simply referred to by the decision number or Rt-citation. The decision number, given after judgment has been rendered or the decision made, is not the same as the case number attributed to each case as the appeals are communicated to the Supreme Court by the courts of appeal.

[7] See § 30-3, first paragraph and § 30-6 litra c of the Dispute Act (lov 17 Juni 2005 nr 90 om mekling og rettergang i sivile tvister (tvisteloven)) and Section 388, first paragraph No. 3 of the Criminal Procedure Act (lov 22 mai 1981 nr 25 om rettergangsmåten i straffesaker (Straffeprosessloven)).

that is more detailed than the one envisaged by the national court when making the request.[8]

When a case reaches the Supreme Court, one should think that these problems do not play a role. When selecting judgments for further consideration, the Appeals Selection Committee of the Supreme Court will look for judgments that raise unsolved questions of interpretation of a general interest, rather than judgments where the parties still disagree on the facts of the case or the concrete application of the law. However, the correct general interpretation of national law may well depend on a rather concrete application of EEA law. Typically, one plausible interpretation of national law may raise an issue of proportionality of a restriction on free movement that another plausible interpretation will not. Even though it is well known on a general level how to apply the EEA principle of proportionality, it may be desirable in some cases to get the view of the EFTA Court on the consequences of the principle for a particular rule of national law.

A case in point is *Criminal Proceedings against N (NAV I)*.[9] For years, persons who had been receiving work-assessment allowance (*arbeidsavklaringspenger*) from the Norwegian Labour and Welfare Administration (NAV) while going abroad without having received an exemption from the obligation to stay in Norway while receiving such an allowance had been convicted of fraud, often receiving a prison sentence. It was clear that the legislature, the Storting, wanted such punishment for violating this 'presence requirement'. In 2019, it came to light that this practice may be contrary to EEA law, in particular the rules on free movement of services and of persons. The defendants themselves, the defence lawyers, the Public Prosecution Service and the courts – or the legislature – had not spotted this problem. At one point within NAV, there were seemingly doubts as to whether the situation was compatible with EEA law, although no action was taken. This 'NAV affair' led to much national debate and soul-searching, where opinions differed on whether the practice really was contrary to EEA law.[10] Earlier convictions were reopened, among them a judgment by the Supreme Court in which only the sentencing, not the conviction as such, had been appealed.[11] On reopening, it was clear that the Supreme Court would also consider the lawfulness of the conviction. In such a case, whatever the conclusion would be, it would gain in authority by being based on an advisory opinion by the EFTA Court. The Supreme Court put several questions to the EFTA Court, among them questions that clearly invited the EFTA Court to conclude on the proportionality of the practice, an invitation to which the EFTA Court responded.[12] In its grand chamber judgment, the Supreme Court accepted the view of the EFTA Court.[13]

[8] On this issue, which the CJEU must also deal with, see a more detailed analysis by OJ Einarsson, 'The Advisory Opinion Procedure and the Relationship between the EFTA Court and the Norwegian Courts: Recent Developments' (2022) *Lov og Rett* 221, in particular 236–38.

[9] Case E-8/20 *Criminal Proceedings against N*.

[10] See the report of the commission of enquiry, *NOU 2020: 9 Blindsonen*, with summary in English in Chapter 3.

[11] Case HR-2017-560-A. For the Supreme Court, the question of principle at that time was whether, in deciding on the correct punishment, account should be taken of the likelihood of getting an exemption from the presence requirement had the person in question applied for it before going abroad.

[12] See the advisory opinion in *Criminal Proceedings against N* (n 9) paras 42 and 107–28.

[13] HR-2021-1453-S at paras 174–84.

In section V, we will revert to the Supreme Court's view of the relevance and weight of advisory opinions. First, we will consider the actual use of the possibility to ask the EFTA Court for guidance on EEA law.

IV. THE SUPREME COURT'S OWN REFERRALS TO THE EFTA COURT

Between 1994 (when the EEA Agreement entered into force) and 2015, the Supreme Court only used the possibility to pose questions to the EFTA Court three times. However, in one of those cases, Rt-1998-330, the request ended up being withdrawn before the EFTA Court had delivered an advisory opinion. This case concerned security for litigation costs. The appeal to the Supreme Court was withdrawn and, consequently, so was the request for an advisory opinion.[14]

The two cases that the Supreme Court did decide after having received advisory opinions in this period were *Finanger I*[15] on motor vehicle insurance and *Paranova*[16] on parallel import of pharmaceuticals. However, the picture would be incomplete without pointing out that the Supreme Court in this period also decided four cases where lower courts had received advisory opinions from the EFTA Court. These were two cases, *Stavanger Catering*[17] and *Bardufoss Flyservice*,[18] respectively, on transfer of undertakings, *Pedicel*[19] on the Norwegian ban on advertisements for alcoholic beverages and *STX*[20] on the posting of workers.

In the same period, it is possible to identify four cases in which requests by one or both parties to the case to submit questions to the EFTA Court were rejected: Rt-2005-1365 (state liability for breach of EEA law), Rt-2007-1003 (state monopoly on gaming machines; the decision not to submit, HR-2005-1630-U, is mentioned above), Rt-2008-354 (motor vehicle insurance and reduction of damages due to own fault by the injured party) and Rt-2010-1500 (state liability for taxes imposed in violation of EEA law). In all four cases, the distinction between general interpretation and concrete application seems to have been an important factor in deciding not to submit.[21]

In a further nine cases in this period, the Supreme Court expressed some doubt with regard to the application of EEA law, without the parties having requested that the EFTA Court be asked for guidance or the Supreme Court doing so of its own motion.[22] In part, this is probably a reflection of the Supreme Court in this period seeing it as mainly up to the parties to take the initiative for questions to be put to the

[14] Rt-1998-330; Case E-5/97 *European Navigation Inc and Star Forsikring AS (uoa)*.
[15] Rt-2000-1811.
[16] Rt-2004-834.
[17] Rt-1997-1965.
[18] Rt-2010-330.
[19] Rt-2009-839.
[20] Rt-2013-258.
[21] For a more detailed analysis, see H Bull, 'Høyesteretts bruk av EU- og EØS-rett' in T Schei, JEA Skoghøy and TM Øie (eds), *Lov Sannhet Rett – Norges Høyesterett 200 år* (Oslo, Universitetsforlaget, 2015) 383–86.
[22] Rt-1999-393, Rt-1999-569, Rt-1999-579, Rt-2001-1390, Rt-2002-391, Rt-2005-1601, Rt-2006-1473, Rt-2012-686 and Rt-2012-761.

EFTA Court, but also in part the reluctance in referring the concrete application of EEA law to the EFTA Court, or the Supreme Court ending up with conclusions that did not really challenge EEA law.[23]

From 2015 until the autumn of 2023, the frequency of referrals to the EFTA Court by the Supreme Court has increased. During this period, the Supreme Court submitted questions in 10 cases, seven of which have already led to judgments, one of which was discontinued due to the appeal being withdrawn and two of which in the autumn of 2023 are still pending.

The seven cases are *Holship* (plenary judgment concerning the legality of a boycott action by dock workers and the right of establishment under EEA law),[24] *Ski Taxi SA* (joint bids for public procurement contracts as a possible restriction on competition),[25] *Thue* (the concept of 'working time' in Directive 2003/88/EC),[26] *Fosen-Linjen II* (the impact of EEA law on national rules on liability for breach of public procurement law),[27] *Kerim* (on the criteria for marriage of convenience in Directive 2004/38/EC),[28] *NAV I* (the compatibility with EEA law of a requirement not to leave Norway without permission while receiving a work assessment allowance, mentioned above in section III)[29] and *Norep* (the understanding of 'commercial agent' in Norwegian law based on Directive 86/653/EEC).[30]

In an eighth case, *Campbell*, the case before the Supreme Court was discontinued due to the appeal being withdrawn.[31] At that point, the EFTA Court had already delivered its advisory opinion to the Supreme Court.[32] The case concerned the derived right of residence in Norway for a third-country national married to a Norwegian national after the couple had been residents of Sweden. It must be understood in conjunction with *Jabbi*[33] before the EFTA Court. We will comment further on these two cases in section VII below.

The two cases that are still pending in the autumn of 2023 are both criminal cases. One concerns COVID-19 restrictions and free movement, and the other revisits the question of derived rights of entry and stay for non-EEA nationals married to EEA nationals, this time as a possible barrier to sanctioning a violation of an expulsion order issued against the non-EEA national.[34]

[23] For further analysis, see Bull (n 21) 387–91.

[24] HR-2016-2554-P; Case E-14/15 *Holship Norge AS v Norsk Transportarbeiderforbund*.

[25] HR-2017-1229-A *Ski Taxi*; Case E-3/16 *Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS v Staten v/Konkurransetilsynet*.

[26] HR-2018-1036-A; Case E-19/16 *Thorbjørn Selstad Thue v The Norwegian Government*.

[27] HR-2019-1801-A; Case E-7/18 *Fosen-Linjen AS supported by the Confederation of Norwegian Enterprise (Næringslivets Hovedorganisasjon) v AtB AS*. The Frostating Court of Appeal had asked the EFTA Court for guidance in the same case, and the answer of the EFTA Court in Case E-16/16 had generated a debate on whether the answer of the EFTA Court in that case was in line with CJEU case law on this question; see section VI below.

[28] HR-2021-1435-A; Case E-1/20 *Kerim v The Norwegian Government, Represented by the Immigration Appeals Board*.

[29] HR-2021-1453-S; *Criminal Proceedings against N* (n 9).

[30] HR-2022-728-A; Case E-2/21 *Norep AS v Haugen Gruppen AS*.

[31] HR-2020-1146-F.

[32] Case E-4/19 *Campbell v The Norwegian Government, Represented by the Immigration Appeals Board (Utlendingsnemnda – UNE)*.

[33] Case E-28/15 *Yankuba Jabbi v The Norwegian Government Represented by the Immigration Appeals Board*.

[34] Case E-5/23 *LDL v Påtalemyndigheten*; Case E-6/23 *MH v Påtalemyndigheten*.

Since 2015, the Supreme Court has also delivered two judgments in which lower courts had already asked the EFTA Court for guidance: first, *Yara* on Norwegian rules on intra-group contributions and the right of establishment,[35] where the EFTA Court had rendered an advisory opinion in the same case; and, second, *NAV II* and *NAV III*, where the advisory opinions concerned two other cases raising the same question of EEA law.[36] Like *NAV I*, the latter judgment of the Supreme Court concerned the presence requirement under Norwegian national insurance law, but this time tied to a different type of benefits, namely unemployment benefits. For this type of benefit, the EFTA Court found that Regulation 883/2004[37] did indeed allow for a presence requirement in the situation obtaining in those two cases.[38] This case and its relationship to *NAV I*[39] is discussed in more detail in section VI below.

In the period after 2015, there seem to be two cases in which the Supreme Court has rejected requests by one of the parties to submit questions to the EFTA Court. These are *CHC Helikopter Service*[40] on the criteria for calculating seniority in connection with workforce reduction, and *ISS Facility Services*[41] on the transfer of undertakings. It seems that the Supreme Court found the general interpretation of relevant EEA law to be sufficiently clarified through CJEU case law.

One may ask what the reasons are for this apparent shift in frequency of requests after 2015. We would caution against making too much out of this. Some of it may simply be the result of coincidence. Relevant cases do not necessarily come at regular intervals.

However, it seems to be a more general trend that it takes some time from new international instruments having been acceded to for their impact on national law to be fully understood by the courts. A case in point is the European Convention on Human Rights (ECHR).[42] Norway acceded to the Convention in 1953. Nevertheless, it was only in the 1990s that it became part of everyday life in Norwegian courts, with a particular impact on criminal procedural law.[43] It is not unreasonable to assume that EEA law has been going through a similar development. As new international rules gradually have more impact on lower courts, the rules will also play a more prominent role for the Supreme Court.

It may be that a few high-profile cases have contributed to increasing the awareness both of parties and courts of EEA law. As already mentioned, the *Holship* case

[35] HR-2019-140-A; Case E-15/16 *Yara International ASA v The Norwegian Government*.

[36] HR-2023-301-A; Case E-13/20 *O v The Norwegian Government Represented by the Labour and Welfare Directorate (Arbeids- og velferdsdirektoratet)* on questions posed by Norwegian National Insurance Court; and Case E-15/20 *Criminal Proceedings against A* on questions posed by the Borgarting Court of Appeal (whose judgment was not appealed to the Supreme Court), both delivered by the EFTA Court on 30 June 2021.

[37] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJL166, p 1.

[38] *O v The Norwegian Government* (n 36) and *Criminal Proceedings against A* (n 36), which were delivered on the same day.

[39] HR-2021-1453-S and *Criminal Proceedings against N* (n 9) before the EFTA Court.

[40] HR-2017-1943-A.

[41] HR-2020-1339-A.

[42] Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950.

[43] E Møse, 'Den internasjonale rettens innflytelse i Norge – EMK og andre menneskerettskonvensjoner' in Schei, Skoghøy and Øie (n 21) 324–27.

ended up as a plenary case before the Supreme Court. This made it necessary for the Supreme Court to go into sensitive questions of workers' right to organise. The 'NAV affair' demonstrated the indirect but very real impact that EEA law may have on criminal law and brought home to the courts the importance of verifying whether EEA law may be relevant, even if the parties themselves have not identified any EEA law issue.

V. THE 'ADVISORY' NATURE OF ADVISORY OPINIONS

In the plenary judgment reported in *Finanger I*,[44] the Supreme Court, for the first time, had occasion to comment on the advisory opinions being advisory rather than, as in the EU, judgments that are binding on the requesting national court. On p 1820 of Rt-2000, the Court states that since the opinion was advisory, the Supreme Court had the power and the obligation to decide whether the Supreme Court's judgment should be based on the opinion. For constitutional reasons, the Supreme Court could hardly have taken another view: without a basis in legislation, it could not have declared itself formally bound by a decision that expressly was 'advisory'.[45] However, it went on to state that advisory opinions must be accorded 'significant weight'. This, in the opinion of the Court, followed from the very fact that an EFTA Court had been set up with the task of rendering advisory opinions and that the Norwegian legislature, the Storting, had assumed that the advisory opinions be treated in this way. The Supreme Court also pointed to the expertise of the EFTA Court in a field of law governed by its own legal method, and to the procedure giving EFTA and EU institutions the possibility to submit written observations and make oral submissions.

This view was upheld in *Holship*, where, at paragraph 77, the Supreme Court stated the following:

> In their interpretation of EEA law, however, national courts shall attach considerable importance to the opinions of the EFTA Court concerning the interpretation of EEA law. The purpose of the EFTA Court is, according to the preamble of the Surveillance and Court Agreement, among other things, to 'arrive at and maintain a uniform interpretation and application of the EEA Agreement and those provisions of the Community legislation which are substantially reproduced in that Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition'. The EFTA state's courts must therefore normally apply the EFTA Court's interpretation of EEA law, and cannot disregard an advisory opinion by the EFTA Court unless 'special circumstances' so indicate, cf. Rt-2013-258, paragraphs 93–94, with reference to the plenary judgment of Rt-2000-1811 p. 1820. In order for the EFTA Court to fulfil its intended purpose, the court's interpretation of EEA law cannot normally be disregarded unless there are weighty and compelling reasons for doing so.[46]

[44] Rt-2000-1811.

[45] *Finanger I* was a split decision, but the majority and the minority agreed on this. The dissent concerned another issue.

[46] Also, *Holship* was a split decision, but not on this point.

The reference to 'special circumstances' and Rt-2013-258 concerns the *STX* case on the posting of workers, the only judgment in which the Supreme Court has demonstrated a willingness to disagree with the opinion of the EFTA Court so far. However, as the Supreme Court saw it, this was not decisive for the outcome of the case, and the disagreement turned on how best to understand relevant CJEU case law – the judgment does not demonstrate any willingness to depart from the principle of EU/EEA homogeneity and insist on the Supreme Court's own understanding of EEA law. Rather, as we shall see in section VI, the Supreme Court did not seem convinced that the EFTA Court's understanding of the relevant CJEU case law was on point.

However, the advisory nature of the opinions does mean that the Supreme Court may find it appropriate to give reasons for its acceptance of the interpretation given by the EFTA Court, even if no one has argued against it. Thus, in *Norep*,[47] mentioned above, the justice writing the lead opinion stated the following at paragraphs 47 and 48 after having cited the passage from *Holship* quoted above:

> In other words, an advisory opinion from the EFTA Court may only be disregarded if there are compelling reasons for doing so.
>
> I cannot see that such reasons have been demonstrated in the case at hand. The EFTA Court's statement is clear and builds on a number of sources of EU law. The statement is particularly supported by the ECJ's judgment of 4 June 2020 in Case C-828/18 *Trendsetteuse*.

In *NAV I*,[48] the Supreme Court also found it appropriate to discuss EEA law at some length rather than simply point to the conclusions of the EFTA Court, even though it did not disagree with the EFTA Court, and nor did the prosecution or counsel for the defence. This must be explained by the fact that the conclusions of the EFTA Court meant that Norwegian provisions on national insurance fraud could not be given the intended scope of application, and that different opinions had been voiced in the public debate on whether the presence requirement was compatible with EEA law.

With the opinions of the EFTA Court being advisory, there is also no need to distinguish between opinions rendered in the case at hand and opinions rendered in other cases. The latter carry the same weight as the former insofar as they concern the relevant question. The Supreme Court made this clear in *NAV II*, where, as was pointed out in section IV above, it relied on two advisory opinions by the EFTA Court concerning other cases, but the same question.[49]

VI. THE ADVISORY OPINION VERSUS CJEU CASE LAW

It follows from Article 6 EEA and Article 3 SCA that the case law of the CJEU is of paramount importance when interpreting EEA law. This is also clear from the EFTA

[47] HR-2022-728-A.
[48] HR-2021-1453-S.
[49] HR-2023-301-A, *O v The Norwegian Government* (n 36) and *Criminal Proceedings against A* (n 36) on questions by the Borgarting Court of Appeal. The Norwegian National Insurance Court does not handle criminal cases, so the case before it concerned a claim for refund of unemployment benefits received while abroad. However, the EEA law issue was the same.

Court's own case law. In practice, the EFTA Court has not distinguished between CJEU judgments rendered before and after the signing of the EEA Agreement, as the wording of Article 6 EEA and Article 3 SCA may suggest. Making a distinction on this point would have jeopardised the attainment of homogeneity between EU and EEA law. The Supreme Court of Norway has followed the same line.

However, the case law of the CJEU, as with all case law, is not necessarily unambiguous and completely stable. Opinions may differ on how to apply it to questions and situations that are slightly on the side of what the CJEU has dealt with thus far. On the one hand, this is precisely why an advisory opinion from the EFTA Court may be useful. On the other hand, this may also lead to a discussion on whether the CJEU would agree with the EFTA Court had the same questions been put to the CJEU. When the opinion of the EFTA Court has been challenged before the Supreme Court, and other Norwegian courts, the argument has mostly been that either the EFTA Court has overlooked or misinterpreted relevant CJEU judgments, or that the CJEU has handed down a conflicting judgment after the advisory opinion was issued.

The Supreme Court has treated such situations as a potential 'special circumstance' in which CJEU case law could give 'compelling reasons' to depart from the view of the EFTA Court.

The argument that the advisory opinion of the EFTA Court conflicted with a new judgment from the CJEU was heard in the plenary judgment reported in *Finanger I*[50] on the understanding of the motor insurance directives. The Supreme Court found it necessary to discuss the question in some detail but concluded that the new CJEU judgment did not constitute grounds for departing from the opinion of the EFTA Court.

A new example is *NAV II*.[51] As previously mentioned, this case concerned the presence requirement under Norwegian national insurance law, for being entitled to unemployment benefits. In *O v The Norwegian Government*[52] and *Criminal Proceedings against P*,[53] the EFTA Court had found that, unlike the work assessment allowance it had dealt with in *Criminal Proceedings against N*,[54] which had been found to fall under the provisions on sickness benefits in Regulation 883/2004,[55] unemployment benefits were regulated by Regulation in such a way as to exclude the application of the general principles on free movement as additional grounds for having the right to continue receiving them during temporary stays in other EEA States as long as the unemployed person was still under an obligation to be available for work. Before the case was pleaded before the Supreme Court, the EFTA Court's view was criticised by some scholars for not being in harmony with CJEU case law,[56] and counsel for the defence made the same argument before the Supreme Court. The

[50] Rt-2000-1811.

[51] HR-2023-301-A.

[52] *O v The Norwegian Government* (n 36).

[53] *Criminal Proceedings against A* (n 36), delivered on the same day as *O v The Norwegian Government* (n 36).

[54] *Criminal Proceedings against N* (n 9).

[55] Regulation (EC) No 883/2004 (n 37) 1.

[56] T. Bekkedal and MT Andenæs, 'Er mottakere av dagpenger beskyttet av EØS-avtalens grunnleggende rett til fri bevegelighet?' (2022) *Lov og Rett* 145.

Supreme Court followed the view of the EFTA Court, which had expressly dealt with the CJEU judgments in question.[57] This meant that in the case at hand, the presence requirement could be upheld, even as a basis for criminal liability. However, it did discuss the relevant CJEU case law in detail before it concluded that this case law did not provide 'sufficiently clear grounds to depart from the understanding of the EFTA Court'.[58] In a separate concurring opinion, one justice found reason to explain that even if the critics were right, and the case fell to be examined under the general rules of free movement of services, as had been the case for the work assessment allowance, the Norwegian presence requirement for unemployment benefits, in his view, was a legitimate and proportionate restriction on free movement. The very detailed discussion in *NAV II* should probably be understood against the background of this being a criminal case, and the difference between the view of the EFTA Court and the view of the critics meant the difference between conviction and acquittal.

As previously mentioned, *STX*[59] on the posting of workers is the only example of a Supreme Court judgment signalling disagreement with the opinion of the EFTA Court so far. In this case, there were no CJEU judgments that directly dealt with the same questions that the EFTA Court had answered. The Supreme Court seems to have found the view of the EFTA Court hard to reconcile with the wording of the directive in question and was not convinced that the CJEU judgments to which the EFTA Court had referred really could be interpreted in the way in which the EFTA Court had done.

It has been debated whether the Supreme Court should have stayed the proceedings and asked the EFTA Court for a new advisory opinion in a request where it explained its doubts rather than proceeding to signal this to the EFTA Court directly in the judgment. It may be that the Supreme Court did not see the need for a new advisory opinion because, in its view, the disagreement was not on a point that really decided the outcome of the case.

In a later case, the Supreme Court took the opportunity to ask again when there had been a discussion on whether the EFTA Court's opinion was in harmony with CJEU case law. *Fosen* concerned liability for the contracting authority after a public tender competition for new car ferries had been cancelled due to error in the competition base. In an advisory opinion to the Frostating Court of Appeal,[60] the EFTA Court seemed to conclude that EU and EEA law demanded strict liability. A debate arose as to whether the EFTA Court had interpreted CJEU case law correctly, centring on the relationship between the judgments in *Strabag*,[61] which could be interpreted to require strict liability, and *Combinatie Spijker*,[62] which was based on the concept of a 'sufficiently serious' breach. In its judgment, the Frostating Court of Appeal voiced its doubts about the EFTA Court's conclusion on this point, but found that in any case,

[57] Case C-406/04 *Gérald De Cuyper v Office national de l'emploi*, ECLI:EU:C:2006:49; C-228/07 *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich*, ECLI:EU:C:2008:494.
[58] Paragraph 116 of the judgment in HR-2023-301-A (n 51).
[59] Rt-2013-258.
[60] HR-2023-301-A; Case E-16/16 *Fosen-Linjen AS v AtB AS*.
[61] Case C-314/09 *Strabag and Others* ECLI:EU:C:2010:567.
[62] Case C-568/08 *Combinatie Spijker and Others*, ECLI:EU:C:2010:751.

there was not a sufficient causal link between the breach and the loss of the positive contract interest.

When the case reached the Supreme Court, the Court requested a new advisory opinion, citing new judgments of the CJEU as one reason why the EFTA Court might wish to reconsider its view on liability. In its advisory opinion in *Fosen-Linjen AS*,[63] the EFTA Court, where incidentally two of the three judges had not participated in the previous case, now concluded that liability could be made contingent on a 'sufficiently serious' breach of EEA law, and the Supreme Court endorsed this view.[64]

The *Fosen* cases are a good example of the 'partner-like' relationship between the EFTA Court and national courts.

VII. THE MEANING OF 'HOMOGENEITY'

Another area where the Supreme Court has engaged in a partner-like dialogue with the EFTA Court concerns the meaning of 'homogeneity' between EU law and EEA law. Does it mean homogeneous results even if a homogeneous understanding of the relevant legal sources suggests otherwise, or does it mean homogeneous understanding of the legal sources even if it leads to heterogeneous results?

This may seem like an odd question: a homogeneous understanding of legal sources is the best guarantee for homogeneous results. The problem nevertheless arises in areas where EU law has moved on from EEA law, and the CJEU bases its interpretation of provisions that form part both of EU law and EEA law on legal sources that are part only of EU law, not EEA law.

So far, this question has presented itself in the area of free movement of persons. Directive 2004/38/EC on free movement of persons[65] forms part of the EEA Agreement. Building on a previous generation of directives that were also part of the EEA Agreement,[66] the Directive extends a right to free movement, on certain conditions, beyond workers and self-employed persons, to groups that are not economically active, such as students and pensioners. According to the CJEU, the directive does not give a third-country national married to an EU Member State national a derived right to settle with his or her spouse in the home state of the EU Member State national after the latter has exercised his or her right to free movement by residing, with the third-country national, in another EU Member State. However, according to the

[63] Case E-7/18 *Fosen-Linjen AS Supported by the Confederation of Norwegian Enterprise (Næringslivets Hovedorganisasjon) v AtB AS*.

[64] On these judgments of the EFTA Court, see A Sanchez-Graells, 'The *Fosen-Linjen* Saga: Not So Simple after All?', ch 18 in this volume.

[65] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJL158, p 77.

[66] Directive 90/364/EEC on the right of residence, Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity and Directive 93/96/EEC on the right of residence for students.

CJEU, an analogous right does exist by virtue of Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) on free movement for Union citizens.[67]

This question does not arise when the EU Member State citizen has resided, together with the third-country spouse, in another EU Member State as an employed or self-employed person. In that case, it follows from the general rules on free movement of workers and the right of establishment that are part of both TFEU and the EEA Agreement that both may settle in the home country of the EU Member State national, provided certain conditions are fulfilled.[68] This means that the principle that the CJEU has established based on Union citizenship has limited practical importance.

There is no EEA equivalent to Union citizenship. This concept entered EU law after the EEA Agreement had been negotiated. In light of the more limited objectives of the EEA Agreement compared to that of the EU, it is in any case not obvious that a parallel concept of 'EEA citizenship' would have been included in the EEA Agreement.

This leaves a potential gap between EU law and EEA law. Even if it has limited practical importance, it is of course quite decisive for those individuals that risk falling into the gap.

In *Jabbi*,[69] the EFTA Court, in an advisory opinion to the Oslo District Court, closed the gap by coming to the conclusion that Directive 2004/38 as part of the EEA Agreement did indeed establish a derived right for third-country nationals to settle in the home country of their EEA State national spouse after the couple had lived together in another EEA State. In its judgment,[70] the Borgarting Court of Appeal remarked that it saw a 'certain tension' between CJEU case law and the opinion of the EFTA Court, but found that the conditions that had to be fulfilled according to the EFTA Court were in any case not fulfilled. Leave to appeal was denied by the Appeals Selection Committee of the Supreme Court.[71]

Another case raising the same question, *Campbell*, did reach the Supreme Court. In the oral hearing, the attorney representing the state invited the Supreme Court to reject the view of the EFTA Court in *Jabbi* as not consistent with the principle of homogeneity. This principle, it was argued, meant that in this case there was indeed a different outcome in EU law and EEA law. The Supreme Court stayed the proceedings and asked the EFTA Court for a new advisory opinion, again citing new case law from the CJEU in which the CJEU had confirmed its view that Directive 2004/38 on its own did not provide a derived right of residence for third-country spouses. In its response, in *Campbell*,[72] the EFTA Court held on to its view in *Jabbi*, but elaborated on its reasoning. It pointed out, among other things, that since no parallel to

[67] Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor – 10 – Immigratie, Integratie en Asiel v B.*, ECLU:EU:C 2014:135. One could perhaps ask whether the CJEU would have found such a right in the directive had there been no Art 21 TFEU on the right of free movement for EU citizens.

[68] See, for instance, Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v RNG Eind*, ECLI:EU:C:2007:771.

[69] *Yankuba Jabbi v The Norwegian Government* (n 33).

[70] LB-2017-98329-2 *A mot staten ved Utlendingsnemnda*.

[71] HR-2018-1711-U.

[72] *Campbell v The Norwegian Government* (n 32).

Article 21 TFEU exists in EEA law, the Directive must be interpreted differently in the EEA than in an EU context in order to realise the objective of the Directive, namely, above all, to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the EEA States.[73]

Before the Supreme Court could hold its second oral hearing, which this time was to take place before the grand chamber, Ms Campbell withdrew her appeal. The Supreme Court never got to continue its dialogue with the EFTA Court on this issue.

VIII. A DIALOGUE ALSO WITH THE ECtHR

In *Holship*,[74] on the legality of a boycott action by dock workers, it was argued before the Supreme Court that if EEA law prevented the boycott action from going ahead, EEA law would conflict with the freedom of association under Article 11 ECHR.[75] One could see this as a question of whether the boycott action, as an exercise of freedom of association, constituted a legitimate, including proportionate, restriction on free movement.[76] In its advisory opinion, the EFTA Court had very strongly suggested that the boycott in question could not otherwise be deemed to pursue an aim that could legitimately justify a restriction on free movement. Alternatively, one could see this as a question of whether declaring the boycott unlawful in the interest of free movement fulfilled the criteria, including proportionality, for restricting the freedom of association. In practice, the application of the principle of proportionality under both EU/EEA law and Article 11 ECHR was the central question under both approaches.[77] The Supreme Court[78] based itself on the pragmatic assumption that in conducting this test on the issue at hand, the CJEU, the EFTA Court, the ECtHR and the Norwegian Supreme Court would come to the same conclusions.[79] The Supreme Court then conducted the proportionality test from the starting point of EEA law.[80]

The case was brought before the ECtHR, which accepted the view of the Supreme Court that there was no violation of Article 11 ECHR.[81] In that sense, the Supreme Court's pragmatic approach to the proportionality test was proven right. However, as a matter of principle, the ECtHR did remark that from its perspective, the EEA

[73] Paragraph 57 of the advisory opinion.

[74] *Holship* (n 24).

[75] Convention for the Protection of Human Rights and Fundamental Freedoms.

[76] See paras 125–27 of the advisory opinion.

[77] For a more in-depth discussion, see TM Øie and H Bull, 'Fundamental Rights and Fundamental Law: The 2014 Revision of the Norwegian Constitution' in G Selvik, M-J Clifton, T Haas, L Lourenço and K Schwiesow (eds), *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher* (Cham, Springer, 2019).

[78] This was a split decision. The position of the minority meant that it did not have an opinion on this question.

[79] *Holship* (n 24) para 86. An English translation of the judgment is to be found on the website of the Supreme Court of Norway.

[80] ibid paras 110 et seq. The Supreme Court then avoided having to give a definitive answer to the question of whether the protection of freedom of association under Art 11 ECHR extended to boycott actions. This was also in dispute, and, at the time, there was no clear answer in the ECtHR case law.

[81] *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers Union (NTF) v Norway*, App No 45487/17.

freedom of establishment was not a counterbalancing fundamental right to freedom of association, but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality under Article 11, paragraph 2 ECHR on the criteria for legitimate restrictions on the freedom of association.[82]

It is logical that a court, whether national or international, considers its own legal system to be the starting point for legal reasoning. However, this means that national courts must balance potentially conflicting international instruments, each with its own international court. National courts may find it hard to satisfy all of them. With different starting points in EU law, EEA law and human rights law, there is no guarantee that the result will always be the same.

Probably, the remark by the ECtHR should be seen as part of a dialogue not only with the Norwegian Supreme Court and the EFTA Court, but also – and perhaps most importantly – with the CJEU. The judgments of the CJEU in *Viking Line*[83] and *Laval*[84] concerning industrial action and the principles of free movement were central to the *Holship* case. In its judgments in these cases, the CJEU recognised the right to collective action as a fundamental right under EU law, and then, after observing that this right may be made subject to certain restrictions,[85] went on to discuss whether, in the cases at hand, it constituted legitimate grounds for accepting proportionate restrictions on free movement.[86] The EU as such is not party to the ECHR, but discussions on its accession are ongoing. It is tempting to think that in *Holship*, the ECtHR took the opportunity to send a signal to the CJEU that under the ECHR, the approach to balancing EU and ECtHR rights is different from that applied by the CJEU in *Viking Line* and *Laval*.

IX. CONCLUDING REMARKS

Since 1994, the relationship between the Norwegian Supreme Court and the EFTA Court has developed and intensified. The number of requests for advisory opinions has increased. This development seems to continue, with two requests having been made in 2023. High-profile cases in the last 10 years or so, most notably *Holship* and the two NAV cases, have alerted Norwegian courts to the impact of EEA law.

The Supreme Court has introduced measures to better identify possible EEA law issues that the parties may not have seen themselves as the appeals are prepared for consideration by the Appeals Selection Committee. One can also see a tendency to

[82] *Holship* (n 24) para 118.

[83] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:292.

[84] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd 1, Byggettan, Svenska Elektrikerförbundet, Svenska Elektrikerförbundet*, ECLI:EU:C:2007:809.

[85] *Viking Line* (n 83) para 77, referring to para 74 of Case C-112/00 *Schmidberger, Laval* (n 84).

[86] *Viking Line* (n 83) paras 78 et seq; *Laval* (n 84) paras 94 et seq. It seems that in *Viking Line*, the CJEU treated the right to take collection action mostly as a means of attaining a wider aim of protection of workers and not really as part of a right to assembly as a fundamental right and legitimate aim in itself.

ask the EFTA Court for advice in cases where the parties themselves have not asked for it, as in *Ski Taxi*.[87]

The close connection of EEA law to EU law, but also, as demonstrated by *Holship*, to human rights law poses challenges to national courts and the EFTA Court alike. The willingness of the EFTA Court to engage in dialogue with national supreme courts is the best guarantee for a continued fruitful development of both EEA law and national law.

[87] HR-2017-1229-A.