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The goal of homogeneous interpretation of the law in the European

Two courts and two separate legal orders, but law that is essentially

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the internal judgment pools of certain supreme courts. The German Bundesgerichtshof is one of these "pilot courts".

These are the first steps towards a Europe-wide library and publication of relevant judgments by the courts in the EU. However, a severe problem remains to be solved, that is, the language question.

Anyhow, one thing is clear: The exchange of information about judgments concerning European law between European courts is indispensable for the unification of jurisdiction. For the purpose of ensuring legal uniformity in the Community this exchange of information will have to become a second pillar alongside the pillar regarding the institution of preliminary rulings.

2. And finally a second remark:

In the near future a recommendation initiated by the European Commission regarding a Common Frame of Reference (CFR) will be presented.

One of the purposes of the CFR will be to provide those applying the law with common principles, terminology, and definitions in the field of European contract law. The aim is to safeguard a coherent application of Community law.

This will also constitute an important step towards a judicial legal harmonisation.

3. Furthermore, the courts hope that the establishment of the unalex-library, especially the case law collection and the European commentary, will quickly proceed.

The goal of homogeneous interpretation of the law in the European Economic Area

Two courts and two separate legal orders, but law that is essentially identical in substance

*Prof. Dr. Carl Baudenbacher**

I. Introduction

The European Economic Area Agreement is based on a **two pillar approach** with an EC and an EFTA pillar. EEA law and EC law are two separate legal orders, but since EEA law originates from EC law,¹ they are largely identical in substance. In the EFTA pillar, the EFTA Surveillance Authority (ESA) functions as a counterpart of the Commission by monitoring the fulfilment of the obligations of the EFTA States as well as the compliance of private actors with the competition and State aid rules. The EFTA Court has been modelled after the template of the ECJ. When the EEA Agreement came into force, the Court consisted of five judges from Austria, Finland, Iceland, Norway and Sweden. Its seat was the old EFTA capital Geneva.² After the accession of Austria, Finland, and Sweden to the EC and of Liechtenstein to the EEA, i.e. since mid 1995, it is composed of three judges nominated by Iceland, Liechtenstein and Norway. In addition, there are six ad hoc judges. The EFTA Court is, however, working without an Advocate General. On 1 September 1996, the Court's seat was moved to Luxembourg.

With the establishment of the EFTA Court, a potential competition situation has been created that could, as a matter of principle, lead to forum shopping and to a race to the bottom (or to the top). In order to avoid that and to secure a level

playing field for individuals and economic operators, the drafters of the EEA Agreement have formulated special **homogeneity rules**. According to Article 6 EEA, the EFTA Court is supposed to interpret provisions of the EEA Agreement that are identical in substance to corresponding rules of the EC Treaty in conformity with the relevant rulings of the ECJ rendered prior to the date of signature of the EEA Agreement (2 May 1992). Under Article 3 II of the Surveillance and Court Agreement (SCA), the EFTA Court is required to pay due account to relevant ECJ rulings rendered after that date. The goal of creating a homogeneous and dynamic EEA is also mentioned in other provisions, in particular in the preamble to the Agreement. Further means intended to contribute to the homogeneous development of the case law in the EEA are the rights of the European Commission and of the EC Member States to submit statements of case or written observations (Article 20 of the Statute of the EFTA Court) and to intervene (Article 36(1) of the Statute of the EFTA Court) in cases before the EFTA Court. On the EC side, there are corresponding rights of ESA and of the EFTA States in cases before the Court of Justice of the European Communities in which one of the fields of application of the EEA Agreement is concerned (Article 23(3) resp. Article 40(3) of that Court's Statute). Under Article 106 EEA, a system of exchange of information concerning the judgments by the EFTA Court, the ECJ, the CFI, and the courts of last resort of the EEA/EFTA States has been set up. In case of a judicial conflict, dispute settlement proceedings could be opened.³

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¹ See Articles 97 *et seq.* EEA.

² Switzerland had negotiated and signed the EEA Agreement, but after a negative referendum in December 1992 was unable to ratify it.

³ Article 105 *et seq.* EEA.

II. EFTA Court following ECJ case law

1. General

The EFTA Court's case law is based on the ECJ's jurisprudence as far as such jurisprudence exists. Attempts by Governments of EFTA States to have provisions of the EEA Agreement interpreted differently from those of the EC Treaty because of an alleged difference in scope have been rejected. The same goes for assertions that minor restrictions of fundamental freedoms are permissible and that in EEA law there are additional justification grounds.⁴ That means that the basic **structures and principles of EC single market law** developed by the ECJ have been transposed into the EEA Agreement. That is so, above all, with respect to the elements of the EEA fundamental freedoms, of the competition law and the State aid law provisions. The case law on the general prohibition to discriminate, the fundamental freedoms and the justification grounds, the principle of proportionality as well as the elements of the competition rules (such as the notions of undertaking, of agreement, of interstate trade or of effect and object) and the State aid rules (such as the notions of selectivity, distortion of competition and trade between Contracting Parties) have been taken over by the EFTA Court. The same holds true of essential concepts of secondary law such as the transmitting State principle underlying the TV Directive, the concept of transfer of undertaking under the respective Directive, or the principle of EEA wide exhaustion of intellectual property rights.⁵ It is fair to say that the EFTA Court goes further in its citation practice than what is required under Articles 6 EEA and 3 II SCA.

2. Creative Homogeneity

The assumption that in view of the homogeneity rules laid down in the EEA Agreement and in the SCA the EFTA Court would be freed of the burden to carry out its own interpretations where "relevant" ECJ case law is available, would be premature. It has always been clear that the obligation to follow or to take into account the ECJ' case law relates primarily to the **outcome of a case** and to a lesser degree to the reasoning. It cannot be assumed that there is a judicial conflict only because the EFTA Court has chosen a different way of reasoning than the ECJ. In fact, the Dutch judge at the ECJ, Professor *Christiaan Timmermans*, has examined the case law of the EFTA Court regarding the question of whether a Contracting Party can only invoke mandatory requirements of general interest in order to justify restrictions of fundamental freedoms if the measures at issue are indistinctly applicable. He found that the EFTA Court has, in its recent case law, treated the written justification grounds and the requirements of general interest as **alternatively available justifi-**

fication grounds, no matter whether the national measure is distinctly or indistinctly applicable. With this, Judge Timmermans concluded, the EFTA Court has possibly gone beyond the parallel jurisprudence of the ECJ. He characterized this as „creative homogeneity“.⁶

The EFTA Court has acted accordingly on other occasions. In a number of cases, it has indicated that it does not take the ECJ's **Keck jurisprudence** for the last word of the wisdom.⁷ It went its own way with regard to the fundamental economic law issue of the relationship between **EEA competition law and collective bargaining**. In Case E-8/00 *LO* the Court held that collective agreements are to some extent sheltered from the cartel prohibition, but that this immunity is not unlimited.⁸ The ECJ for its part had a few years before ruled in a series of judgments that collective agreements concluded in pursuit of social policy objectives such as the improvement of conditions of work and employment, must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) (now: Art. 81[1]) of the Treaty without examining the limits of such immunity.⁹ In two recent judgments concerning the compatibility of gaming and betting State monopolies with the free movement of services and the freedom of establishment, the EFTA Court has applied the **proportionality test** in a different way than the ECJ has done in previous cases.¹⁰

III. Participation of Institutions and Governments

ESA and the **Commission** submitted observations in every single case dealt with by the EFTA Court. It's role is particularly important in view of the lack of an Advocate-General. The Commission, which is being represented by its Legal Service, is thereby making a significant contribution to the homogeneous development of the case law in the EEA. At the same time, the Commission pursues its own agenda. It also finds itself in a peculiar situation since it would be the institu-

⁶ *Christiaan Timmermans*, Creative Homogeneity, Festschrift for *Sven Norberg*, 2006, 471 et seqq.

⁷ See Cases E-5/96 *Nille*, 1997 EFTA Court Report, 30, at paragraphs 28 et seq., with reference to ECJ 17 October 1995 – C-124/94 – *DIP and Others v Comune di Bassano del Grappa and Comune di Chioggia*, 1995 ECR, I-3257; E-6/96 *Wilhelmsen*, 1997 EFTA Court Report, 53; E-4/04 *Pedidel* EFTA Court Report [2005] 1.

⁸ Case E-8/00 *LO* EFTA Court Report [2002] 114, para. 35.

⁹ ECJ 21 September 1999 – C-67/96 – *Albany* 1999 ECR, I-5751, paras 59-61; ECJ 21 September 1999 Joined Cases – C-115/97, C-116/97 and C-117/97 – *Brentjens* 1999 ECR, I-6025, ECJ 21 September 1999 – C-219/97 – *Drijvende Bokken* 1999 ECR, I-6121; ECJ 21 September 2000 – C-222/98 – *van der Woude* 2000 ECR, I-7111; ECJ 12 September 2000 Joined Cases – C-180/98 to C-184/98 – *Pavlov* 2000 ECR, I-6451.

¹⁰ Cases E-1/06 2007 EFTA *Surveillance Authority v The Kingdom of Norway*, EFTA Court Report, 7, at paragraphs 42 et seqq., 47 et seqq.; E-3/06 *Ladbrokes*, 2007 EFTA Court Report, 85, at paragraphs 49 ff., 55 et seqq.; see *Eleanor Cashin Ritaine/Eva Lein*, La notion de proportionnalité appliqué au droit des jeux de hasard – Les cas *Placamica* et Autorité de surveillance de l'AELE/Royaume de Norvège, *Schweizerisches Jahrbuch für Europarecht = annuaire Suisse de droit Européen* 2006/2007, 335, 367 et seqq.; *Eva Lein*, *Quo vadis Luxemburg?* Die europäische Rechtsprechung zum Glücksspielrecht, *ERA Forum* 2007, 8, 373 et seqq., 393 et seqq.; *Simon Planzer*, "Place your bets" – Towards a policy of responsible gambling (*Ladbrokes Ltd. v. The Kingdom of Norway*, Judgment of the EFTA Court of 30 May 2007, E-3/06), *European Law Reporter* No 6/2007. 206 et seqq., 208 et seqq.

⁴ See *Carl Baudenbacher*, Governments Before the EFTA Court, Festschrift til *Claus Gulmann*, Kopenhagen 2006, 23 et seqq., 30 et seqq., with references.

⁵ See EFTA Court. Legal framework and case law, 2nd edition, by *Carl Baudenbacher*, President of the EFTA Court, October 2006.

tion which would represent the Community if, due to a judicial conflict, the EEA Joint Committee were called to look for a solution. The EFTA Court has in many cases decided according to the suggestions of the Commission. But in important cases, for instance concerning EEA State liability, the relationship between collective bargaining and competition law, and international exhaustion of trademark rights, the EFTA Court has **not followed** the Commission's arguments.¹¹

EC Member States have submitted observations or intervened 48 times, namely Belgium,¹² Denmark,¹³ Finland,¹⁴ France,¹⁵ Germany,¹⁶ Greece,¹⁷ Hungary,¹⁸ the Netherlands,¹⁹ Poland,²⁰ Portugal,²¹ Slovenia,²² Spain,²³ Sweden,²⁴ and the United Kingdom.²⁵ On the other hand, the EFTA Surveillance

Authority has participated in 36 cases before the ECJ, Norway in more than 60, Iceland in 6 and Liechtenstein in 5 cases.

IV. ECJ following EFTA Court case law

1. ECJ interpreting EC law

In a number of cases, the ECJ referred to EFTA Court case law as a **main or even a leading argument** when interpreting EC law. Cases in point are the holding in joined cases C-34/95, 35/95, 36/95 *De Agostini and TV-Shop i Sverige*²⁶ that Directive 84/450/EEC concerning misleading advertising may apply to transfrontier TV broadcasts despite the fact that Articles 2(2) and 16 of the Television Directive 89/552/EEC have laid down the transmitting State principle (reference to Joined Cases E-8/94 and E-9/94 *Mattel Scandinavia and Lego Norge*),²⁷ the findings in C-13/95 *Süzen*,²⁸ that the succession of contracts, i.e. the termination of a contract with an independent service provider followed by the conclusion of a new contract with a more competitive service provider, did not constitute a transfer of an undertaking within the meaning of the respective Directive (reference to Case E-2/96 *Ulstein and Røiseng*),²⁹ and in C-172/00 *Oy Liikenne* that the circumstance that a transaction comes under Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts does not of itself rule out the application of Directive 77/187/EEC (reference to the EFTA Court's rulings in Cases *Eidesund* and E-3/96 *Ask and Others v ABB and Aker*).³⁰ Mention must also be made of the ECJ's statement in C-452/04 *Fidium Finanz*³¹ on how to decide which of two fundamental freedoms (freedom to provide services and free movement of capital) applies in a case involving the granting of credit by a company incorporated under foreign law with its registered office and central administration in a third country to residents of an EC Member State (reference to Case E-1/00 *Íslandsbanki*),³² and of the EC Court's holding in C-434/04 *Ahokainen and Leppik* that national legislation under which undenatured ethyl alcohol of an alcoholic strength

¹¹ As far as the relationship between the TV Directive 89/552/EEC and the Misleading Advertising Directive 84/450/EEC is concerned, the EFTA Court held in Joined Cases E-8/94 and E-9/94 *Mattel Scandinavia and Lego Norge* 1994-1995 EFTA Court Report, 113, that the latter may be invoked in the context of transfrontier broadcasts. In the subsequent Joined Cases ECJ 9 July 1997 – C-34/95, C-35/95 and C-36/95 – *De Agostini and TV-Shop i Sverige*, 1997 ECR, I-3843, the Commission unsuccessfully argued that this would be incompatible with the Transmitting State principle which is underlying the TV Directive. The ECJ rejected the Commission's stand and made reference to the EFTA Court's ruling (para. 37); Cases E-9/97 *Sveinbjörnsdóttir*, 1998 EFTA Court Report, 95; E-8/00 *LO EFTA* Court Report [2002] 114; E-2/97 *Maglite* EFTA Court Report [1997] 127.

¹² Cases E-1/06, *EFTA Surveillance Authority v Norway*, 2007 EFTA Court Report, 7; E-3/06 *Ladbroke*, 2007 EFTA Court Report, 85; E-8/07 *Celina Nguyen*, pending.

¹³ Cases E-3/00 *EFTA Surveillance Authority v Norway*, 2000-2001 EFTA Court Report, 73; Joined Cases E-11/07 and E-1/08 *Olga Rindel and Therese Slinning*, pending.

¹⁴ Cases E-1/06, *EFTA Surveillance Authority v Norway*, 2007 EFTA Court Report, 7; E-3/06 *Ladbroke*, 2007 EFTA Court Report, 85.

¹⁵ Cases E-2/97 *Maglite*, 1997 EFTA Court Report, 127; E-3/00 *EFTA Surveillance Authority v Norway*, 2000-2001 EFTA Court Report, 73; E-3/06 *Ladbroke*, 2007 EFTA Court Report, 85.

¹⁶ Cases E-3/96 *Tor Angeir Ask*, 1997 EFTA Court Report, 1; E-2/97 *Maglite*, 1997 EFTA Court Report, 127; E-3/04 *Athanasios*, 2004 EFTA Court Report, 95; E-3/06 *Ladbroke*, 2007 EFTA Court Report, 85; E-7/07 *Seabrokers*, judgment of 7 May 2008, nyr.

¹⁷ Joined Cases E-8/94 and E-9/94 *Mattel Scandinavia and Lego Norge* 1994-1995 EFTA Court Report, 113; Case E-1/06, *EFTA Surveillance Authority v Norway*, 2007 EFTA Court Report, 7; E-3/06 *Ladbroke*, 2007 EFTA Court Report, 85.

¹⁸ Case E-1/06, *EFTA Surveillance Authority v Norway*, 2006 EFTA Court Report, 7.

¹⁹ Cases E-2/98 *Federation of Icelandic Trade*, 1998 EFTA Court Report, 172; E-3/00 *EFTA Surveillance Authority v Norway*, 2000-2001 EFTA Court Report, 73; E-1/06, *EFTA Surveillance Authority v Norway*, 2007 EFTA Court Report, 7; E-3/06 *Ladbroke*, 2007 EFTA Court Report, 85.

²⁰ Case E-4/04 *Pedical*, 2005 EFTA Court Report, 1; E-2/06 *ESA v Norway (Waterfalls)*, 2007 EFTA Court Report, 163; Joined Cases E-11/07 and E-1/08 *Olga Rindel and Therese Slinning*, pending.

²¹ Cases E-1/06, *EFTA Surveillance Authority v Norway*, 2006 EFTA Court Report, 7; E-3/06 *Ladbroke*, 2007 EFTA Court Report, 85.

²² E-3/06 *Ladbroke*, 2007 EFTA Court Report, 85.

²³ E-3/06 *Ladbroke*, 2007 EFTA Court Report, 85.

²⁴ Cases E-2/95 *Eilert Eidesund*, 1995/1996 EFTA Court Report, 1; E-3/95 *Torgeir Langeland*, 1996 EFTA Court Report, 36; E-6/96 *Wilhelmsen*, 1997 EFTA Court Report, 53; E-8/97 *TV 1000*, 1998 EFTA Court Report, 68; E-9/97 *Sveinbjörnsdóttir*, 1998 EFTA Court Report, 95; E-8/00 *LO* 2002 EFTA Court Report, 114; E-1/06, *EFTA Surveillance Authority v Norway*, 2007 EFTA Court Report, 7.

²⁵ Cases E-2/95 *Eilert Eidesund*, 1995/1996 EFTA Court Report, 1; E-3/95 *Torgeir Langeland*, 1995/1996 EFTA Court Report, 36; E-2/96 *Ulstein and Røiseng*, 1995/1996 EFTA Court Report, 65; E-3/96 *Tor Angeir Ask*, 1997 EFTA Court Report, 1; E-2/97 *Maglite*, 1997 EFTA Court Report, 127; E-8/97 *TV 1000*, 1998 EFTA Court Report, 68; E-9/97 *Sveinbjörnsdóttir*, 1998 EFTA Court Report, 95; E-2/98 *Federation of Icelandic Trade*, 1998 EFTA Court Report, 172; E-1/04 *Fokus*

Bank, 2004 EFTA Court Report, 11; E-3/05 *EFTA Surveillance Authority v Norway*, 2006 EFTA Court Report, 101; E-5/06 *EFTA Surveillance Authority v Liechtenstein*, 2007 EFTA Court Report, 295; Joined Cases E-11/07 and E-1/08 *Olga Rindel and Therese Slinning*, pending.

²⁶ Joined Cases ECJ 9 July 1997 – C-34/95, C-35/95 and C-36/95 – *De Agostini and TV-shop i Sverige* [1997] ECR I-3843, para 62 and operative part. – These cases had originally been referred to the EFTA Court by the Swedish Market Court (Cases E-4/94 *De Agostini AB* EFTA Court Report [1994-95] 89, and E-5/94 *TV-shop i Sverige AB* EFTA Court Report [1994-95] 93). After Sweden's accession to the EU, that court withdrew the request for a preliminary ruling and, on 7 March 1995, referred it to the ECJ.

²⁷ EFTA Court Report [1994/95] 113.

²⁸ ECJ 11 March 1997 – C-13/95 – *Ayşe Süzen v Zehnacker Gebäudereinigung GmbH Krankenhauservice* [1997] ECR, I-1259.

²⁹ Case E-2/96, EFTA Court Report [1995-96] 65, para 27.

³⁰ 2001 ECR, I-745, para 21: References to Cases E-2/95 *Eilert Eidesund* 1995-96 EFTA Court Report 1, para. 50, and E-3/96 *Tor Angeir Ask*, 1997 EFTA Court Report 1, para 33. Advocate-General Léger had not mentioned the EFTA Court's judgments.

³¹ ECJ 3 October 2006 – C-452/04 – *Fidium Finanz AG* 2006 ECR, I-9521, para 49.

³² 2000-2001 EFTA Court Report 8, para 32, emphasis added.

of more than 80 % may be imported only by a person who has obtained a licence to do so in principle contrary to Article 28 EC (reference to Case E-1/94 *Restamark*).³³ EFTA Court case law, namely paragraphs 41 to 45 of the judgment in Case E-3/02 *Paranova v Merck*,³⁴ also served as a source of inspiration to the ECJ when the latter held in the context of repackaging of pharmaceuticals in C-348/04 *Boehringer Ingelheim II* “that the condition that packaging be necessary is directed only at the fact of repackaging the product – and the choice between a new carton and overstickings – for the purposes of allowing that product to be marketed in the importing State and not at the manner or style in which it has been repackaged”.³⁵ In Case T-308/00 *Salzgitter AG v Commission*, the CFI referred to EFTA Court case law when dealing with the issue of selectivity in the context of State aid law.³⁶

The most important cases of the ECJ following EFTA Court case law concern the recognition of the **precautionary principle** and of its premises in food law and related areas. In Case E-3/00 *EFTA Surveillance Authority v Norway*, the so-called *Kellogg’s* judgment,³⁷ the EFTA Court rejected the argument of the Norwegian Government that in order to justify a marketing ban on cornflakes fortified with vitamins and iron which had been lawfully manufactured and marketed in other EEA States, it was sufficient to show the absence of a nutritional need for the fortification in the Norwegian population. At the same time, the EFTA Court found that in examining whether the marketing of such goods may be banned on grounds of the protection of human health, a national government may, in the absence of harmonization, invoke the precautionary principle. According to that principle, it is sufficient for a Government to show that there is relevant scientific uncertainty with regard to the risk in question. The EFTA Court held that measures taken must be based on scientific evidence; they must be proportionate, non-discriminatory, transparent, and consistent with similar measures already taken. The potentially negative health consequences have to be identified, and the risk to health has to be comprehensively evaluated on the basis of the most recent scientific information. The Norwegian fortification policy did not fulfil these requirements and was therefore held to be contrary to Article 11 EEA.

In September 2002, the CFI in the two cases T-13/99 *Pfizer Animal Health* and T-70/99 *Alpharma* which involved the **fortification of animal feedingstuff with antibiotics** acknowledged the precautionary principle as being part of Community law. The CFI considered that the existence of

such a principle has in essence and at the very least implicitly been recognised by the ECJ, the CFI and the EFTA Court.³⁸ In Case C-192/01 *Commission v Denmark*,³⁹ the **facts were similar** to the ones in EFTA Court *Kellogg’s*. In its judgment of 23 September 2003, the ECJ recognized the precautionary principle and formulated essentially the same conditions for its application as the EFTA Court had done in *Kellogg’s*. The EC Court made no less than six references to the latter’s findings.⁴⁰ The ECJ also relied on EFTA Court *Kellogg’s* in its 2004 judgment in Case C-41/02 *Commission v Netherlands* which again dealt with the fortification of foodstuffs.⁴¹ Moreover, the ECJ in C-236/01 *Monsanto Agricoltura Italia* referred to EFTA Court *Kellogg’s* and held in a case concerning the release of **genetically modified maize** that the safeguard clause laid down in Article 12 of the so-called Novel Food Regulation No 258/97 must be understood as giving specific expression to the precautionary principle.⁴² Case C-286/02 *Bellio Fratelli* involved the confiscation of a Norwegian consignment of fish flour in Italy in the context of the **fight against BSE** after samples showed that it contained fragments of animal bones.⁴³ With regard to the precautionary principle and the conditions of its application, the ECJ repeatedly referred to EFTA Court *Kellogg’s*.⁴⁴

Occasionally, there may be a reference to EFTA Court jurisprudence in *ECJ case law* that has less the character of a main argument than of an **additional argument** or a further hint. That such additional citations may be important, is demonstrated by Case C-140/97 *Rechberger*, a case originating from Austria, whose facts occurred in 1994. The ECJ denied jurisdiction to rule on whether the principle of State liability applied in Austria after that country’s accession to the EEA on 1 January 1994, but pointed out that the principles governing the liability of an EFTA State for infringement of a directive were the subject of the EFTA Court’s judgment of 10 December 1998 in *Sveinbjörnsdóttir*.⁴⁵ In that case, the EFTA Court had acknowledged State liability to be part of EEA law. The ECJ’s reference to the EFTA Court’s case law was important because the Governments of Iceland, Sweden, and, in particular, Norway had opposed the idea of EEA State liability. Rather surprisingly, the Commission was of the same view.⁴⁶

³³ References to Case 1/04, 1994-1995 EFTA Court Report 15, paras 49 and 50 in ECJ 28 September 2006 – C-434/04 – *Ahokainen and Leppik*, 2006 ECR, I-9171 = [2006] EuLF I-207, para 20.

³⁴ 2003 EFTA Court Report 1.

³⁵ ECJ 26 April 2007 – C-348/04 – *Boehringer Ingelheim KG and Others v Swingward Ltd and Dowelhurst Ltd*. ECR, I-3391 = [2007] EuLF I-219, para. 38.

³⁶ ECJ 1 July 2004 – T-308/00 – *Salzgitter AG v Commission* 2004 ECR, II-1933: Reference to Case E-6/98 *Norway v EFTA Surveillance Authority*, EFTA Court Report 1998, 74.

³⁷ 2000-2001 EFTA Court Report 73.

³⁸ ECJ 11 September 2002 – T-13/99 – *Pfizer Animal Health* 2002 ECR, II-3305, para 115; ECJ 11 September 2002 – T-70/99 – *Alpharma* 2002 ECR, II-3495, para 136; see also the reference to the EFTA Court’s statement that preventive measures cannot properly be based on a purely hypothetical approach to the risk (*Pfizer Animal Health*, para. 143; *Alpharma*, para. 156).

³⁹ ECJ 23 September 2003 – C-192/01 – *Commission v Denmark* 2003 ECR, I-9693.

⁴⁰ References to paras 29 – 32 of the EFTA Court’s judgment in paras 47 – 53 of the ECJ’s judgment.

⁴¹ ECJ 2 December 2004 – C-41/02 – *Commission of the European Communities v Kingdom of the Netherlands* 2004 ECR, I-11375, para 62.

⁴² Reference to Case E-3/00, EFTA Court Report 2000-2001 73, paras 36 – 38, in ECJ 9 September 2003 – C-236/01 – *Monsanto* 2003 ECR, I-8105, para 106.

⁴³ ECJ 1 April 2004 – C-286/02 – *Bellio F.lli* 2004 ECR, I-3465.

⁴⁴ References to Case E-3/00 EFTA *Surveillance Authority v Norway* 2000-2001 EFTA Court Report 73 para 25, 26, and 27.

⁴⁵ ECJ 15 June 1999 – C-140/97 – *Rechberger* 1999 ECR I-3499, para 39.

⁴⁶ Case E-9/97 1998 EFTA Court Report 95.

The Common Market Law Review stated in Editorial Comments that with this reference, the ECJ has given “more than a ‘coup de chapeau’, a salute to the EFTA Court. With this statement, it is important to note, the EC Court appears to endorse the EFTA Court’s judgment”.⁴⁷ *John Forman*, a head of unit in the Commission’s legal service who pleaded a considerable number of cases before the EFTA Court (albeit not *Sveinbjörnsdóttir*), spoke of “express endorsement” and pointed out that the ECJ also made reference to the principle of uniformity as regards the interpretation and application of the EEA Agreement.⁴⁸ *Thérèse Blanchet*, a former member of the legal service of the EFTA Secretariat, stated that the ECJ “a entériné de manière lapidaire cette interprétation dans son arrêt ‘Rechberger’”.⁴⁹ It appears that compensation was in fact paid in the framework of a settlement before the referring Austrian court.⁵⁰

2. ECJ reconsidering its case law in the light of EFTA Court jurisprudence

In a few cases, the ECJ has reconsidered its case law in view of a judgment of the EFTA Court. In Case C-13/95 *Süzen* it followed the EFTA Court’s finding in Case E-2/96 *Ulstein* that the succession of contracts, i.e. the replacement of an independent service provider by a second one, does not normally constitute a transfer of an undertaking.⁵¹ The EC Court had previously interpreted the **notion of transfer of undertaking** in a rather expansive way, in particular by holding in C-392/92 *Christel Schmidt* that the outsourcing of a sheer activity could constitute a transfer.⁵² In academic literature, *Süzen* has been called a quiet good-bye to *Christel Schmidt*.⁵³ Seen from that perspective, one is prompted to conclude that the ECJ has reconsidered its case law in the light of the EFTA Court’s jurisprudence. As stated earlier, the EFTA Court found in Case C-3/00 *Kellogg’s* that a Member State could not limit itself to invoking a lack of a **nutritional need** in order to justify a prohibition to market fortified foodstuffs. Rather, that State had to prove a possible harm to public health even if it could thereby rely on the precautionary principle. In C-192/01 *Commission v Denmark*, the ECJ shared the opinion of the Commission which by way of reference to EFTA

Court *Kellogg’s* had argued that a general ban on the marketing of fortified foodstuffs could not be justified by the mere assertion that there was no respective nutritional need in the Member State concerned.⁵⁴ The ECJ’s jurisprudence on the **precautionary principle** was subsequently developed further by way of dialogue with the EFTA Court in *Bellio Fratelli*.⁵⁵

One may finally argue that the ECJ has clarified its case law concerning the interpretation of the **Motor Vehicle Insurance Directives** in Case C-537/03 *Katja Candolin* by holding that a provision of Finnish automobile liability law which excluded a passenger who took a ride in a car driven by an intoxicated driver from insurance coverage was incompatible with the Directives.⁵⁶

3. Advocates-General referring to EFTA Court case law

Advocates-General will, as a matter of principle, take into account virtually every source of information which will help them to fulfil their task under Article 222(2) EC. EFTA Court case law constitutes such a source. Opinions of Advocates-General are therefore an important gateway for EFTA Court case law into the ECJ’s jurisprudence. Advocates-General have relied on EFTA Court case law as a **main or leading argument** on a number of occasions. In Joined Cases C-34/95 C-35/95 and C-36/95 *De Agostini/TV-Shop i Sverige*, Advocate-General *Jacobs* referring to the EFTA Court’s rulings in Joined Cases E-8/94 and E-9/94 *Mattel Scandinavia/Lego Norge* concluded that trans-frontier advertising directed at children falls within the scope of the TV Directive and that by virtue of Article 2(2) of that Directive a receiving State may not restrict transmission on its territory.⁵⁷ In Case C-126/01 *GEMO*, Advocate-General *Jacobs* mentioned the EFTA Court’s *Husbanken II* judgment as a reference for the so-called “state aid approach” to the issue of whether financial compensation granted by a Member State to an undertaking providing a public service should be regarded as State aid.⁵⁸ In *Commission v Denmark* and in *Greenham and Abel*, Advo-

⁴⁷ Editorial Comments: European Economic Area and European Community: Homogeneity of legal orders?, 1999 CMLRev, 697, 700.

⁴⁸ *John Forman*, The EFTA Court Five Years On: Dynamic Homogeneity in Practice and its Implementation by the two EEA Courts, CMLRev. 1999, 751 et seq., 777, fn. 151.

⁴⁹ Le Succès Silencieux de Dix Ans d’Espace Économique Européen: Un Modèle pour l’Avenir avec d’Autres Voisins?, Liber Amicorum in Honour of *Sven Norberg*, edited by *Martin Johansson*, *Nils Wabl*, and *Ulf Bernitz*, Brussels 2006, 115.

⁵⁰ See *Georg Gorton*, Staatshaftung im EFTA-Pfeiler des EWR: Zusammenspiel von EuGH und EFTA-GH, European Law Reporter ELR 1999, 321 et seq., 323; *Christine Stix-Hackl*, Europa-Seiten im 5-Jahres-Spiegel, Österreichisches Anwaltsblatt 2000, 440, 468 et seq.; *Carl Baudenbacher*, Staatshaftung im gesamten Europäischen Wirtschaftsraum: EuGH und EFTA-Gerichtshof im Doppelpass, EWS 2000, 425 et seq., 430.

⁵¹ See above.

⁵² ECJ 14 April 1994 – C-392/92 – *Christel Schmidt* 1994 ECR, I-1311.

⁵³ *Franz Marhold*, Der leise Abschied von *Christel Schmidt* St. Galler Europarechtsbriefe EU B (1997) 162 et seqq.

⁵⁴ [2003] ECR, I-9693, paras 54 and 25; see Project on International Courts and Tribunals PICT, www.pict-pcti.org/research/systemic_issues/news.html: ECJ overrules its older case-law with reference to EFTA Court’s judgment; *Marco M. Slotboom*, Do Public Health Measures Receive Similar Treatment in European Community and World Trade Organization Law? Journal of World Trade (2003) 37(3), 553, 585; *Marco Bronckers*, Exceptions to liberal trade in foodstuffs: the precautionary approach and collective preferences, in *Carl Baudenbacher/Per Tresselt/Thorger Örylsson* (eds) The EFTA Court Ten Years On (2005).

⁵⁵ Case E-3/00 *EFTA Surveillance Authority v Norway* 2000-2001 EFTA Court Report 73, para 26.

⁵⁶ ECJ 30 June 2005 – C-537/03 – *Katja Candolin*, *Jari-Antero Viljanemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta* 2005 ECR, I-5745 = [2005] EuLF I-131. For details see *Carl Baudenbacher*, The EFTA Court, the ECJ, and the Latter’s Advocates General – a Tale of Judicial Dialogue, in: Continuity and Change in EU Law. Essays in Honour of *Sir Francis Jacobs*, edited by *Anthony Arnall*, *Piet Eckhout* and *Takis Tridimas*, Oxford University Press 2008, 90 et seq., 108 et seq.

⁵⁷ Opinion of *AG Jacobs* of 17 September 1996 in Joined Cases ECJ 9 July 1997 – C-34/95 C-35/95 and C-36/95 – *De Agostini/TV-Shop i Sverige* 1997 ECR, I-3843, Pts. 21, 46, 63.

⁵⁸ Opinion of *AG Jacobs* of 30 April 2002 in ECJ 20 November 2003 – C-126/01 – *GEMO* 2003 ECR, I-13769, at fn. 64, 77: References to Case E- E-4/97 *Husbanken II* 1997 EFTA Court Report 1, fn 64, 77.

cate-General *Mischo* advised the ECJ to follow the EFTA Court's 2001 *Kellogg's* ruling insofar as it recognized the right of Member States to invoke the precautionary principle when examining whether fortified food can be marketed or not.⁵⁹ In Case C-236/01 *Monsanto*, Advocate-General *Alber* emphasized that action is appropriate even where cause for concern is based on preliminary scientific findings, but that in view of the free movement of goods, not every claim or scientifically unfounded presumption of potential risk to human health or the environment can justify the adoption of national protective measures. Rather, Mr. *Alber* stated with reference to EFTA Court *Kellogg's* and CFI *Pfizer Animal Health*, "the risk must be adequately substantiated by scientific evidence".⁶⁰ In *Commission v. Netherlands*, Advocate-General *Poiães Maduro* made reference to the *Kellogg's* judgment when stating that a preventive measure which bans the marketing of enriched foodstuff based on health concerns cannot be properly based on hypothetical considerations.⁶¹ In Case C-452/01 *Ospelt*, Advocate-General *Geelhoed* rejected the Austrian Government's attempt to compare Article 40 EEA to Article 67 EEC in its pre-Maastricht version and referred to EFTA Court *Íslandsbanki*. Mr. *Geelhoed* stated that according to the latter's case law the provisions on free movement of capital in the EEA Agreement have direct effect.⁶² AG *Poiães Maduro* in Joined Cases C-232/04 and C-233/04 *Güney-Görres* referred to EFTA Court *Rasmussen* when concluding that the lack of transfer of ownership from one service provider to another does not prevent there being a transfer of assets, if it is established that the assets in question form part of the transferable entity.⁶³ In Case C-537/03 *Candolin*, Advocate-General *Geelhoed* proposed to the ECJ to hold that Community law precludes exclusions from cover by compulsory insurance against civil liability in respect of the use of motor vehicles other than the one explicitly referred to in the Second Motor Vehicle Insurance Directive (a person voluntarily entered a stolen vehicle) from being relied on by the insurer as against the passengers. Mr. *Geelhoed* referred to the EFTA Court's 1999 ruling in E-1/99 *Finanger* with regard several considerations.⁶⁴ In Case C-348/04 *Boebringner Ingelheim II*, Advocate-General *Sharpston*, citing passages from the EFTA Court's judgment in E-3/02 *Paranova v Merck* stated that the precise manner and style of re-boxing which affects only the outer packaging would not impair the guarantee of origin and that the notion of the condition of the goods being changed or

impaired in Article 7(2) of the Trade Marks Directive should not be broadly interpreted.⁶⁵ In Case C-434/04 *Jan-Erik Anders Ahokainen and Mati Leppik*, Advocate-General *Poiães Maduro* proposed the ECJ to hold that Article 28 EC precludes national legislation which requires a licence for the import of substances containing more than 80% by volume of undenatured ethyl alcohol from another Member State. When rejecting the Portuguese Government's contention that Article 28 EC did not preclude a system of prior import authorisation for spirits because it constituted neither a quantitative restriction on imports, nor a measure having equivalent effect, he referred, *inter alia*, to the EFTA Court's judgment in Case E-1/94 *Restamark*.⁶⁶ In his opinion of 12 September 2007 in Case C-380/05 *Centro Europa 7 Srl* Advocate-General *Poiães Maduro* when stating that it is possible for a licensing system which limits the total number of economic operators in the national territory to be justified in the light of considerations of public interest referred, *inter alia*, to E-3/06 *Ladbrokes*, paragraphs 40-48. In her opinion of 14 December 2007 in Case C-265/06 *Commission v Portugal*, Advocate General *Trstenjak* made several references to the EFTA Court's judgments in Cases E-1/94 *Restamark*, E-6/96 *Willemssen*, and E-4/04 *Pedicel*, when dealing with the notion of free movement of goods, the identity in substance of the prohibition of quantitative restrictions on imports and all measures having equivalent effect between the Member States in EEA and EC law, and the proportionality principle.⁶⁷ Mr. *Poiães Maduro* in Case C-438/05 *Viking Line* when stating that collective agreements must enjoy a "limited antitrust immunity" referred to E-8/00 *LO*.⁶⁸

Advocates-General have also made reference to EFTA Court case law as a further argument. Cases in point are the opinions of Mr. *Lenz* in C-222/94 *Commission v United Kingdom*, where he stated that the principal objective pursued by Council Directive 89/552/EEC is to remove barriers to the free provision of television broadcasting services (reference to the EFTA Court's judgment in Joined Cases E-8/94 and E-9/94 *Mattel Scandinavia and Lego Norge*),⁶⁹ of Mr. *Elmer* in Case C-189/95 *Franzén*, a case on the compatibility with Articles 28 and 31 of the EC Treaty of the Swedish legislation governing the retail sale of alcoholic beverages (reference to EFTA Court E-1/94 *Restamark*),⁷⁰ of Mr. *Poiães Maduro* in Case 319/03 *Briheche* when stating that under the Equal

⁵⁹ References to Case E-3/00 *Kellogg's* 2000-2001 EFTA Court Report 73, in the Opinions of AG *Mischo* of 12 December 2002 in Case – C-192/01 – *Commission ./. Denmark* 2003 ECR, I-9693, Pts. 81, 85, 87, 100, 125-128, and in Case 16 May 2002 – C-95/01 – *Greenham and Abel* 2004 ECR, I-1333, Pts. 44, 53 – 55.

⁶⁰ Opinion of AG *General Alber* of 13 March 2003 in Case – C-236/01 – *Monsanto* 2003 ECR, I-8105, Pts. 137 and 138 of the opinion.

⁶¹ *Ibid* pt. 46.

⁶² Reference to Case E-1/00 *Íslandsbanki* 2000-2001 EFTA Court Report 8, in Opinion of AG *Geelhoed* of 10 April 2003 in Case– C-452/01 – *Ospelt* 2003 ECR I-9743, fn. 32.

⁶³ Reference to Case E-2/04 *Rasmussen* 2004 EFTA Court Report 57, in Opinion of AG *Poiães Maduro* in Joined Cases 16 June 2005 – C-232/04 and C-233/04 – *Güney-Görres* 2005 ECR, I-11237, Pt. 15.

⁶⁴ Opinion of AG *Geelhoed* in Case 10 March 2005 – C-537/03 – *Candolin* 2005 ECR, I-5745, Pt. 42 and Fn. 14, Fn. 15, Pt. 51 and Fn. 17.

⁶⁵ References to Case E-3/02 *Merck v Paranova* 2003 EFTA Court Report 101, in Opinion of AG *Sharpston* in Case 6 April 2006 –C-348/04– *Boebringner Ingelheim II*, 2007 ECR, I-3391, Pts. 49-55.

⁶⁶ ECJ 28 September 2006 – C-434/04 – *Ahokainen and Leppik*, 2006 ECR, I-9171 = [2006] EuLF I-207, pts. 49 and 50.

⁶⁷ Footnotes 10, 13, 44.

⁶⁸ AG *Poiães Maduro* Case 23 May 2007 – C-438/05 – *Viking Line*, not yet published in the ECR, Pt. 27, fn. 24.

⁶⁹ AG *Lenz* Case 30 April 1996 – C-222/94 – *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* 1996 ECR, I-4025, Pt. 3: References to ECJ 9 February 1995 – C-412/93 – *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* 1995 ECR I-179, para 28; 1994-1995 EFTA Court Report 113, para 22.

⁷⁰ Reference to Case E-1/94 *Restamark* 1994-1995 EFTA Court Report 15 by AG *Elmer* in Case 4 March 1997 – C-189/95 – *Criminal proceedings against Harry Franzén* 1997 ECR, I-5909, Pt. 3.

Rights Directive 76/207/EEC and Article 141(4) EC measures favouring women in order to reduce their underrepresentation in professional life must be reconciled as far as possible with the equal treatment principle (reference to E-1/02 *University of Oslo*).⁷¹

Certain Advocates-General are prepared to enter a **substantial or even dialectic argument** with the EFTA Court. In his opinion in Joined Cases C-34/95, C-35/95 und C-36/95 *De Agostini* and *TV Shop i Sverige*, Advocate-General Jacobs unsuccessfully advised the ECJ to follow the holding in EFTA Court *Mattel Scandinavia/Lego Norge* 1995 that the TV Directive prevents receiving States from controlling **trans-frontier TV broadcasts**, but not the dictum that such control may be based on the Misleading Advertising Directive.⁷² In his opinion in C-355/96 *Silhouette*, a case involving the question of whether EC Member States were under Article 7(1) of the Trade Mark Directive entitled to opt for **international exhaustion**. Mr. Jacobs made reference to the EFTA Court's judgment in Case E-2/97 *Maglite*.⁷³ The EFTA Court had concluded that Article 7(1) of the Trade Mark Directive was to be interpreted as leaving it up to the EFTA States parties to the EEA Agreement to decide whether they wish to introduce or maintain the principle of international exhaustion of rights conferred by a trade mark with regard to goods originating from outside the EEA. Mr. Jacobs distinguished the two cases on the facts (in *Maglite*, unlike in *Silhouette*, the parallel imports stemmed from the U.S., i.e. from outside the EEA) and on the law (unlike the EC Treaty, the EEA Agreement has not established a customs union, but a free trade area in which sovereignty in foreign trade matters lies with the Contracting Parties). He also found the argument put forward in *Silhouette* by the Swedish government that the function of trade marks is not to enable the trade mark owner to divide up the market and to exploit price differentials and that the adoption of international exhaustion would bring substantial advantages to consumers, and would promote price competition, "extremely attractively".⁷⁴ The same approach is underlying the EFTA Court's *Maglite* ruling. However, the Advocate-General concluded that the ECJ's case law on the function of trade marks was developed in the context of the Community, not the world market, and to allow Member States to opt for international exhaustion would itself result in barriers between Member States. The ECJ followed that reasoning without making reference to the EFTA Court's *Maglite* ruling. In his opinions in Case C-95/01 *Greenham* and *Abel* of 16 May 2002 and in C-392/01 *Commission v Denmark* of 12 December 2002, Advocate-General *Mischko* advised the ECJ not to follow the EFTA Court's finding that a Member State may

not rely on the **nutritional need** argument.⁷⁵

As already stated, the ECJ did not follow this proposal. In Cases C-374/04 *Test Claimants* and C-170/05 *Denkavit*, Advocate-General *Geelhoed* asked the ECJ not to follow the EFTA Court's 2004 *Fokus Bank* ruling which found that a Member State which grants a tax credit to shareholders residing in that State on dividends paid by domestic companies, but denies such a favour to shareholders residing in other EEA countries (outbound dividends) violates the **free movement of capital**. The EFTA Court rejected the Norwegian attempt to justify this violation by invoking bilateral double taxation agreements.⁷⁶ Mr. *Geelhoed* proposed the ECJ to hold that the effects of DTA's should be taken into account in this assessment.⁷⁷ In *Test Claimants* the EC Court's Grand Chamber acknowledged, in principle, that the effects of DTA's could be taken into account. It did not make reference to the EFTA Court's *Fokus Bank* judgment.⁷⁸ In *Denkavit*, the ECJ's First Chamber followed that line of argument.⁷⁹ Both judgments do not refer to the EFTA Court's *Fokus Bank* judgment.⁸⁰ In Case C-170/04 *Rosengren*,⁸¹ the ECJ was asked whether a **ban on private imports of alcoholic beverages** such as that imposed by the Swedish Alcohol Law constituted a rule concerning the operation of a retail sales monopoly in the products in question which was to be examined under Article 31 EC. The EC Court had laid down in Case C-185/95 *Franzén* a general test whereby "the rules relating to the existence and operation of the monopoly" of a State retail alcohol monopoly are to be examined with reference to Article 31 EC, whereas "the effect on intra-Community trade of the other provisions of the domestic legislation which [are] separable from the operation of the monopoly" are to be examined with reference to Article 28 EC.⁸² *Rosengren*, the EFTA Surveillance Authority, and the Commission argued that the ban falls under Article 28 EC. The Governments of Sweden, Finland and Norway were of the opposite view. In his opinion of 30 November 2006, Advocate-General *Mengozzi* Extensively dealt with the EFTA Court's judgment in Case E-4/05 *HOB-vin* of 17 January 2006.⁸³ In that case, the EFTA Court held, *inter alia*, that the requirements that products of a certain quantity must be delivered on a pallet and that the price of the pallet must be included in the price of the product related to the operation of the monopoly. Since they exclusively applied

⁷¹ *AG Póaires Maduro* Case 29 June 2004 – C-319/03 – *Serge Bribeche* 2004 ECR, I-8807, Pts. 34, 36 and 40: References to Case E-1/02 *EFTA v University of Oslo* 2003 EFTA Court Report 1.

⁷² Opinion at pt. 85

⁷³ Case E-2/97 1997 EFTA Court Report 127.

⁷⁴ *AG Jacobs* Case 29 January 1998 – C-355/96 – 1998 ECR, I-4799, Pts. 48 *et seq.*; see *Carl Baudenbacher*, Trademark Law and Parallel Imports in a Globalized World – Recent Developments in Europe with Special Regard to the Legal Situation in the United States, 22 *Fordham Int'l L.J.* 645 *et seq.*

⁷⁵ Opinion of *AG Mischko* of 16 May 2002 in Case– C-95/01 – *Greenham and Abel* 2004 ECR, I-1333 Pts. 51 – 73 and 87.

⁷⁶ See above.

⁷⁷ Opinion of *AG Geelhoed* of 23 February 2006 in Case– C-374/04 – *Test Claimants* 2006 ECR, I-11673, Pt. 71, and in Case 27 April 2006 – C-170/05 – *Denkavit* 2006 ECR, I-11949, pt. 39.

⁷⁸ ECJ 12 December 2006 – C-374/04 – *Test Claimants*, 2006 ECR, I-11673.

⁷⁹ ECJ 14 December 2006 – C-170/05 – *Denkavit*, 2006 ECR, I-11949 = [2006] EuLF I-210.

⁸⁰ In the field of social security law, see the Opinion of *AG Kokott* of 29 March 2007 in Case C-287/05 *Hendrix* 2007 ECR I-6909, fn. 39.

⁸¹ Opinion of *AG Mengozzi* of 30 November 2006 in Case– C-170/04 – *Rosengren* 2007 ECR, 4071, pts. 52-56.

⁸² ECJ 23 October 1997 – C-189/95 – *Franzén* 1997 ECR I-5909, paras 35 and 36.

⁸³ 2006 EFTA Court Report 3.

to the monopoly, they had to be considered inseparable from its operation.⁸⁴

The EFTA Court has, for its part, referred to opinions of Advocates-General in particular in cases where there was **no relevant ECJ case law**. In Joined Cases C-E-5/04, E-6/04 and E-7/04 *Fesil and Finn fjord and Others v EFTA Surveillance Authority*, it cited Advocate-General *Jacobs* who had stated in his opinion in Case C-99/98 *Austria v Commission* that the new system established by Council Regulation No 659/1999 laying down detailed rules for the application of Article 93 EC ‘strikes a somewhat novel and different balance between the interests of the Community, of Member States and of other interested parties ... it would ... be hazardous to isolate individual rules of that Regulation and to claim that those rules (which would be necessarily taken out of their context) codify the preexisting state of the law’. The EFTA Court shared this view.⁸⁵ In Case E-3/05 *EFTA Surveillance Authority v Norway* (“*Finnmark*”), the EFTA Court held that a Norwegian regulation giving parents living together with their children in a certain region up to the age of 18 the right to obtain family allowances was compatible with Article 73 of Regulation 1408/71. With regard to the relationship between Council Regulation No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Council Regulation No 1612/68 on freedom of movement of workers within the Community, the EFTA Court referred to the opinion of Advocate-General *Alber* in Case C-35/97 *Commission v France*.⁸⁶

In some cases the EFTA Court made reference to opinions of Advocates-General **despite there being relevant ECJ case law**. In Case E-1/04 *Fokus Bank* the EFTA Court held that provisions of the EEA Agreement on free movement of capital are essentially identical in substance to the ones of the EC Treaty as amended by the Maastricht Treaty. The EFTA Court referred to the ECJ’s judgment in Case C-452/02 *Ospelt*, but also to the opinion of Advocate-General *Geelhoed* in that case.⁸⁷ In Case E-1/02 *University of Oslo* the EFTA Court decided that the earmarking of a certain number of academic posts for women was incompatible with the principle of equal treatment laid down in the respective Directive. The EFTA Court first described the development of the ECJ’s case law and cited two cornerstones in this development, the opinions of Advocate-General *Tesauro* in Case C-450/93 *Kalanke* and of Advocate-General *Saggio* in Case C-158/97 *Badeck*.⁸⁸ In Case E-6/07 *HOB vín II*, the EFTA Court when

dealing with the concept of taxation within the meaning of Article 14 EEA, the provision mirroring Article 90 EC, not only cited the judgment of the ECJ in C-90/94 *Haahr Petroleum*, but also the Opinion of Advocate General *Jacobs* in that case.⁸⁹

Occasionally, the EFTA Court made reference to the Advocates-General’s opinion although (or because) it pursued **another line of argument** than the ECJ’s judgment. In Case E-8/00 *Norwegian Federation of Trade Unions*,⁹⁰ the EFTA Court held that articles of a collective agreement which pursue the aim of improving the conditions of work and employment do not fall within the scope of the EEA competition rules. This did not mean, however, that provisions of collective agreements were automatically sheltered from competition law.⁹¹ The ECJ had in C-67/96 *Albany* not made this reservation. Unlike the ECJ, the EFTA Court made reference to Advocate General *Jacobs*’ opinion in C-67/96 *Albany*.⁹² In its judgment in Case E-2/02 *Bellona* of 19 June 2003,⁹³ the EFTA Court decided that a Norwegian environmental foundation, and a German environmental consulting firm did not have *locus standi* to challenge a decision of the EFTA Surveillance Authority addressed to Norway under Article 36(2) EEA, the provision mirroring Article 230(4) EC. The foundation was unable to demonstrate that its own commercial or financial interests were adversely affected, it is not an association and has no members. The German consulting firm was deemed not to be affected by any competition arising from the adoption of the contested decision. Although the EFTA Court did not deviate from the ECJ’s case law, it made reference to Advocate General *Jacobs*’ Opinion in Case C-50/00 *Pequeños Agricultores* where the latter had unsuccessfully proposed the ECJ to overrule its *Plauman* jurisprudence and to replace it by a more liberal approach.

4. ECJ securing the homogeneous development of EEA law in cooperation with the EFTA Court

The EFTA Court has in its very first case, E-1/94 *Restamark*, and ever since emphasized the importance of the objective of the Contracting Parties to create a dynamic and ho-

⁸⁴ *Ibid*, para 25.

⁸⁵ Reference to the Opinion of AG *Jacobs* in Case 13 July 2000 – C-99/98 – *Austria v Commission* 2001 ECR, I-1101 in Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finn fjord*, 2005 EFTA Court Report 117, para 123.

⁸⁶ Reference to the Opinion of AG *Alber* in Case 26 March 1998 – C-35/97 – *Commission v France* 1998 ECR I-5325 in Case E-3/05 *EFTA Surveillance Authority v Norway*, 2006 EFTA Court Report 101, pt. 63

⁸⁷ Reference to the Opinion of AG *Geelhoed* in Case 10 April 2003 – C-452/01 – *Ospelt* 2003 ECR, I-9743 in Case E-1/04 *Fokus Bank* 2004 EFTA Court Report 11, para 23.

⁸⁸ References to the Opinion of AG *Tesauro* in Case 6 April 1995 –

C-450/93 – *Kalanke* 1995 ECR, I-3051, and of AG *Saggio* in Case 10 June 1999 – C-158/97 – *Badeck* 2000 ECR, I-1875 in Case E-1/02 *University of Oslo* 2003 EFTA Court Report 1, paras 37 und 40.

⁸⁹ Judgment of 5 March 2008, nyr., para. 26 *et seqq.*, 35 (ECJ 17 July 1997 and opinion of AG *Jacobs* of 27 February 1997 – C-90/94 – *Haahr Petroleum*, 1997 ECR, I-4085). In two recent cases, the EFTA Court quoted passages from the parties’ written pleadings which contained references to Opinions of Advocates General (Cases E-5/07 *Private Barnebaggers v ESA*, judgment of 21 February 2008, nyr., para. 66: Reference of the Applicant to AG *Jacobs*’ Opinion in Case 13 September 2001 – C-218/00 – *Cisal*, 2002 ECR, I-691; E-5/06 *ESA v Liechtenstein*, 2007 EFTA Court Report, 295, para. 40 and 42: Reference to AG *Kokott*’s Opinion in Case 20 October 2005 – C-286/03 – *Hosse*, 2006 ECR, I-1771).

⁹⁰ Case E-8/00 *Norwegian Federation of Trade Unions and Others v Norwegian Association of Local and Regional Authorities and Others* 2002 EFTA Court Report 114.

⁹¹ *Ibid*, paras 55 *et seq.*

⁹² ECJ 21 September 1999 and opinion of AG *Jacobs* 28 January 1999 – C-67/96 – *Albany* 1999 ECR, I-5751.

⁹³ 2003 EFTA Court Report 52, paras 36 *et seq.*

mogeneous EEA.⁹⁴ The *CFI* in its judgment of 22 January 1997 in Case T-115/94 *Opel Austria* stated that the two pillar system underlying the EEA Agreement was reinforced, in addition to the similarity between the terms of the various provisions of the Agreement and the EC Treaty, by specific rules aimed at guaranteeing a homogeneous development of the case law and referred to the judgments of the EFTA Court in Cases E-1/94 *Restamark* and E-2/94 *Scottish Salmon Growers*.⁹⁵

A series of judgments rendered by the ECJ and the EFTA Court in the years 2003/2004 was particularly important for guaranteeing a homogeneous development of the case law in the EFTA pillar of the EEA. In Case C-452/01 *Ospelt* which involved national restrictions on the free movement of capital, the ECJ saw it as **its task** to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly within the Member States.⁹⁶ In Case E-1/03 *ESA v Iceland*, when ruling on the compatibility of Icelandic legislation, which imposed a higher tax per air passenger travelling from Iceland to other EEA States than per passenger travelling on domestic flights, with the freedom to provide services, pointed to the homogeneity objective laid down in EEA law and referred to Case C-452/01 *Ospelt*.⁹⁷ The ECJ took up that ball in C-286/02 *Bellio Fratelli*, a case dealt with under EEA law, by emphasizing that, **“both the Court and the EFTA Court** have recognised the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly”.⁹⁸ On that point, the ECJ referred to its judgment in Case C-452/01 *Ospelt*,⁹⁹ and to the EFTA Court’s ruling in Case E-1/03 *EFTA Surveillance Authority v Iceland*.¹⁰⁰ The EFTA Court, for its part, replied eight months later in Case E-1/04 *Fokus Bank*¹⁰¹ by pointing to the importance of the homogeneity objective and referring to its judgment in Case E-1/03 *ESA v Iceland* and the ECJ’s judgment in Case C-286/02 *Bellio Fratelli*. The ECJ’s holding on the significance of homogeneity in *Bellio* has since been used in tax law cases involving the interpretation of the EC Treaty and of the EEA Agreement: C-471/04 *Keller Holding*,¹⁰² Case C-345/05

Commission v. Portugal;¹⁰³ Case C-522/04 *Commission v Belgium*.¹⁰⁴

5. National courts of EC countries asking the ECJ to clarify its case law in the light of EFTA Court jurisprudence

National courts of EC Member States have in three major cases referred questions to the ECJ under the Article 234 EC procedure on the ground that due to EFTA Court case law, there is doubt about the legal situation within the meaning of the CILFIT formula.

In the second *Boehringer* case, the England and Wales Court of Appeal referred, *inter alia*, the question to the ECJ whether the use by a parallel importer and re-packager of pharmaceuticals of **its own design elements** (referred to as “co-branding”) was in line with the Directive’s provisions on the exhaustion principle and the ECJ’s case law related thereto, in particular the “necessity test” developed by the ECJ in the context of the act of re-packaging itself.¹⁰⁵ The Court of Appeal emphasized that with regard to this question, there appeared to be two schools of thought in European justice: Whereas the EFTA Court’s jurisprudence showed a positive approach towards the parallel importer creating a package design of its own, the Supreme Courts of Austria, Denmark, and Germany, as well as the Svea (Stockholm) Court of Appeal, applied a strict necessity test and tended to prohibit conduct such as *Paranova*’s in the EFTA Court’s judgment.¹⁰⁶ The Court of Appeal hinted that it tended to side with the EFTA Court and referred the question to the ECJ whether the condition that it must be shown that it is necessary to repackage the product in order that effective market access is not hindered, applies merely to the fact of re-boxing (“as held by the EFTA Court in Case E-3/02 *Paranova v Merck*”) or also to the precise manner and style of the re-boxing carried out by the parallel importer.

On 21 September 2005, the Amsterdam Court of Appeal requested the ECJ for a preliminary ruling regarding the compatibility of the Dutch **dividend withholding tax exemption** for intercompany dividend payments.¹⁰⁷ *Amurta* was a tax resident of Portugal and owned 14% of the shares in a Dutch company. It filed an objection to the levy of 25 Dutch dividend withholding tax arguing that the free movement of capital under Article 56 EC was violated since a company resident in the Netherlands would not have been subject to withholding tax. The Court considered that *Amurta*, being a non-

⁹⁴ Case E-1/94 *Restamark*, 1994-1995 EFTA Court Report, paras 24, 32 – 35, 44 et seqq.; see *Vincent Kronenberger*, Does the EFTA Court Interpret the EEA Agreement as if It were the EC Treaty? Some Questions Raised by the *Restamark* Judgment, 45 Intl & Comp. L.Q. 198, 207.

⁹⁵ References to EFTA Court *Restamark*, paras 24, 33 and 34 and to *Scottish Salmon Growers*, para 29 in ECJ 22 January 2007 – T-115/94 – *Opel Austria GmbH v Council of the European Union* [1997] ECR II-39, para 108.

⁹⁶ *Ibid*, para 29.

⁹⁷ 2003 EFTA Court Report 143, para 27.

⁹⁸ Para 34, emphasis added.

⁹⁹ ECJ 23 September 2003 – C-452/01 – *Ospelt* 2003 ECR I-9743, para 29.

¹⁰⁰ 2003 EFTA Court Report, 143, para 27.

¹⁰¹ 2004 EFTA Court Report 11, para 22; see with regard to the development described in the text also *Dirk Buschle*, The Free Movement of Capital in the EEA – A *Lehrstück* in Homogeneity, in: *Monti, et al.*, eds., Economic Law and Justice in Times of Globalisation, Festschrift for *Carl Baudenbacher*, Baden-Baden/Vienna/Berne 2007, 75 et seqq., 82 et seqq.

¹⁰² ECJ 23 February 2006 – C-471/04 – *Keller Holding*, 2006 ECR, I-2107,

para. 48.

¹⁰³ ECJ 26 October 2006 – C-345/05 – *Commission v. Portugal*, 2006 ECR, I-10633, para. 40.

¹⁰⁴ ECJ 5 July 2007 – C-522/04 – *Commission of the European Communities v Kingdom of Belgium* 2007 ECR, I-5701, para. 44.

¹⁰⁵ 2004 EWCA (Civ) 129.

¹⁰⁶ ECJ 26 April 2007 – C-348/04 – *Boehringer Ingelheim KG and Others v Swingward Ltd and Dowelhurst Ltd*. 2007 ECR I-3391 = [2007] EuLF I-219.

¹⁰⁷ ECJ 8 November 2007 – C-379/05 – *Amurta*. *AG Mengozzi* made reference to the EFTA Court’s *Fokus Bank* judgment (see fn. 23 of his Opinion of 7 June 2007), but the ECJ did not (not yet published in the ECR).

resident, was in principle not in a situation comparable to that of a resident taxpayer, that there was no restriction of the free movement of capital, because the taxpayer was able to credit the Dutch withholding tax against the company's corporate tax liability in Portugal and that even if the Dutch levy constituted a restriction of the free movement of capital, it was justified based on the coherence of the Dutch tax system. Nevertheless, in light of the EFTA Court's judgment in Case 1/04 *Fokus Bank*, the Court of Appeals considered that its preliminary conclusions were not free from all reasonable doubt. The EFTA Court in *Fokus Bank*¹⁰⁸ had declared the Norwegian imputation tax credit system according to which shareholders resident in Norway were granted an imputation tax credit, whereas this credit was not granted to shareholders non-resident in Norway to be in breach of Article 40 EEA. The fact that Contracting Parties are, within the framework of double taxation agreements, at liberty to determine the connecting factors for the purposes of allocating powers of taxation as between themselves was not held to mean that in the exercise of the power of taxation so allocated, a Contracting Party may disregard EEA law. The EFTA Court considered shareholders resident and non-resident in Norway to be in an objectively comparable situation, it did not accept cohesion of the international tax system as a justification, since this would amount to giving bilateral tax agreements preference over EEA law.

The German Supreme Fiscal Court (*Bundesfinanzhof*) on 29 June 2006 submitted, *inter alia*, the question to the ECJ of whether it is compatible with Articles 56 EC and 58 EC and with Article 43 EC for a national rule to provide for divergent set-off arrangements for the distribution of profits by a capital company using portions of its own capital, resulting in consequent tax liability even in cases in which the capital company demonstrates that it has distributed **dividends to non-resident shareholders**, even though, under national law, such non-resident shareholders, unlike resident shareholders, are not entitled to set off against their own tax the corporation tax thus determined. In its reasons, the *Bundesfinanzhof* made ample reference to the EFTA Court's *Fokus Bank* judgment.¹⁰⁹

V. Conclusions

In its first Opinion on the Draft EEA Agreement, 1/91, the ECJ uttered serious doubts as to whether homogeneity of the case law could be achieved.¹¹⁰ Such fears have turned out to be unfounded. No judicial conflict has been asserted by the EEA Contracting Parties in the fifteen years of the EFTA Court's existence. This is remarkable in light of the fact that the homogeneity guarantees of the EEA Agreement, as described above, are rather weak. That the case law in the EEA has developed in a homogeneous way is not only due to the fact that

the EFTA Court is taking the homogeneity rules very seriously.

The ECJ for its part has made important contributions to that outcome. It is willing to enter a dialogue with the EFTA Court and even to reconsider and to adjust its case law in the light of the EFTA Court's jurisprudence. Experience shows that the ECJ will take its little sister court's jurisprudence into account if the latter has answered a **fresh legal question**, provided the ECJ shares the EFTA Court's position with regard to the outcome and the reasons. In a small number of cases, the ECJ has given reasons that differ from the ones previously relied on by the EFTA Court. In such cases, the ECJ will not deal with the EFTA Court's judgment.¹¹¹ One must conclude from this that the judicial dialogue between the ECJ and the EFTA Court is essentially **affirmative in nature**. Some Advocates-General tend to be more generous when referring to EFTA Court jurisprudence. A number of them would even enter a substantial discussion with the EFTA Court. Overall, one may say that the written homogeneity rules laid down in the EEA Agreement have been complemented by judicial dialogue. ECJ President *Vassilios Skouris* has rightly stated that the results produced by the cooperation between the ECJ and the EFTA Court "constitute a true paradigm for international cooperation between judicial institutions".¹¹²

¹¹¹ See the ECJ's 1997 judgment in Case 23 October 1997 – C-189/95 – *Franzén* 1997 ECR, I-5909, and the EFTA Court's judgment in Case E-6/96 *Wilhelmsen* 1997 EFTA Court Report 53, concerning the relationship between Articles 28 and 31 EC and between Articles 11 and 13 EEA in the assessment of a state alcohol retail monopoly; the ECJ's judgment in Case 16 July 1998 – C-355/96 – *Silhouette* [1998] ECR, I-4799 and the EFTA Court's ruling in E-2/97 *Maglite* EFTA Court Report[1997] 127, concerning international exhaustion of trademark rights under the Trademark Directive 89/104/EEC; the ECJ's judgment in 14 September 1998 – C-348/98 – *Ferreira* 2000 ECR, I-6711, and the EFTA Court ruling in E-1/99 *Finanger* 1999 EFTA Court Report 119, concerning the scope of application of the Motor Vehicle Insurance Directives; and the ECJ's judgments in Cases 12 December 2006 – C-374/04 – *Test Claimants*, 2006 ECR, I-11673, and 14 December 2006 – C-170/05 – *Denkavit*, 2006 ECR, I-11949 = [2006] EuLF I-210, on the one hand, and E-1/04 *Fokus Bank* 2004 EFTA Court Report 11, on the other, concerning the taxation of out-bound dividends.

¹¹² The ECJ and the EFTA Court under the EEA Agreement in *Carl Baudenbacher/Per Tresselt/Thorgeir Örylgsson* (eds), *The EFTA Court Ten Years On*, (2005) 123, 129; see also *Christiaan Timmermans*, *The European Union's Judicial System*, CMLRev. 2004, 393, 400; *Francis G. Jacobs*, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, TILJ Vol. 38, Special 2003: Symposium Judicialization and Globalization of the Judiciary, 2003, 547, 552; *Carl Baudenbacher*, *The EFTA Court: An Actor in the European Judicial Dialogue*, 28 *Fordham International Law Journal*, 353 *et seqq.* (2005); *Allan Rosas*, *Methods of Interpretation – Judicial Dialogue*, in: *Carl Baudenbacher and Erhard Buseck*, Eds., *The Role of International Courts*, Heidelberg 2008, 185 *et seqq.*

¹⁰⁸ Case E-1/04 *Fokus Bank ASA* 2004 EFTA Court Report 11.

¹⁰⁹ ECJ – C-284/06 – *Finanzamt Hamburg-Am Tierpark v Burda Verlagsbeteiligungen GmbH*, pending.

¹¹⁰ 1991 ECR, 6097 *et seqq.*