ARTICLES

# The EEA Agreement as a Jack-in-the-box in the Relationship Between the CJEU and the European Court of Human Rights?

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Abstract: In the scholarly debate about the relationship between the European Court of Human Rights and the CJEU, the potential impact of the Agreement on the European Economic Area (EEA) is often overlooked. Unless the European Court of Human Rights' equivalent protection doctrine is extended to the EEA, the door is open for indirect ECHR review of all the parts of EU law that have been made part of the EEA Agreement and as such implemented into the national laws of the participating European Free Trade Association (EFTA) States. The impact of CJEU case-law in the EFTA pillar of the EEA is such that this will come very close to full (albeit indirect) scrutiny of the CJEU's protection of fundamental rights within the EU's internal market. An extension of the equivalent protection doctrine to EEA law admittedly presupposes a novel approach to the question of whether an international treaty establishes a system that offers a level of human rights protection equivalent to that of the ECHR, and to the limitation to strict legal obligations established in *Bosphorus*. Nevertheless, we submit that the European Court of Human Rights ought to rethink its apparent opposition to the idea. This will also offer an opportunity to clarify the relationship between

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/421

the judgments in *Matthews* and *Bosphorus* with regard to obligations flowing from international treaties to which Member States have freely entered into.

KEYWORDS: European Court of Human Rights – CJEU – EFTA Court – EFTA States – EEA – equivalent protection.

## I. INTRODUCTION

In the scholarly debate about the complex and complicated relationship between the European Court of Human Rights and the CJEU, the potential impact of the 1992 Agreement on the European Economic Area (EEA) is often overlooked. The EEA Agreement is an international agreement between the EU, the EU Member States and three of the remaining four Member States of the European Free Trade Association (EFTA), which for more than 25 years have integrated the latter (Iceland, Liechtenstein and Norway) into the better part of the EU's internal market.[1] Its principal objective, in the words of both the CJEU and the separate Court of Justice of the EFTA pillar of the EEA (EFTA Court),[2] is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market is extended to the participating EFTA States.[3] In order to fulfil this objective, more or less the entire internal market *acquis* is incorporated into the Agreement[4] and as such subjected to specific rules of interpretation intended to secure uniform application of EU and EEA law in "a homogeneous European Economic Area" (Art. 1 EEA).[5] As a result of this, the well-known need to balance the fundamental freedoms of the internal market and the fundamental (human) rights that the CJEU has recognised as general principles of EU law is also to be found in the EEA. Furthermore, as the three EEA/EFTA States are all parties to the European Convention on Human Rights (ECHR), the potential for conflicts between their EEA and ECHR obligations is comparable to the better-known potential for conflicts between EU Member States obligations under EU and ECHR law.

[1] Agreement on the European Economic Area. The fourth remaining EFTA State, Switzerland, remains outside the EEA as the result of a referendum held in 1992. Certain sectors of the internal market are kept outside the EEA Agreement (agriculture, fisheries, etc.), but that is of no concern for our present purposes.

[2] Established by the participating EFTA States as a substitute for the CJEU, as required by Art. 108 EEA.

[3] See Court of Justice, judgment of 23 September 2003, case C-452/01, *Ospelt and Schlössle Weissenberg*, para. 29, and the EFTA Court's follow-up in its judgment of 12 December 2003, case E-1/03, *EFTA Surveillance Authority v. Iceland*, para. 27. This understanding of the Agreement's objective has been normative for the interpretation of EEA law ever since, see e.g. the recent confirmation by the Court of Justice, judgment of 2 April 2020, case C-897/19 PPU, *Ruska Federacija* [GC], para. 50.

[4] At the time of writing, more than 12 500 EU legal acts have been incorporated into the EEA Agreement since the signing in 1992. Of these acts, around half are currently in force, see www.efta.int.

[5] For an introduction, see H.H. FREDRIKSEN, C. FRANKLIN, *Of Pragmatism and Principles: The EEA Agreement 20 Years On*, in *Common Market Law Review*, 2015, p. 629 *et seq.*

As far as the EU Member States are concerned, the European Court of Human Rights decided in the seminal *Bosphorus* judgment that they are shielded from full ECHR review by the so-called equivalent protection doctrine. Holding that EU law provides "equivalent protection" of human rights "as regards both the substantive guarantees offered and the mechanisms controlling their observance",[6] the European Court of Human Rights established a strong presumption of convention compatibility that applies if an EU Member State has done nothing more than to implement EU law obligations. The presumption is rebutted only if it is demonstrated that the protection of ECHR rights was "manifestly deficient" in the circumstances of that particular case.[7] Indirectly, but hardly inadvertently, this established a pragmatic allocation of tasks between the European Court of Human Rights and the CJEU that has reduced the potential for judicial conflicts between the two courts considerably.

The question of whether the equivalent protection doctrine extends to the EEA and the participating EFTA States, however, remains open.[8] There are indeed differences between EU law and the law of the EFTA pillar of the EEA that may suggest an answer in the negative. However, such a conclusion would leave the door wide open for indirect ECHR review of all parts of EU law that have been incorporated into the EEA Agreement and as such implemented into the national laws of the participating EFTA States. The impact of CJEU case-law in the EFTA pillar of the EEA is such that this would come very close to full (albeit indirect) scrutiny of the CJEU's protection of fundamental rights within the scope of the EU's internal market. It would also leave the EEA/EFTA States in a difficult situation in cases where there indeed are tensions between the CJEU's and the European Court of Human Rights' balancing of fundamental rights and freedoms.

[6] European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], para. 155. The doctrine is often referred to as the "*Bosphorus* doctrine", but we prefer the term "equivalent protection doctrine" as it predates the *Bosphorus* judgment. The roots of the equivalent protection doctrine at least go back to European Commission of Human Rights, decision of 9 February 1990, no. 13258/87, *M & Co v. Germany*.

[7] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 156 *et seq.*

[8] There is some, but not much literature on this. See, in the English language: C. BAUDENBACHER, *Fundamental Rights in EEA Law or: How Far from Bosphorus Is the European Economic Area Agreement?*, in S. BREITENMOSER, B. EHRENZELLER, M. SASSOLI, W. STOFFEL, B. W. PFEIFER (eds), *Human Rights, Democracy and the Rule of Law: Liber amicorum Luzius Wildhaber*, Baden-Baden: Nomos , 2007, p. 59 *et seq.* (suggesting that *Bosphorus* could be extended to cover the EEA/EFTA system); D.T. BJÖRGVINSSON, *Fundamental Rights in EEA Law*, in The EFTA Court (ed.), *The EEA and the EFTA Court – Decentered Integration*, Oxford: Hart, 2014, p. 271 *et seq.* (rejecting analogous application of *Bosphorus*). An early contribution in the Norwegian language is H.H. FREDRIKSEN, K.E. SKODVIN, *Den europeiske menneskerettighetsdomstolens kontroll med vern av grunnleggende rettigheter i EF, EU og EØS*, in *Tidsskrift for Rettsvitenskap*, 2006, p. 566 *et seq*. (scepticism towards the *Bosphorus* doctrine as such carried over to the question of its applicability to the EEA/EFTA System, but partially for reasons that have later been remedied – such as the EFTA Court's subsequent recognition of fundamental rights as unwritten general principles of EEA law, see section IV.1 below).

In its recent judgment in the case of *Konkurrenten.no v. Norway*, the European Court of Human Rights suggested in passing (*obiter dictum*) that the equivalent protection doctrine does not apply to the EEA Agreement.[9] This inherent differentiation between EU and EEA law parts with the approach of the CJEU, which has come to considers the EEA/EFTA States to be "on the same footing as Member States of the European Union"[10] and their citizens to be in a situation "objectively comparable with that of an EU citizen to whom, in accordance with Art. 3, para. 2, TEU, the Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured".[11]

In this *Article*, we will first sketch out the European Court of Human Rights' case-law on the interaction between the ECHR regime and international organisations (section II) and then present the *Konkurrenten.no* case (section III). The main part of our contribution is a critical review of the European Court of Human Rights' reasons for the suggested non-application of the equivalent protection doctrine to the EEA/EFTA system (section IV), followed by an analysis of whether other characteristics of the EEA nevertheless compel the same result (section V). We identify the delimitation of the equivalent protection doctrine towards international legal obligations "freely entered into", as established in *Matthews* and apparently upheld in *Bosphorus*, as the main challenge to an extension of the doctrine to the EEA. We nevertheless argue that the *raison d'être* of the equivalent protection doctrine suggests that obligations flowing from judicial evolution of (implicitly) *open-ended treaty commitments* ought to be covered by the equivalent protection doctrine, and on this basis that the doctrine can be extended to the EEA/EFTA system. In the final section, we submit that the European Court of Human Rights ought to reconsider the *obiter dictum* in *Konkurrenten.no* when ruling upon the pending case *LO and NTF v. Norway*.[12]

In the following, we use the term "EEA/EFTA system" to refer to the substantive and procedural system established by the EEA Agreement and the closely related Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (EEA/EFTA Surveillance and Court Agreement – SCA).[13] The European Union and its Member States are also parties to the EEA Agreement, but not to the

[9] European Court of Human Rights, decision of 5 November 2019, no. 47341/15, *Konkurrenten.no AS v. Norway*, para. 45.

[10] Court of Justice, judgment of 18 December 2015, case C-81/13, *United Kingdom v. Council* [GC], para. 59 (differentiating the EEA Agreement from the EEC-Turkey Association Agreement).

[11] *Ruska Federacija* [GC], cit., para. 58.

[12] European Court of Human Rights, no. 45487/17, *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway* (communicated 30 April 2019).

[13] Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice of 2 May 1992 (hereafter: SCA). For the consolidated Agreement with all its protocols and annexes, see www.efta.int.

SCA.[14] For the purposes of this *Article*, it is the situation for the EEA/EFTA States *vis-à-vis* the ECHR and the European Court of Human Rights that is of interest. The EEA Agreement forms an integral part of the Union legal system and is as such to be applied by the EU Member States in conformity with the fundamental rights guaranteed by primary EU law.[15] It follows from this that the application of EEA law in the EU Member States is already covered by the *Bosphorus* presumption of ECHR conformity.[16]

The scope of the contribution is limited to whether the equivalent protection doctrine, *as it currently applies to the EU Member States*, ought to be extended to the EFTA States in the EEA. We will not enter into the debate about the continued justification of the *Bosphorus* presumption in a situation where the road to EU accession to the ECHR has become much longer than originally anticipated, and where the CJEU has arguably become more interested in the EU's own Charter of Fundamental Rights than in the ECHR. From the perspective of the EEA/EFTA States, the main concern is equal treatment with the EU Member States, not so much the exact level of scrutiny to which the European Court of Human Rights subjects them all. If the European Court of Human Rights instead took the step of abolishing the equivalent protection doctrine altogether, rather than extending it to the EEA, we would thus not object.

## II. Attribution of conduct and the European Court of Human Rights case-law on international organisations

The European Court of Human Rights has developed a voluminous case-law on the interaction between the ECHR regime and international organisations. We do not need to reiterate all the twists and turns of this case-law here.[17] Nevertheless, one fundamental distinction is crucial for properly understanding the equivalent protection doctrine and its (potential) applicability to the EEA/EFTA system. That is the distinction between conduct attributed solely to an international organisation (IO-attributed conduct) and conduct attributed solely or partially to a Member State implementing a decision of an international organisation (MS-attributed conduct).[18]

[14] As EU Member States' fulfilment of their EEA law obligations is monitored by the European Commission and adjudicated upon by the CJEU, in accordance with the general rules of the TFEU, see (implicitly) Art. 108 EEA and (explicitly, as far as the Commission is concerned) Art. 109 EEA.

[15] In the hierarchy of EU norms, international agreements rank above legal acts enacted by the EU institutions, but below the Treaties, the Charter of Fundamental Rights and the general principles that together constitute so-called primary EU law.

[16] Despite the general wording of the *obiter dictum* in *Konkurrenten.no AS v. Norway*, cit., it thus seems safe to assume that the European Court of Human Rights had only the EFTA pillar of the EEA in mind.

[17] For a recent study of this case-law, see E. Ravasi, *Human Rights Protection by the ECtHR and the ECJ*, Leiden: Brill, Nijhoff, 2017, p. 19 *et seq*.

[18] We are far from the first to emphasise this distinction. See e.g.: T. Lock, *Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights*, in *Human Rights Law Review*, 2010, p. 529 *et seq*.; C.

As we will explain in this section, the starting point when assessing the responsibility of a Member State for these two forms of conduct differs. MS-attributed conduct should engage the responsibility of that Member State, while IO-attributed conduct should not generally engage the responsibility of its Member States. The European Court of Human Rights nominally applies the equivalent protection doctrine to both MS-attributed conduct and IO-attributed conduct. However, despite the use of identical terminology to these two different forms of conduct, the European Court of Human Rights' standard of review differs sharply depending on the form of conduct – thus recognising the fundamental differences between them.

### II.1. European Court of Human Rights review of MS-attributed conduct

The *Bosphorus* case is a stereotypical example of MS-attributed conduct: Irish officials seized a Bosphorus Airways' plane in order to implement Council Regulation 990/93 regarding sanctions against the Federal Republic of Yugoslavia. As the European Court of Human Rights confirmed, the conduct of Irish officials is attributable to Ireland, even when they are merely implementing an obligation under the law of an international organisation Ireland is a member of – *in casu* the EU.[19] Given this, the point of departure is that such MS-attributed conduct engages that Member State's responsibility, if it violates the ECHR.

What the European Court of Human Rights did in *Bosphorus* was to carve out an exception to the Member State's responsibility, on the basis that EU law provides "equivalent protection" of human rights "as regards both the substantive guarantees offered and the mechanisms controlling their observance".[20] For the EU and other international organisations providing "equivalent protection", a strong presumption of Convention compatibility applies if the State has done nothing more than implementing legal obligations flowing from its membership of the organisation. To rebut this presumption, it must be demonstrated that the protection of ECHR rights was "manifestly deficient" in the circumstances of a particular case.[21]

Ryngaert, *Oscillating Between Embracing and Avoiding Bosphorus: The European Court of Human Rights on Member State Responsibility for Acts of International Organisations and the Case of the European Union*, in *European Law Review*, 2014, p. 176 *et seq.*; E. Ravasi, *Human Rights Protection by the ECtHR and the ECJ*, cit., p. 19 *et seq*.

[19] When acting outside the strict legal obligations flowing from their membership in the organisation, Member States are fully responsible for their conduct, see e.g. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 157; European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece* [GC], para. 338.

[20] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 155.

[21] *Ibid.*, para. 156.

### II.2. European Court of Human Rights Review of IO-attributed Conduct

In situations of IO-attributed conduct, no relevant acts or omissions are attributable to the organisation's Member States. From the perspective of international law, an international organisation is a subject of law separate from its Member States. The organisation's rights and duties are separate from those of its members. Consequently, IO-attributed conduct does not engage the responsibility of the organisation's Member States.

The European Court of Human Rights, however, does not leave states completely off the hook when they transfer powers to an international organisation. The act of entering into the constituent instrument of the organisation is attributable to the Member States, and so far the European Court of Human Rights has identified two situations where responsibility may arise on this basis:

*a*) If the constituent instrument itself directly violates a substantive ECHR right (*Matthews*).[22]

*b*) If the organisation is established with structural weaknesses in its system of procedural guarantees rendering it manifestly deficient compared to the ECHR system (*Gasparini*).[23]

In *Matthews* the applicant successfully argued before the European Court of Human Rights' Grand Chamber that the provisions of the EU Treaties providing for direct elections to the European Parliament violated his right to vote under Art. 3 of Protocol no. 1 to the ECHR. According to the treaties as they stood at the time, the residents of Gibraltar (a dependent territory of the UK) were precluded from voting in the European Parliament elections – even though Union law applied there.[24] The European Court of Human Rights came to the rather blunt conclusion that the relevant parts of the EU Treaties were "freely entered into by the United Kingdom", and consequently that it, "together with all the other parties to the Maastricht Treaty", was responsible for "the consequences of" the EU Treaties.[25]

The *Matthews* situation is, in other words, not really an example of IO-attributed conduct, as it may appear to be at first glance, but of MS-attributed conduct. As the European Court of Human Rights correctly concludes, the constituent treaties of interna-

[22] European Court of Human Rights, judgment of 18 February 1999, no. 24833/94, *Matthews v. United Kingdom* [GC].

[23] European Court of Human Rights, decision of 12 May 2009, no. 10750/03, *Gasparini v. Italy and Belgium*.

[24] *Matthews v. United Kingdom* [GC], cit., para. 33.

[25] *Ibid.*, para. 33. The violation of Protocol no. 1, Art. 3 ECHR flowed from the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976, which the European Court of Human Rights considered to "a treaty within the Community legal order", together with the extension to the European Parliament's competences brought about by the Maastricht Treaty. For the sake of completeness, it should be noted that the UK (but not the other EU Member States) could also have been held responsible for its *implementation* of its treaty obligation not to extend the right to vote to the Gibraltarians.

tional organisations are not acts of the organisations, but rather "common acts of the Member States", for which the parties to the ECHR are fully liable.[26] The act of entering into a treaty is a free choice, and thus an MS-attributed act. Even if the conduct directly causing the violation may be IO-attributed, it is directly mandated by a treaty provision, which is a form of MS-attributed conduct.

Such violations, which are directly caused by a treaty obligation (*Matthews* – MS-attributed conduct), must be distinguished from violations that result from the subsequent *exercise by the organisation alone* of its powers (*Gasparini* – IO-attributed conduct). International organisations have a legal personality separate from that of their Member States, and consequently some degree of autonomy. For Member States, international organisations may represent a so-called "Frankenstein problem": When an organisation is created, it attains a life of its own and cannot be fully controlled – at least not by individual states.[27] If the European Court of Human Rights were to hold the Member States fully responsible for the IO-attributed conduct, thus piercing the institutional veil, the "Frankenstein problem" would become acute. As a response, the Member States would keep the organisation under even closer control, which in turn would hinder international cooperation.[28] The underlying rationale differs from that which applies to MS-attributed conduct,[29] and suggests that the standard of review must be lenient if IO-attributed conduct is susceptible to European Court of Human Rights review.

The European Court of Human Rights' approach to this issue in *Gasparini* and subsequent case-law is well in line with these considerations. In *Gasparini*, a NATO staff member alleged that proceedings before the NATO Appeals Board did not meet the requirements of fair trial under Art. 6 ECHR. An organ of NATO, the Appeals Board was in practice the final arbiter in disputes between NATO and its staff, due to the organisation's jurisdictional immunity. Since NATO is not party to the EHCR, the applicant filed the case against Belgium (NATO's host country) and Italy (his state of nationality), arguing that they should have ensured that NATO's dispute resolution mechanisms sufficiently protected the right to a fair trial when the organisation was created.

[26] E. Ravasi, *Human Rights Protection by the ECtHR and the ECJ*, cit., p. 35.

[27] A. Guzman, *International Organizations and the Frankenstein Problem*, in *European Journal of International Law*, 2013, p. 1000.

[28] M. Hartwig, *International Organizations or Institutions, Responsibility and Liability*, in R Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law (online edition)*, Oxford: Oxford University Press, 2011, opil.ouplaw.com, para. 32; E. Ravasi, *Human Rights Protection by the ECtHR and the ECJ*, cit., p. 72. This rationale also shines through in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., particularly in para. 150.

[29] Whether in the form of acceding to an organization's constituent instrument (e.g. *Matthews v. United Kingdom* [GC], cit.) or of implementing obligations established by the secondary law of that organisation (e.g. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit.).

Rather than dismissing the case for lack of jurisdiction *ratione personae*, as it had done in the comparable cases of *Boivin* and *Connolly*,[30] the European Court of Human Rights entertained the applicant's novel argument in *Gasparini*. The European Court of Human Rights distinguished *Boivin* and *Connolly*, since the applicants in those cases only challenged specific decisions of the applicable dispute resolution mechanisms, rather than a structural deficiency. It then stated, borrowing some phrases from *Bosphorus*, that there was a presumption of EHCR compliance that could be rebutted if the procedural regime was manifestly deficient.[31]

Despite the similarity in phrasing, this *Gasparini* test is more lenient than the *Bosphorus* test. To rebut the *Gasparini* presumption of equivalent protection, it is not sufficient to demonstrate that there is a manifest deficiency in the human rights protection in the particular case – as is possible in cases concerning MS-attributed conduct. Rather, the *Gasparini* test entails that applicants must prove that there are manifest and *structural* deficiencies in the system of human rights protection. Moreover, the assessment is fixed in time; it is sufficient that when the Member State(s) in question joined the organisation, they did so with the good faith that there were no such manifest and structural deficiencies.[32] The *Gasparini* test has therefore been accurately characterised as the "light" version of the equivalent protection doctrine – in contrast to the stricter (but still not very strict) version that is applicable to MS-attributed conduct.[33]

Zooming out, we see that the use of different versions of the equivalent protection doctrine for these two situations reflects the variable involvement of the respondent Member State. The strict version is applicable where the Member State itself has implemented legal obligations flowing from its membership. The light version is applicable where the Member State has merely been involved in setting up the organisation, and not taken part in the conduct causing the alleged violation at hand.

## III. The European Court of Human Rights' first stab at the EEA: *Konkurrenten.no v. Norway*

In the recent case of *Konkurrenten.no v. Norway*, a chamber of the European Court of Human Rights addressed the applicability of the equivalent protection doctrine to the EFTA pillar of the EEA for the first time:

> "43. [...] the basis for the presumption established by *Bosphorus* is in principle lacking when it comes to the implementation of EEA law at domestic level within the framework

[30] European Court of Human Rights: decision of 9 September 2008, no. 73250/01, *Boivin v. 34 Member States of the Council of Europe*; decision of 9 December 2008, no. 73274/01, *Connolly v. 15 Member States of the European Union*.

[31] *Gasparini v. Italy and Belgium*, cit.

[32] E. Ravasi, *Human Rights Protection by the ECtHR and the ECJ*, cit., p. 74.

[33] *Ibid*., p. 70.

> of the EEA Agreement, due to the specificities of the governing treaties, compared to those of the European Union. For the purpose of the present analysis, two distinct features need to be specifically highlighted. Firstly, and in contrast to EU law, there is within the framework of the EEA Agreement itself no direct effect and no supremacy (contrast [*Bosphorus*] § 164). Secondly, and although the EFTA Court has expressed the view that the provisions of the EEA Agreement 'are to be interpreted in the light of fundamental rights' in order to enhance coherence between EEA law and EU law (see, inter alia, the EFTA Court's judgment in its case E-28/15 *Yankuba Jabbi* [2016] para. 81), the EEA Agreement does not include the EU Charter of Fundamental Rights, or any reference whatsoever to other legal instruments having the same effect, such as the Convention".

Importantly, this statement is an *obiter dictum*, as the case was not about MS-attributed conduct. Rather, it fell in the category of IO-attributed conduct, and more precisely the subcategory of alleged violations that result from the exercise by the organisation alone of its powers (*Gasparini*). That is because the case concerned the handling of the EFTA Court – which is an international organisation of its own[34] – of a particular case.

In short, the complaint in *Konkurrenten.no* concerned the compatibility of the rules on standing in direct actions before the EFTA Court with Art. 6 ECHR. The applicable standing rule of the SCA, Art. 36, para. 2, is based on Art. 263, para. 4, TFEU and requires the plaintiff to be either an addressee of the decision of the EFTA Surveillance Authority or directly and individually concerned by it. As the EFTA Court has essentially adopted the CJEU's (in)famous *Plaumann* formula, both the very strict "direct and individual concern" test and the question of its compatibility with the principle of effective judicial protection will be familiar to EU law lawyers.[35] However, there are (as always) some twists on the EEA version of the matter.

In EU law, the strict rules on standing in actions for annulment of EU legal acts are compensated for by the possibility to bring an action before a national court, with the *Foto-Frost* doctrine obliging even a first instance court to refer the matter to the CJEU if it considers the objections to the validity of the EU legal act in question to be well founded.[36] Furthermore, the 2007 Treaty of Lisbon omitted the "individual concern" criteria for regulatory acts that do not entail implementing measures.[37] In the EEA/EFTA system,

[34] Art. 1 of Protocol no. 7 SCA.

[35] Court of Justice, judgment of 15 July 1963, case 25/62, *Plaumann v. Commission of the EEC*, as confirmed with regard to its compatibility with the principle of effective judicial protection in Court of Justice, judgment of 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*. From the EFTA Court, see e.g. judgment of 19 June 2003, case E-2/02, *Technologien Bau- und Wirtshaftsberatung GmbH and Bellona Foundation v. EFTA Surveillance Authority*; judgment of 21 February 2008, case E-5/07, *Private Barnehagers Landsforbund*.

[36] As held by the Court of Justice in *Unión de Pequeños Agricultores v. Council*, cit., para. 40. See also Court of Justice, judgment of 22 October 1987, case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*.

[37] Art. 263, para. 4, third limb, TFEU. See also P. Craig, G. de Búrca, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2020, pp. 559-564.

however, the prevailing view is that national courts are never obliged to refer a case to the EFTA Court, not even in a *Foto-Frost* scenario.[38] Even if a reference is made, the EFTA Court can only give an advisory opinion on the interpretation of the EEA Agreement, not rule upon the validity of a decision from the EFTA Surveillance Authority (or from the EEA Joint Committee).[39] Furthermore, the special regime for EU regulatory acts has no parallel in the EEA/EFTA system.[40]

Thus, it is indeed possible to argue that the EFTA Court's adoption of the *Plaumann* formula may, in certain cases, leave certain individuals without adequate judicial protection against decisions of the EFTA Surveillance Authority. However, the merits of this argument depend on the national court's ability to remedy the problem.[41]

As to the case brought before the European Court of Human Rights by the Norwegian bus transportation company Konkurrenten.no, however, this mattered little. Before the EFTA Court, the company had brought actions for annulment against two decisions from the EFTA Surveillance Authority that concerned the closing of investigations into alleged State aid to a competitor.[42] The EFTA Court dismissed both applications due to lacking *locus standi*. Such decisions are not regulatory acts within the meaning of Art. 263, para. 4, TFEU,[43] nor are they acts where the differences concerning the preliminary ruling procedures in Union law and in the EEA/EFTA system appear to be of any relevance.

True, Konkurrenten.no could not have brought an action against the EFTA Surveillance Authority in Norwegian courts, but neither can such decisions of the European Commission be challenged before the national courts of EU Member States. On the other hand, the underlying matter of substantive EU/EEA law, whether the competitor had indeed been given unlawful State aid by Norway, could have been brought before Norwegian courts. But Konkurrenten.no had not done so.[44]

The conduct complained about to the European Court of Human Rights – *i.e.* the dismissals of the two actions for annulment – was authored by the EFTA Court alone.

[38] See section IV.3 below.

[39] *Ibid*.

[40] Art. 36 SCA has not been updated to include the third limb of Art. 263, para. 4, TFEU, which was added by the 2007 Treaty of Lisbon.

[41] Which again may challenge the European Court of Human Rights' above-mentioned differentiation between IO-attributed and MS-attributed conduct, since the ECHR-compatibility of the standing rules before the EFTA Court and the national courts will be interdependent. This, however, is a matter that will not be pursued further in this *Article*.

[42] EFTA Court, order of 20 March 2015, case E-19/13, *Konkurrenten.no v. ESA* (one of the two orders that gave rise to the complaint to the European Court of Human Rights in the case under discussion).

[43] As noted by the EFTA Court in *Konkurrenten.no v. ESA*, cit., para. 91. If the decisions had been regulatory acts within the meaning of Art. 263, para. 4, TFEU, the EFTA Court would have had to consider the possibility, within acknowledged EEA law rules of interpretation, of adopting a more liberal approach to Art. 36, para. 2, SCA in order to provide for equal access to justice in the EFTA pillar and the EU pillar of the EEA.

[44] Presumably because it is very difficult to substantiate such a claim without the assistance of the EFTA Surveillance Authority, with its far reaching investigatory powers, resources, and expertise.

That said, Konkurrenten.no attempted to argue otherwise, namely that the intervention of the Norwegian government in the proceedings before the EFTA Court was a reason for attributing the EFTA Court's dismissal of the case to Norway. However, the European Court of Human Rights noted that the EFTA Court is a judicial body, deciding cases independently and impartially. Should a court ultimately decide a case "more or less along the same lines as [a State] argued in [its] submission, that cannot itself trigger the responsibility of that State".[45]

Thereafter, without discussing the broader EEA context of the case, the European Court of Human Rights applied the *Gasparini* test to the EFTA Court. The EFTA Court had used the CJEU's *Plaumann* formula for legal standing, and given adequate (arguably even detailed) reasons for why Konkurrenten.no, as "only" a competitor of the recipient of the alleged State aid, did not pass the test. The European Court of Human Rights found that this did not constitute a structural shortcoming in the procedural regime of the EFTA Court – as required to trigger member state responsibility for IO-attributed conduct.[46] This confirmation of the ECHR conformity of the *Plaumann* formula in the EEA setting will not please everyone, but given the applicable test (*Gasparini*) it can hardly be considered surprising.

## IV. The equivalent protection doctrine and its (in-)applicability to the EEA/EFTA system

In the *obiter dictum* in *Konkurrenten.no*, the European Court of Human Rights asserts that the equivalent protection doctrine is inapplicable to the EFTA pillar of the EEA because EEA law does not provide a level of fundamental rights protection "equivalent" to that of the ECHR system. The Court offers two arguments to support this view: the lack of EEA law principles of direct effect and supremacy, and the lack of a textual basis for the recognition of fundamental rights as part of EEA law.

As we will explain in sub-sections IV.1 and IV.2 below, we are of the opinion that neither of these arguments justify the finding that the EEA law of the EFTA pillar does not provide equivalent protection to that of the ECHR. On the other hand, as we will demonstrate in sections IV.3 and IV.4, there are other differences between EU and EEA law that might perhaps justify the conclusion drawn by the European Court of Human Rights. Most notable among them are the differences between the EU and the EEA/EFTA versions of the preliminary ruling procedure and the fact that all decisions of the EEA Joint Committee require the consent of all three EEA/EFTA States.

[45] *Konkurrenten.no AS v. Norway*, cit., para. 41.
[46] *Ibid*., paras 42-48.

### IV.1. The EEA Agreement's lack of a written catalogue of fundamental rights

As mentioned in section II above, the equivalent protection doctrine consists of two limbs: the equivalence of the substantive guarantees offered and the equivalence of the mechanisms controlling their observance.[47] The European Court of Human Rights' remark in *Konkurrenten.no* concerning the lack of an EEA equivalent to the EU Charter of Fundamental Rights, "or any reference whatsoever to other legal instruments having the same effect", relates to the first of these: Are the substantive fundamental rights guarantees offered by the EEA Agreement equivalent to those of the ECHR?

If one looks at the text of the EEA Agreement, the European Court of Human Rights is certainly right that an EEA catalogue of fundamental rights is nowhere to be found. Nor are there references to the Charter of Fundamental Rights, the ECHR or other human rights instruments. Indeed, the only relevant reference in the main part of the EEA Agreement is the contracting parties' intention, expressed in the very first recital of the preamble, that the European Economic Area will contribute "to the construction of a Europe based on peace, democracy and human rights". This hardly compares to the present state of EU law, where the Charter of Fundamental Rights is given the same legal value as the Treaties (Art. 6, para. 1, TEU) and fundamental rights, "as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States", are recognised as general principles of EU law (Art. 6, para. 3, TEU).

However, if one compares the EEA Agreement with the state of EU law in 2005, when *Bosphorus* was decided, the contrast is much less stark. While the Charter of Fundamental Rights was solemnly proclaimed by the EU's Parliament, Council and Commission on 7 December 2000, it remained a soft law instrument until the 2007 Treaty of Lisbon made it part of primary EU law. In *Bosphorus*, the European Court of Human Rights took note of the Charter of Fundamental Rights, but stressed that it was not legally binding.[48] Thus, unless the *obiter dictum* in *Konkurrenten.no* is meant to raise the bar for application of the equivalent protection doctrine, the lack of an EEA equivalent to the Charter of Fundamental Rights cannot be decisive.

As to the ECHR, it is true that today's Art. 6, para. 3, TEU was introduced into the EU Treaties already by the 1992 Treaty of Maastricht (as Art. F of the Treaty on the European Union).[49] Still, as noted by the European Court of Human Rights itself in *Bosphorus*, this was no more than a reflection of the case-law of the CJEU, which at that time had long recognised fundamental rights as general principles of Community law and high-

[47] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 155.
[48] *Ibid.*, para. 159.
[49] Treaty on European Union (adopted 2 July 1992, in force 1 November 1993).

lighted the special significance of the ECHR as a source of inspiration.[50] The reasoning in *Bosphorus* hardly suggests that the codification of the case-law of the CJEU was particularly important – not to mention decisive – to the assessment of the substantive guarantees of fundamental rights offered by EU law in 2005.

If one attempts to compare the approach to fundamental rights in the CJEU case-law prior to the entry into force of the Charter of Fundamental Rights with that of the EFTA Court today, the similarities outweigh the differences. It is true that the EFTA Court occasionally "only" states that provisions of the EEA Agreement "are to be interpreted in the light of fundamental rights", as it indeed did in the *Jabbi* case that the European Court of Human Rights chose to cite in *Konkurrenten.no*. On other occasions, however, the EFTA Court has made quite clear that fundamental rights are recognised as *unwritten general principles* of EEA law. One example is provided by *Posten Norge*, in which the EFTA Court noted that "[t]he principle of effective judicial protection including the right to a fair trial, which is *inter alia* enshrined in Art. 6 ECHR, is a general principle of EEA law".[51] Another more generally phrased example is the case of *Olsen* from 2014, where the EFTA Court was confronted with the question of whether the imposition of a particular Norwegian wealth tax was contrary to the requirement to respect "the fundamental rights guaranteed under the EEA Agreement".[52] The Norwegian government argued that the scope of fundamental rights was irrelevant to the case as the wealth tax in question fell outside the scope of the EEA Agreement. The EFTA Court replied that:

> "In essence, the fundamental rights guaranteed in the legal order of the EEA Agreement are applicable in all situations governed by EEA law. The Court [...] must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures. [...]
> Where it is apparent that national legislation is such as to obstruct the exercise of one or more fundamental freedoms guaranteed by the EEA Agreement, it may benefit from the exceptions provided for by EEA law in order to justify that fact only insofar as that complies with the fundamental rights enforced by the Court. That obligation to comply with fundamental rights manifestly comes within the scope of EEA law [...]".[53]

[50] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 159, cf. para. 73 *et seq*.

[51] EFTA Court, judgment of 18 April 2012, case E-15/10, *Posten Norge AS v. EFTA Surveillance Authority*, para. 86.

[52] EFTA Court, advisory opinion of 9 July 2014, joined cases E-3/13 and E-20/13, *Fred. Olsen and Others and Petter Olsen and Others and The Norwegian State, represented by the Central Tax Office for Large Enterprises and the Directorate of Taxes*, para. 224.

[53] *Ibid*., paras 225 and 227.

In the 2016 case of *Holship*, the EFTA Court summed this up in one short sentence: "Fundamental rights form part of the unwritten principles of EEA law".[54]

Moreover, the EFTA Court has long highlighted that all of the EEA States (the three EEA/EFTA States *and* all of the EU Member States) are parties to the ECHR, and constantly held that the provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of the fundamental rights of EEA law.[55] As a result, there is by now consensus in EEA literature that provisions of the EEA Agreement are to be interpreted and applied in a manner that is consistent with the EEA States' obligations under the ECHR.[56] The situation is less clear when it comes to fundamental rights enshrined in the Charter of Fundamental Rights that go beyond those found in the ECHR.[57] However, that is a matter of no relevance to the question of whether the EEA/EFTA system provides substantive fundamental rights guarantees equivalent to those of the ECHR system.[58]

If any difference is to be found in the ECHR-equivalence of the substantive fundamental rights that form part of EEA and EU law, it is that the EFTA Court has remained more ECHR-centred than the CJEU. After the entry into force of the Charter of Fundamental Rights, the CJEU appears to have turned its attention towards the EU's own Charter and lost some of its previous interest in the ECHR.[59] Whether the EFTA Court will side with the CJEU or the European Court of Human Rights in a case of divergences in the case-law between the latter two, remains open. A qualified guess is that it will try to mitigate the conflict and search for the middle ground. The point advanced here, however, is that this cannot impact upon the European Court of Human Rights' assessment of the ECHR-equivalence of the substantive fundamental rights guarantees offered by the EEA Agreement as long as the European Court of Human Rights maintains that the EU meets this test.

[54] EFTA Court, advisory opinion of 19 April 2016, case E-14/15, *Holship Norge AS and Norsk Transportarbeiderforbund*, para. 123.

[55] Including in EFTA Court, advisory opinion of 26 July 2016, case E-28/15, *Yankuba Jabbi and The Norwegian Government, represented by the Immigration Appeals Board*, to which the European Court of Human Rights referred in *Konkurrenten.no AS v. Norway*, cit.

[56] For an analysis, see D.T. BJÖRGVINSSON, *Fundamental Rights in EEA Law*, cit., p. 263 *et seq*. See also R. SPANO, *The EFTA Court and Fundamental Rights*, in *European Constitutional Law Review*, p. 476 *et seq*.

[57] See, e.g., H.H. FREDRIKSEN, C. FRANKLIN, *Of Pragmatism and Principles*, cit., p. 647 *et seq*.; R. SPANO, *The EFTA Court and Fundamental Rights*, cit., p. 479 *et seq*.

[58] It may be added here that the European Court of Human Rights' remarks on the lack of a written EEA catalogue of human rights was "acknowledged" in the opinion of AG Tanchev delivered on 27 February 2020, case C-897/19 PPU, *Ruska Federacija*, para. 113, but then essentially brushed aside with reasoning that takes for granted that EEA law prohibits extradition to conditions of inhuman or degrading treatment in the same way as Art. 3 ECHR and Art. 4 of the Charter of Fundamental Rights, see para. 114 *et seq*. The CJEU itself did not comment on this in the judgment in the case.

[59] See, in particular, G. DE BÚRCA, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 168 *et seq*.

Thus, assuming that an *obiter dictum* in an ordinary chamber judgment is not meant to raise the bar for what constitutes equivalent (substantive) protection, as this concept was fleshed out in *Bosphorus*, the emphasis put on the EEA Agreement's lack of a written catalogue of fundamental rights appears misguided.[60]

### IV.2. The lack of EEA law principles of direct effect and supremacy

The second of the European Court of Human Rights' two arguments for not extending the equivalent protection doctrine to the EEA/EFTA system is that "in contrast to EU law, there is within the framework of the EEA Agreement itself no direct effect and no supremacy (contrast [*Bosphorus*] § 164)".[61] As the pinpoint reference indicates, supremacy and direct effect was indeed mentioned in *Bosphorus*. However, in *Konkurrenten.no* the European Court of Human Rights appears to have put far more emphasis on these two doctrines than the *Bosphorus* precedent suggests.

*a*) Supremacy and direct effect in *Bosphorus*.

In *Bosphorus*, supremacy and direct effect are mentioned in connection with the question of whether the EU offers a level of human rights protection equivalent to that of the ECHR system *in procedural terms*.[62] As the European Court of Human Rights put it, "the effectiveness of [the] substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure their observance".[63]

An obvious argument against procedural equivalency between the ECHR system and the EU system was (and still is) the limited direct access to the CJEU for individuals. An individual can only institute review proceedings before the CJEU against an act of institutions, bodies, offices or agencies of the Union addressed to that person or which is of direct and individual concern to them, and these conditions are interpreted and applied strictly by the CJEU (the above-mentioned *Plaumann* formula).[64] As is well known, there is no individual complaint procedure to the CJEU resembling that of Art. 34 ECHR. Compared with the rules on standing before the European Court of Human Rights, one can thus hardly say that direct actions before the CJEU provide an equivalent level of protection. The question for the European Court of Human Rights in *Bosphorus* was

[60] This finding does not alter the fact that the EEA/EFTA States in our opinion ought to implement the EEA-relevant parts of the Charter of Fundamental Rights into the EEA legal framework, either in the EEA Agreement as such (with the consent of the EU) or, alternatively, in the SCA. Such formal recognition of the Charter will strengthen the legitimacy of the fundamental rights case-law of the EFTA Court and prevent misunderstandings as to the status of fundamental rights within EEA law.

[61] *Konkurrenten.no AS v. Norway*, cit., para. 43.

[62] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., paras 160-165.

[63] *Ibid.*, cit., para. 160.

[64] Art. 263, para. 4, TFEU; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 162.

therefore whether other aspects of the EU system of judicial protection compensated for the lack of direct access to the CJEU.

Key here is the EU system of preliminary references from national courts to the CJEU. The European Court of Human Rights began its analysis by outlining the relationship between the CJEU and domestic courts, and it is in this context that supremacy and direct effect are mentioned in passing:

> "it is essentially through the national courts that the Community system provides a remedy to individuals against a member State or another individual for a breach of Community law [...]. It was the development by the ECJ of important notions such as th*e supremacy of Community law, direct effect,* indirect effect and State liability [...] which greatly enlarged the role of the domestic courts in the enforcement of Community law and its fundamental rights guarantees".[65]

As we can see, supremacy and direct effect are mentioned as part of an array of Union law doctrines. However, there is nothing in the quotation that suggests that supremacy and direct effect have a particular prominence when assessing equivalency. Moreover, when read in context, the above-quoted subparagraph appears to be a mere introduction to the European Court of Human Rights' main point:

> "The ECJ maintains its control on the application by national courts of [Union] law, including its fundamental rights guarantees, through the procedure for which [Art. 267 TFEU] provides. While the ECJ's role is limited to replying to the interpretative or validity question referred by the domestic court, the reply will often be determinative of the domestic proceedings (as, indeed, it was in the present case [...]) and detailed guidelines on the timing and content of a preliminary reference have been laid down by the [TFEU] and developed by the ECJ in its case-law. The parties to the domestic proceedings have the right to put their case to the ECJ during the [Art. 267 TFEU] process. It is further noted that national courts operate in legal systems into which the Convention has been incorporated, albeit to differing degrees".[66]

Immediately thereafter, the European Court of Human Rights concluded that "[i]n such circumstances, the Court finds that the protection of fundamental rights by [Union] law can be considered to be, and to have been at the relevant time, 'equivalent' [...] to that of the Convention system".[67]

Although the European Court of Human Rights is not explicit with regard to the relative importance of the different factors it mentions in this part of *Bosphorus*, its focus appears to be on the CJEU and its relationship with – and control over – domestic courts. Taken as a whole, the European Court of Human Rights' reasoning reads as a

[65] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 164, subpara. 1 (emphasis added).

[66] *Ibid.*, para. 164, subpara. 2.

[67] *Ibid.*, para. 165.

justification for why the CJEU is in control of the application of Union law in the Member States, and consequently able to review it against the EU catalogue of fundamental rights (which is substantively equivalent to that of the ECHR).

In this light, the brief references to the doctrines of supremacy and direct effect in *Bosphorus* come across as ancillary factors. The European Court of Human Rights appears to see them as tools for the CJEU's enforcement of EU fundamental rights *vis-à-vis* domestic courts, thus contributing towards a procedurally equivalent level of protection.

*b*) Does the lack of supremacy and direct effect of EEA law lessen the protection of fundamental rights?

Given the importance that the European Court of Human Rights seems to attach to the lack of EEA law principles of direct effect and supremacy in *Konkurrenten.no*, it is pertinent to ask whether supremacy and direct effect actually contribute towards protection of fundamental rights in the context of EU law. And, if so, when and how?

In order to answer these questions, it is paramount to distinguish between the direct effect and supremacy of the fundamental rights recognised as part of EU law, on the one hand, and the direct effect and supremacy of EU law obligations that allegedly interfere with ECHR rights and freedoms, on the other. *Bosphorus* itself belongs in the latter category, as the conduct of Irish authorities and courts were governed by the direct effect (or rather, according to the wording of Art. 288, para. 2, TFEU, direct applicability) and supremacy of Council Regulation 990/93 regarding sanctions against the Federal Republic of Yugoslavia. To Bosphorus Airways, the effect that EU law gives to e.g. regulations hardly improved the company's effective judicial protection against the alleged violations of the right to property. Quite the contrary.

Thus, the fact that the EFTA Court has made clear that the decisions of the EEA Joint Committee are not directly effective at the national level *qua EEA law*,[68] simply cannot matter for EU/EEA obligations that allegedly interfere with ECHR rights and freedoms. If an alleged ECHR-interfering EEA law obligation has not been implemented into the national legal system of the dualist EEA/EFTA States (now only Iceland and Norway), its harmful effect will simply not be effective in the national courts and the question of its compatibility with the ECHR will not materialise.[69]

In this connection, it should be emphasised that EEA law's lack of direct effect does not imply that the EEA/EFTA States can exercise any more discretion in implementing their EEA obligations than EU Member States have in implementing their Union law ob-

[68] See, e.g., EFTA Court, judgment of 28 January 2015, case E-15/14, *EFTA Surveillance Authority v. Iceland*, para. 32.

[69] It may be added that non-implemented EEA rules can produce indirect effects in the dualist EEA/EFTA States, e.g. due to the EEA law principle of conform interpretation and/or domestic law doctrines of EEA-conform interpretation of national law. However, it is difficult to see how this can be relevant to the question of the applicability of the equivalent protection doctrine to the EEA.

ligations. This is an important point, because the equivalent protection doctrine is only applicable to MS-attributed conduct mandated by a strict legal obligation.[70] A Member State remains fully responsible for conduct falling outside the scope of its legal obligations, including where the rules allow for discretion.[71] The *M.S.S.* case exemplifies this well: Belgium argued that they were obliged under the so-called Dublin II Regulation[72] to return an asylum seeker to Greece – the asylum seeker's first state of entry.[73] However, as the European Court of Human Rights correctly pointed out, that regulation contains a general exception granting each Member State the competence to examine an application for asylum, despite not being the first state of entry.[74] Belgium was thus able to exercise discretion under the rules, and consequently could not invoke the equivalent protection doctrine.[75]

Within the scope of the EEA Agreement, EU and EEA Member States have the same substantive legal obligations. The difference between the two systems is simply that EU Member States are required to ensure that implementation happens automatically in some instances, through the domestic application of the doctrine of direct effect, while EEA/EFTA states are not. The difference thus merely relates to the choice of means of domestic implementation of the obligation, and not its binding nature as a matter of international law. Consequently, there is no difference between EU and EEA law when it comes to assessing the fulfilment of the strict legal obligation prerequisite for applying the equivalent protection doctrine to MS-attributed conduct.

Turning to the direct effect of the fundamental rights themselves, the lack of an EEA equivalent to the EU law principle of direct effect may at first sight seem to be a very real problem. In the context of EU law, the direct effect of the Charter of Fundamental Rights and the general principles of EU law guarantees that national courts can defend fundamental rights in all situations where national authorities act within the scope of EU law, if need be with the assistance of a preliminary ruling from the CJEU.[76]

However, the effect of the general principles of EEA law in the national legal orders of the dualist EEA/EFTA States was settled long ago by a pragmatic proposition by the

[70] See e.g. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 157; *M.S.S. v. Belgium and Greece* [GC], cit., para. 338.

[71] *Ibid*.

[72] Regulation (EC) 343/2003 of the Council of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national. Now Art. 17, para. 1, of Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation).

[73] *M.S.S. v. Belgium and Greece* [GC], cit.

[74] *Ibid*., para. 339.

[75] *Ibid.*, para. 340.

[76] See e.g. Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC].

EFTA Court in the seminal *Sveinbjörnsdóttir* case on the principle of State liability for violations of EEA obligations. Knowing that both of the remaining dualist EEA/EFTA States, Iceland and Norway, have given the main part of the EEA Agreement the status of statutory law, the EFTA Court stated that the unwritten principle of State liability had to be seen as "an integral part of the EEA Agreement as such" and that it was therefore "natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of State liability".[77] This somewhat bold proposition as to the interpretation of the EEA Acts of Iceland and Norway was accepted by the Icelandic as well as the Norwegian Supreme Court, respectively.[78] There is no compelling reason why this should not extend to other generally accepted unwritten principles of EEA law, including fundamental rights.

As far as fundamental rights equalling those of the ECHR are concerned, it may be added that all of the EEA/EFTA States have incorporated the Convention into their national legal orders. It would simply make no sense for them or their national courts to refuse to recognise such common EEA/ECHR fundamental rights as part of the EEA Agreement *as implemented into national law*. Tellingly, the Supreme Court of Norway didn't even contemplate this matter when it held, in the *Holship* case of 2016, that "[f]undamental rights under EU and EEA law include, *inter alia*, the ECHR and other fundamental international human rights".[79] The Supreme Court simply considered it self-explanatory that the fundamental rights recognised as part of EEA law are fully effective in the Norwegian legal order.

Turning to the question of supremacy, it is true that the EEA Agreement only knows of a watered-down version of this EU law principle. According to Protocol no. 35 of the Agreement, the EFTA States have undertaken to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in cases of possible conflicts between implemented EEA rules and other statutory provisions.[80] The limitation to "implemented" EEA rules follows from the above-mentioned lack of direct effect, but has – as demonstrated above – no practical interest as far as fundamental rights are concerned, as they are indeed implemented into Icelandic and Norwegian law as an integral part of the main part of the

[77] EFTA Court, advisory opinion of 10 December 1998, case E-9/97, *Erla María Sveinbjörnsdóttir v. the Government of Iceland*, para. 63.

[78] Icelandic Supreme Court, judgment of 16 December 1999, case 236/1999, *Sveinbjörnsdottir*; Norwegian Supreme Court, judgment of 28 October 2005, case HR-2005-1690-P, *Finanger II*.

[79] Norwegian Supreme Court, judgment of 16 December 2016, case HR-2016-2554-P, *Holship*, para. 111. An English translation of the judgment is available from the Norwegian Supreme Court's webpage: www.domstol.no. This case has been brought before the European Court of Human Rights, where it is pending as *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway*, cit. See also sections V.2 and VI below.

[80] For an introduction, see M.K.F. Dystland, I. Søreбø, F.B. Finstad, *Article 7 [Binding Effect and Implementation of EU Legal Acts]*, in F. Arnesen, H.H. Fredriksen, H.P. Graver, O. Mestad, C. Vedder (eds), *Agreement on the European Economic Area: A Commentary*, Baden-Baden: Nomos, 2018, p. 262.

EEA Agreement. The same holds true for the fact that the obligation under Protocol no. 35 itself has to be implemented into the national legal orders of the dualist EEA/EFTA States, since both Iceland and Norway have done just that.[81] For the purposes of the equivalent protection doctrine, there are thus "only" two relevant differences between the EU law principle of supremacy and the EEA law obligation to ensure the primacy of implemented EEA rules: that the latter do not demand primacy in case of a conflict with constitutional law, and that its implementation by way of a provision of domestic (statutory) law cannot guarantee against new legislation setting the primacy provision aside.

Whilst certainly relevant to the comparison of the protection of fundamental rights under EU and EEA law as a matter of principle, we dare suggest that the practical effect of these differences is very limited. Firstly, after more than 25 years, there are no examples of any of the EEA/EFTA States invoking their constitutions as a shield against EEA fundamental rights or enacting new legislation to the same effect. Moreover, the theoretical possibility such situations should at most negate the application of the equivalent protection doctrine in those (theoretical) cases where there is an alleged conflict between the ECHR and a EEA/EFTA State's constitution. In other words, these fringe cases could be EEA/EFTA examples where the "manifest deficiency" exception to the equivalent protection doctrine is applicable. Finally, it is not clear whether EU law really offers much better protection in a scenario where an EU Member State should wish to limit the effect of EU fundamental rights in such ways.[82]

### IV.3. Other EEA/EFTA peculiarities that might justify non-application of the equivalent protection doctrine

So far we have argued that neither the lack of a written fundamental rights catalogue nor the lack of direct effect and supremacy disprove that the EFTA pillar of the EEA offers a level of human rights protection equivalent to that of the ECHR system. However, there are at least three other differences between the EU and EEA/EFTA systems which must be included in the equivalent (procedural) protection assessment. The first is the lack of an obligation for apex courts to refer cases to the EFTA Court. The second is the non-binding nature of the EFTA Court's answers to questions of interpretation put to it by the national courts. The third is the EFTA Court's lack of jurisdiction to review decisions of the EEA Joint Committee.

*a*) No obligation for apex courts to refer cases to the EFTA Court.

[81] Section 2 of the Norwegian EEA Act (Law no. 109/1992) and Section 3 of the Icelandic EEA Act (Law no. 2/1993).

[82] For a recent example of a domestic apex court limiting the effect of Union law, albeit in the name of (domestic) human rights provisions, see the German Federal Constitutional Court, judgment of 5 May 2020, 2 BvR 859/15, *Weiss/PSPP*.

The CJEU's control over the application of EU law in domestic courts, in lieu of direct access, appear to be central to the European Court of Human Rights' assessment of procedural equivalent protection in *Bosphorus*.[83] It follows from Art. 267, para. 3, TFEU that when questions of Union law are raised before an apex court of an EU Member State – *i.e.* "a court or tribunal [...] against whose decisions there is no judicial remedy under national law" – the court in question "shall" refer the question to the CJEU. While this obligation has been moderated somewhat by the *CILFIT* doctrine (*acte clair* and *acte éclairé*), it remains that apex courts are obliged to refer a question of Union law to the CJEU, unless the answer to it is "so obvious as to leave no scope for any reasonable doubt".[84] In *Bosphorus*, the European Court of Human Rights explained the *CILFIT* doctrine in the introductory part of the judgment, and referred back to that explanation when conducting its detailed assessment of whether EU law affords individuals equivalent (procedural) protection.[85]

EEA law, on the other hand, contains no obligation for domestic apex courts to refer cases to the EFTA Court.[86] The EEA Agreement itself does not require the EEA/EFTA States to establish a system of preliminary references from national courts to the EFTA Court.[87] When the EEA/EFTA States nevertheless did just that through Art. 34 SCA, they deliberately omitted the third paragraph of Art. 267 TFEU. Whilst it is true that the EFTA Court itself has suggested that the general duty of loyal cooperation under Art. 3 EEA can oblige the apex courts of the EEA/EFTA States to refer unresolved questions of EEA law to it,[88] this push has convinced neither the Icelandic nor the Norwegian Supreme Court, nor the EFTA Surveillance Authority.[89] We need not pursue this controversial

[83] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 164; European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia* [GC], para. 104.

[84] Court of Justice: judgment of 6 October 1982, case 283/81, *CILFIT v. Ministero della Sanità*, paras 12-16; judgment of 9 September 2015, case C-160/14, *Ferreira da Silva e Brito and Others*, para. 38.

[85] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., paras 98 and 164, respectively.

[86] See H.H. Fredriksen, C. Franklin, *Of Pragmatism and Principles*, cit., pp. 672-673, with further references.

[87] Cf. Art. 108, para. 2, EEA, which makes clear that jurisdiction to deal with preliminary references from national courts is not among the competences which the Contracting Parties agreed that the EFTA Court had to have. See further Art. 107 EEA, which instead opens up for preliminary references to the CJEU, but which also makes clear that this is only an option (of which none of the EFTA States, for reasons of sovereignty, have availed themselves).

[88] See, e.g., EFTA Court, advisory opinion of 28 September 2012, case E-18/11, *Irish Bank*, para. 58 *et seq.*; EFTA Court, advisory opinion of 20 March 2013, case E-3/12, *Jonsson*, para. 60.

[89] The Icelandic Supreme Court has referred only two cases to the EFTA Court over the last five years. The Supreme Court of Norway has been more cooperative, with seven referrals in the same period, but there are several examples of complex matters of EEA law being decided without a reference and nothing in the referrals that suggest that the justices feel obliged to send certain types of cases to the EFTA Court. Some of the refusals to refer have led to complaints to the EFTA Surveillance Authority – so far to no avail.

matter further here, as the European Court of Human Rights' assessment of the procedural protection of fundamental rights in the EFTA pillar of the EEA must clearly be based on "facts on the ground".

Since the domestic courts of the EEA/EFTA States do not consider themselves obliged to refer questions of EEA law, the EFTA Court's control over them is less firm than the control the CJEU exercises over the domestic courts of EU Member States. As a consequence, the EFTA Court's ability to ensure that EEA law is interpreted and applied in line with human rights law is weaker than the corresponding ability of the CJEU.

When reading *Bosphorus*, it appears that the preliminary ruling procedure is one of the key factors, if not *the* key factor, leading to the finding of equivalent (procedural) protection. Indeed, the European Court of Human Rights has itself stated that in *Bosphorus* it "attached considerable importance to the role and powers of the CJEU".[90]

On the face of it, the EFTA Court's role and powers are less prominent than those of the CJEU. However, cases where there is an alleged conflict between Union law and the ECHR may reach the European Court of Human Rights without prior intervention by the CJEU. One example is *Avotiņš*. The applicant had not asked for, nor did the Latvian Supreme Court on its own motion request, a preliminary ruling from the CJEU.[91] The European Court of Human Rights nevertheless upheld its finding in *Bosphorus* that Union law provides equivalent protection.[92] Moreover, after a detailed (yet opaque) discussion it concluded that the presumption of equivalent protection could not be rebutted, because the fundamental rights protection was not manifestly deficient in the circumstances of that particular case.[93]

In the earlier case of *Michaud*, however, the presumption of equivalent protection *was* rebutted. In that case, prior CJEU involvement was precluded by the French Conseil d'Etat's refusal to accept the applicant's request for a preliminary ruling.[94] According to the European Court of Human Rights, by refusing to entertain a request for preliminary ruling even though the CJEU had not had an opportunity to examine the legal issue at hand, "the Conseil d'Etat ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the

[90] *Avotiņš v. Latvia* [GC], cit., para. 104.

[91] *Ibid.*, para. 111. For these reasons, the European Court of Human Rights explicitly distinguished this case from judgment of 6 December 2012, no. 12323/11, *Michaud v. France*, which is discussed just below.

[92] *Avotiņš v. Latvia* [GC], cit., paras 105-112. For more detailed commentary on the case, see S.Ø. JOHANSEN, *EU Law and the ECHR: The Bosphorus Presumption Is Still Alive and Kicking – the Case of Avotiņš v. Latvia*, in *EU Law Analysis*, 24 May 2016, eulawanalysis.blogspot.com.

[93] *Avotiņš v. Latvia* [GC], cit., paras 115-125.

[94] *Michaud v. France*, cit.

Convention – having been deployed".[95] Therefore, there was a manifest deficiency in the circumstances of that particular case.[96]

By contrast, in *Avotiņš*, the applicant had not even advanced any specific arguments regarding the interpretation of the Union law at issue.[97] It thus appears that *Avotiņš* constitutes an example of Union law being (more or less) overlooked in the domestic proceedings, while *Michaud* is an example of a case where the domestic apex court wrongly considered that the *CILFIT* doctrine was applicable.

As the *Michaud* and *Avotiņš* cases illustrate, a formal obligation to refer cases to the CJEU is no ironclad guarantee for the actual deployment of the full potential of the Union's supervisory mechanism.[98] Thus, the European Court of Human Rights will assess, in each individual case, whether there are manifest deficiencies in the deployment of the Union's supervisory mechanisms – notably the CJEU.

If transferred to the EFTA pillar of the EEA, *Michaud* and *Avotiņš* suggest that the lack of an obligation to refer cases to the EFTA Court need not be decisive after all. Rather, *Michaud* and *Avotiņš* could be interpreted as suggesting that the equivalent protection doctrine will apply if the domestic courts of the EEA/EFTA States have the *opportunity* to submit questions to an international court embedded within a system that provides substantially equivalent protection to that of the ECHR. If the full potential of the applicable supervisory mechanisms is not realised in the circumstances of a particular case – for example a *Michaud*-style refusal to refer a case to the EFTA Court – that may constitute a manifest deficiency, so that the presumption of equivalent protection is rebutted. If, on the other hand, a case has been referred, and the EFTA Court has thus been given the opportunity to assess the fundamental rights invoked by the parties, the fact that referrals are voluntary ought not to be decisive.[99]

*b*) Non-binding preliminary rulings from the EFTA Court.

[95] *Ibid.*, para. 115.

[96] *Ibid*. In both *Michaud* and *Avotiņš* the European Court of Human Rights' reasoning is somewhat muddled with regard to whether the deployment of "the full potential of the relevant institutional machinery" is a prerequisite for a general finding of equivalent protection, or whether it forms part of the case-by-case assessment of manifest deficiency. We agree with E. Ravasi, *Human Rights Protection by the ECtHR and the ECJ*, cit., p. 116 and pp. 112-123 that the latter understanding is correct. This is also how the European Court of Human Rights' First Section understood the *Michaud* case in decision of 18 June 2013, no. 3890/11, *Povse v. Austria*, para. 83 – which is in turn was referenced by the European Court of Human Rights' Grand Chamber when setting the stage for its assessment of manifest deficiency in *Avotiņš v. Latvia* [GC], cit., para. 112.

[97] *Avotiņš v. Latvia* [GC], cit., para. 111.

[98] *Michaud v. France*, cit., para. 115; *Avotiņš v. Latvia* [GC], cit., para. 105.

[99] One such example is the pending European Court of Human Rights case *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway*, cit., where the Supreme Court of Norway indeed obtained an advisory opinion from the EFTA Court on, e.g., the right to collective bargaining and collective action as a fundamental right under EEA law.

Another peculiarity of the EEA/EFTA system when compared to that of the EU is the non-binding nature of the EFTA Court's answers to any question of interpretation put to it by a national court. Formally speaking, the EFTA Court's decisions in cases under Art. 34 SCA are "advisory opinions". Admittedly, this has not prevented the EFTA Court from styling them as "judgments"[100] and considering them part of its case-law on the same footing as the binding judicial decisions that other provisions of the SCA vests in the court. Still, both the Icelandic and the Norwegian Supreme Court have emphasised that the EFTA Court's opinions on the interpretation of the EEA Agreement are advisory. In the *Holship* case of 2016, the Supreme Court of Norway, sitting in plenary session (Full Court), held this to entail that "the courts of the EFTA States must independently consider how to interpret and apply EEA law".[101]

At the same time, however, the Norwegian Supreme Court has emphasised that national courts shall attach "considerable importance" to the opinions of the EFTA Court. Again, the *Holship* case is instructive:

> "The EFTA states' courts must [...] 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, p. 258, paragraphs 93–94, with reference to the plenary judgment of Rt. 2000, pp. 1811-1820. 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".[102]

The assessment of the effect in the EEA/EFTA States of the EFTA Court's advisory opinions for the purpose of the applicability of the equivalent protection doctrine is further complicated by the intricate relationship between EU and EEA law. Whilst it is true that the Supreme Court of Norway has on a few occasions deviated from the interpretation of EEA law advocated by the EFTA Court, it has only done so in cases where it was convinced that CJEU case-law necessitates adjustments of the advice received from the EFTA Court.[103] This may seem strange to EU and ECHR lawyers unfamiliar with the peculiarities of the EEA, but in essence both the national courts of the EEA/EFTA States and

[100] This practice of the EFTA Court began with its very first ruling under Art. 34 SCA: EFTA Court, advisory opinion of 16 December 1996, case E-1/94, *Restamark*. After some deviations early on, e.g. in *Erla María Sveinbjörnsdóttir v. the Government of Iceland*, cit., it has stuck to styling them as judgments. For recent examples, see e.g. EFTA Court: advisory opinion of 13 May 2020, case E-4/19, *Campbell*, and advisory opinion of 4 February 2020, case E-5/19, *Criminal proceedings against F and G*.

[101] Norwegian Supreme Court, *Holship*, cit., para. 76. The Norwegian Supreme Court's emphasis put on the advisory character of the answers received from the EFTA Court goes all the way back to the plenary judgment of 16 November 2000, case HR-2000-49-B, *Finanger I*.

[102] Norwegian Supreme Court, *Holship*, cit., para. 77.

[103] See further H.H. Fredriksen, C. Franklin, *Of Pragmatism and Principles*, cit., p. 674.

the EFTA Court itself agrees that the EEA Agreement can only work if common EU/EEA law is interpreted and applied in line with CJEU case-law.[104]

For our present purposes, we need not go into the controversies that naturally arise in cases where the Norwegian Supreme Court believes that it knows the ways of the CJEU better than does the EFTA Court. It will rather suffice to note that more than 25 years after the entry into force of the EEA Agreement, no court of an EEA/EFTA State has disregarded *CJEU case-law* in a manner even remotely comparable to the rebellion of the German Constitutional Court in *Weiss* or of the Czech Constitutional Court in *Landtová*.[105] Furthermore, if a national court of an EEA/EFTA State ever was to disregard an advisory opinion received from the EFTA Court without firm support in CJEU case-law, the EFTA Surveillance Authority could be expected to initiate an infringement action under Art. 31 SCA. Since the EFTA Court has jurisdiction to issue binding judgments in infringement actions, this constitutes an indirect route to a binding decision.

Thus, if one focuses on the *adherence to joint EFTA Court and CJEU case-law* by the national courts rather than the "mere" advisory character of the EFTA Court's opinions, the situation in the EEA/EFTA States is at least comparable and arguably even better than in quite a few of the EU Member States. If one interprets *Bosphorus* to the effect that the European Court of Human Rights was concerned with the actual control exercised by the CJEU over the fundamental rights protection offered by domestic courts, and not so much the formal framework, the lack of binding preliminary rulings from the EFTA Court cannot alone be decisive. The European Court of Human Rights could therefore extend the equivalent protection doctrine to the EEA/EFTA system and then check carefully if the procedural protection offered is "manifestly deficient" if there is ever a case where a national court has deviated from an advisory opinion from the EFTA Court in a way that appears detrimental to the protection of the fundamental rights of the complainant.[106]

[104] The most explicit example from the EFTA Court is the advisory opinion of 8 July 2008, joined cases E-9/07 and E-10/07, *L'Oréal*, para. 28, where, in a remarkably open and straightforward manner, the Court held that the objective of a homogeneous EEA "calls for an interpretation of EEA law in line with new case-law of the [CJEU] regardless of whether the EFTA Court has previously ruled on the question".

[105] German Federal Constitutional Court, *Weiss/PSPP*, cit.; J. KOMÁREK, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII*, in *European Constitutional Law Review*, 2012, p. 323 *et seq*.

[106] It may be added here that the European Court of Human Rights itself "merely" renders advisory opinions in cases where national apex courts refer questions of interpretation to it, see Protocol no. 16 ECHR. However, the relevance of this to the assessment of the advisory opinions of the EEA/EFTA system remains doubtful. On the one hand, it may be argued that the European Court of Human Rights presumably expects its advisory opinions to be adhered to by the referring courts, and that it may therefore also acknowledge the advisory opinions of the EEA/EFTA system as not so different from the preliminary rulings of the CJEU. On the other hand, the right under Art. 34 ECHR to bring a complaint before the European Court of Human Rights also applies in cases where the national court has obtained an advisory opinion, something which arguably suggests that the parties to the ECHR acknowledge that a system with ad-

*c*) The lack of jurisdiction to annul EEA Joint Committee decisions.

A further challenge to an extension of the equivalent protection doctrine to the EEA/EFTA system lies in the fact that the EFTA Court lacks jurisdiction to rule on the validity of decisions from the "EEA legislator" (the EEA Joint Committee).[107] In direct actions, the EFTA Court only has jurisdiction to review the legality of EFTA Surveillance Authority decisions (Art. 36 SCA), whereas its jurisdiction under the preliminary reference procedure is limited to questions concerning interpretation of EEA law (Art. 34 SCA).[108]

For present purposes, the problem can be illustrated by the infamous Data Retention Directive, which the CJEU declared invalid in the 2014 *Digital Rights Ireland* case for violating the fundamental right to privacy enshrined in Art. 7 of the Charter of Fundamental Rights.[109] At the time of this judgment, the directive was still stuck in the EEA Joint Committee due to Icelandic opposition to it, but it was only a matter of time before it would have been incorporated into the EEA Agreement. If one imagines e.g. an Icelandic version of *Digital Rights Ireland*, with an Icelandic court referring it to the EFTA Court under Art. 34 SCA, the EFTA Court could not have declared the EEA Joint Committee's decision to incorporate the directive into the EEA Agreement invalid.

Upon reflection, however, this difference between EU law and the law of the EEA/EFTA system hardly adds much to the already discussed difference between the binding preliminary rulings of the CJEU and the advisory opinions of the EFTA Court. An advisory opinion could never declare a legal act invalid; it could merely suggest that the national court behind the referral should draw this conclusion. If one is prepared to accept the judicial protection of fundamental rights in the EEA/EFTA system as equivalent

visory opinions to national courts cannot replace a system with direct individual complaints to the European Court of Human Rights. Still, an attempt to apply the latter argument to criticise the protection of fundamental rights offered by the EEA/EFTA system would also risk affecting the positive assessment in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., of the preliminary ruling procedure before the CJEU. The fact that the preliminary rulings of the CJEU are binding as to the *interpretation* of relevant EU law does not remove the risk of a national apex court applying it in a way that the losing party nevertheless considers to be incompatible with fundamental rights. It may be added that both the EU and the EEA/EFTA system offer indirect enforcement by way of possible infringement proceedings brought by the EU Commission/the EFTA Surveillance Authority, something which Protocol no. 16 ECHR does not (as there is no need for it in light of Art. 34 ECHR).

[107] Novel EU legislation of EEA relevance is constantly incorporated into the EEA Agreement by decisions of the EEA Joint Committee, see Art. 102 EEA. The Joint Committee has the power to adapt the EU legal acts to the EEA framework and may also grant requests for substantive adjustments (although the EU side rarely agrees to such requests from the EEA/EFTA States). The legal basis for the applicability of EU legislation in the EEA is the EEA Joint Committee's decisions, which justifies the characterisation of the Committee as the legislature in the EEA.

[108] Art. 34 SCA has no parallel to Art. 267, para. 1, let. b), TFEU, which gives the CJEU jurisdiction to issue preliminary rulings concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

[109] Court of Justice, judgment of 8 April 2014, joined cases C-293/12 and C- 594/12, *Digital Rights Ireland* [GC].

to that offered by the ECHR, despite that fact that the EFTA Court only has jurisdiction to render advisory opinion, then the lack of jurisdiction to declare EEA Joint Committee decisions invalid ought not to create additional problems. If the focus is on the overall protection offered jointly by the EFTA Court and the national courts of the EEA/EFTA States, it should suffice that an Icelandic version of *Digital Rights Ireland* could be solved by the EFTA Court recognising an EEA fundamental right to privacy mirroring the one found in Art. 7 of the Charter of Fundamental Rights and Art. 8 ECHR and holding that the overarching objective of homogeneity between EU and EEA law does not allow for the directive to be applicable in the EEA in a situation where it would have to be considered invalid and therefore inapplicable in the EU, without there being any need for a formal declaration of the EEA Joint Committee decision being null and void.[110]

### IV.4. Preliminary conclusion on the applicability of the equivalent protection doctrine to the EEA

Based on the analysis above, we are not convinced by the European Court of Human Rights' view that the basis for the presumption established by *Bosphorus* is lacking in the EFTA pillar of the EEA. There are certainly significant differences between EU law and the law of EEA/EFTA system: no written catalogue of fundamental rights, no direct effect, no obligation to refer, only advisory opinions, no review powers. However, these differences do not, in our view, hinder the fact that the overall protection of fundamental rights, *as guaranteed by the complex interplay between the EFTA Court, the CJEU and the national courts of the EEA/EFTA States*, are comparable to the protection offered in the EU, and which the European Court of Human Rights found to suffice in *Bosphorus*.

An extension of the equivalent protection doctrine to the EEA/EFTA system nevertheless requires that the role of national courts of the EEA/EFTA States are taken into consideration to a greater extent than the role of the national courts of the EU Member States in *Bosphorus* itself. To EEA lawyers, familiar with the more "partner-like" relationship between the EFTA Court and the national courts,[111] this would seem a natural adaptation of *Bosphorus* to the characteristics of the EEA. Still, to shield the EEA/EFTA States from full ECHR review in cases where the national courts, in the words of the Supreme Court of Norway, "must independently consider how to interpret and apply EEA law",[112] is undoubtedly quite a stretch of *Bosphorus*.

[110] Another albeit related matter is whether the EFTA Court would in fact have been prepared to "go first" in such a scenario and hold the directive to violate fundamental rights, *i.e.* before the CJEU reached this conclusion in *Digital Rights Ireland* [GC], cit. In hard cases such as *Digital Rights Ireland*, is the judicial protection of fundamental rights in the EEA/EFTA system not only *de jure*, but also *de facto* comparable to that offered by EU law? For a sceptical view, see H.H. Fredriksen, C. Franklin, *Of Pragmatism and Principles*, cit., pp. 682-683.

[111] As highlighted by the EFTA Court itself in *Irish Bank*, cit., para. 59.

[112] Norwegian Supreme Court, *Holship*, cit., para. 76.

However, the *raison d'être* of *Bosphorus* lies in the European Court of Human Rights' desire to facilitate European integration and to establish a workable relationship with the CJEU. In section VI below, we will address this matter and ask if this justifies an extension of *Bosphorus* to the EEA/EFTA system. First, however, we need to address a more fundamental question, overlooked by the European Court of Human Rights in *Konkurrenten.no*, but in our opinion the crux of the matter when considering whether to extend the equivalent protection doctrine to the EEA/EFTA system: the European Court of Human Rights' finding in *Matthews* that a State can never be shielded from ECHR review of its application of international obligations which it has "freely entered into".[113]

## V. The (in-)applicability of *Matthews* to the EEA/EFTA system

In *Konkurrenten.no* the European Court of Human Rights did not address whether obligations under the EEA Agreement flow from membership of an international organisation to which the EEA/EFTA States have transferred part of their sovereignty, or whether they rather are to be considered obligations "freely entered into" and therefore as such exempted from the equivalent protection doctrine.[114]

At a glance, there appears to be good reasons to question both whether, by entering into the EEA agreement, the EEA/EFTA States have become members of an international *organisation* and whether they have delegated *sovereign* powers to it. As we will come back to, the EEA Agreement was drafted specifically to avoid transfer (or, more precisely: delegation) of sovereign powers. Moreover, the EEA/EFTA system is not encapsulated by an overarching international organisation.

Before considering this issue further, we need to analyse *Matthews* and its rationale more closely – in particular its far from clear relationship to *Bosphorus* and the equivalent protection doctrine. This is done in section V.1. We then return to the EEA/EFTA system in section V.2.

### V.1. *Matthews* and its relationship to the equivalent protection doctrine

The relationship between *Matthews* and the judgment in *Bosphorus* six years later, is far from clear. In *Bosphorus*, the European Court of Human Rights affirmed *Matthews*, distinguishing it along the lines set out in section II above.[115] Subsequent case-law has not explicitly overruled or limited *Matthews*, either. The approach in *Gasparini* was to hold Member States responsible for a violation caused by conduct attributable to the organi-

[113] *Matthews v. United Kingdom* [GC], cit., para. 33.

[114] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 154; *Matthews v. United Kingdom* [GC], cit., para. 33.

[115] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 157.

sation alone, because that organisation was set up with a manifestly deficient system of (procedural) human rights protection. The *Matthews* doctrine therefore appears to hold: parties to the ECHR are responsible for violations caused by treaty commitments they have "freely entered into".[116]

If taken literally, however, the "freely entered into" approach of *Matthews* encompasses all of the EU Treaties, thus excluding all cases where EU Member States comply with obligations flowing directly from them from the scope of the equivalent protection doctrine. As the *raison d'être* of *Bosphorus* lies in the European Court of Human Rights' desire to facilitate European integration and to establish a workable relationship with the CJEU, this begs the question of whether *Matthews* must nevertheless be considered at least partially overruled by *Bosphorus*.

In our view, there are valid arguments in favour of handling treaty commitments by a State (as in *Matthews*) differently from binding decisions taken by an international organisation that is later implemented by its Member States (as in *Bosphorus*). The act of committing to a treaty is a voluntary exercise of state sovereignty. While there may be significant political pressure to commit to new treaty obligations, for example when the constituent treaties of the European Union are renegotiated, each state is formally free to decide for itself.

In contrast, states that set up international organisations with the power to take legally binding decisions addressed to them as members, are in effect delegating – and pooling – their sovereign powers. Those powers are then exercised by the organisation, which is endowed with a certain degree of autonomy, as well as a legal personality separate from that of its Member States. This contrast is less stark for decisions of international organisations that are taken by consensus. In the EU system, most legal acts are based on competences that provide for majority voting, but some legal bases still require unanimity.[117] Even in areas where majority voting is possible, most decisions by the EU Council are nevertheless taken by consensus.[118] However, to attribute decisions of an organisation to its member states (whether all or just those taken unanimously) is tantamount to piercing the organisation's institutional veil. International law knows no such doctrine of veil-piercing; the clear, general rule is that the separate legal personali-

[116] *Matthews v. United Kingdom* [GC], cit., para. 33; see also, e.g. European Court of Human Rights, judgment of 12 July 2001, no. 42527/98, *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], para. 47. Of course, this only applies to the treaty commitments that are subsequent to the entry into force of the ECHR for the state in question: see European Commission of Human Rights, decision of 28 May 1975, no. 6231/73, *Hess v. UK*.

[117] Unanimity is still the rule in over 70 areas post-Lisbon, see P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford: Oxford University Press, 2010, p. 43.

[118] For example, in 2019 the EU Council adopted 104 legislative acts using the qualified majority voting procedure. Only 14 of those acts were adopted with one or more votes against. Abstentions were more common, though, with 49 acts adopted with at least one Member State either abstaining or voting against. See www.consilium.europa.eu.

ty of the organisation cannot be circumvented.[119] Tellingly, in *Bosphorus* the European Court of Human Rights did not enquire whether Ireland could have blocked Council Regulation 990/93 regarding sanctions against the Federal Republic of Yugoslavia.

Joining an international organisation with decision-making powers that also bind the member states therefore entails an *explicitly* open-ended commitment. When a state joins the EU, it knows that it operates on the basis of the principle of conferral (like all other international organisations) as well as the contours of the competences conferred upon the Union, which are laid down in its constituent treaties. The content of secondary Union law cannot be known in advance, however, as it is the result of the political processes in Brussels.

As well demonstrated by the EU constituent treaties, however, the view of the European Court of Human Rights in *Matthews* that treaty obligations as such are static and their consequences therefore foreseeable for a state freely entering into them, does not hold. A treaty commitment may in practice entail an *implicitly* (and partially) open-ended commitment, because they may contain terms that by design are capable of evolving through interpretation.[120] The interpretation of vague treaty terms may be particularly evolutive when an international court has jurisdiction to interpret and apply the treaty in question – especially when the court in question favours the object and purpose above the treaty text, as the CJEU is (in)famous for doing.

The Union's constituent treaties provide clear examples of this. They establish both decision-making institutions and far-reaching substantive treaty obligations. Of substantive treaty obligations, some are of a more static nature, while others have shown themselves highly susceptible to evolutionary interpretation. Joining the EU thus entails:

*1*) explicitly open-ended commitments (with regard to secondary law and other binding decisions of its institutions – like those at issue in *Bosphorus*),

*2*) more or less static treaty commitments (e.g. the black letter treaty provision on elections to the European Parliament – like those at issue in *Matthews*), and

*3*) implicitly open-ended treaty commitments (e.g. the four freedoms, competition law, Union citizenship, and much more).

Commitment type (*1*) is covered by the equivalent protection doctrine. Commitment type (*2*) appear to be covered by the *Matthews* doctrine, meaning that member states are fully responsible for the consequences flowing from them. However, as of yet there are no

[119] Though, in very rare instances a single piece of conduct may be attributed both to the organisation and (one or more) Member States. Such dual attribution would, however, require a very high degree of involvement by the Member State(s) in question that goes far beyond a mere affirmative vote in the relevant decision-making body of the organisation. See generally, and with further references, S.Ø. JOHANSEN, *Dual Attribution of Conduct to Both an International Organisation and a Member State*, in *Oslo Law Review*, 2019, p. 178.

[120] E. BJØRGE, *The Evolutionary Interpretation of Treaties*, Oxford: Oxford University Press, 2014, p. 2 *et seq*.

European Court of Human Rights cases concerning commitment type (*3*): implicitly open-ended commitments under the constituent treaties of the Union. Nor do we know of any cases involving other treaty commitments that are of an implicitly open-ended nature.[121]

At present, it is therefore somewhat uncertain how the European Court of Human Rights will handle open-ended treaty commitments. On the one hand, the rationale behind *Matthews* appears to be that states enter into (static) treaty commitments freely, and may foresee the consequences of binding themselves to the mast. If it were otherwise, states could simply circumvent ECHR responsibility by entering into treaties detailing their planned human rights violations. On the other hand, the rationale behind the equivalent protection doctrine is the importance of international cooperation and the consequent need to secure the proper functioning of international organisations.[122]

The rationale that best fits implicitly open-ended treaty commitments is in our view the one underlying the equivalent protection doctrine. While it may not be a perfect fit, it is certainly more relevant than the rationale underlying *Matthews*. This suggests that the *Matthews* doctrine should not be applied to implicitly open-ended treaty commitments. Instead, some version of the equivalent protection doctrine should be applied to such treaty commitments, which – although "freely entered into" – are developed by international courts.

The distinction between static and (implicitly) open-ended treaty commitments that we suggest here may appear vague. An alternative way of distinguishing would be to delimit the equivalent protection doctrine in the line with the CJEU's jurisdiction. It would then only be outside the scope of the CJEU's jurisdiction that the *Matthews* doctrine – full ECHR responsibility for treaty commitments – should apply.[123] We are not opposed to such an approach, but it does require the European Court of Human Rights to explicitly overrule *Matthews* and thus admit that the distinguishing of that judgment in *Bosphorus* was misguided. That is because the CJEU did indeed have jurisdiction to interpret the rules of EU primary law that were at issue in *Matthews* – although it obviously could not set them aside.[124] Drawing the line where the CJEU has jurisdiction not only to interpret, but also to annul, is in our view not recommendable. That is because

[121] However, a case of this kind originating in the EEA/EFTA system is presently before the European Court of Human Rights: *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway*, cit. We will come back to this case in section V.2 below.

[122] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], para. 150, subpara. 2.

[123] As suggested, e.g., by H.H. Fredriksen, K.E. Skodvin, *Den europeiske menneskerettighetsdomstolens kontroll med vern av grunnleggende rettigheter i EF, EU og EØS*, cit., pp. 552-554.

[124] That the Court of Justice has jurisdiction to interpret these rules is most clearly evidenced by judgment of 12 September 2006, case C-145/04, *Spain v. UK* [GC], where Spain challenged the UK's attempt at remedying the ECHR violation identified in *Matthews v. United Kingdom* [GC], cit.

such a demarcation would lump all treaty commitments together, whether static or open-ended, which we have already demonstrated as being problematic.[125]

The distinction we propose preserves both (the core of) *Matthews* and the equivalent protection case-law, while identifying that there is space for an equivalent protection-like doctrine for implicitly open-ended treaty commitments. Against this background, we will now turn to (re)analysing the EEA/EFTA system.

### V.2. Open-ended commitments and the EEA/EFTA system

The EEA/EFTA system is replete with open-ended treaty commitments. Not only does the main part of the EEA Agreement contain commitments of this nature copied from the (pre-Maastricht) EEC Treaty. As we will now demonstrate, secondary Union law – notably regulations and directives – make their way over to the EEA/EFTA system in the form of treaty commitments.

For the EU Member States, obligations flowing from secondary Union law are covered by the equivalent protection doctrine because it is enacted by the organs of the Union – an international organisation. Secondary EU law then makes its way into the EEA Agreement through decisions of the EEA Joint Committee. But what is the nature of the Joint Committee? Is it just the name for a meeting of the parties to the EEA Agreement, or something more – an international organisation?

While there is some dispute regarding the exact criteria for what constitutes an international organisation, one fundamental requirement is that it must have at least one organ with a will of its own (*volonté distincte*).[126] This criterion is closely intertwined with the notion of international legal personality, which is a reflection of the organisation's *volonté distincte*.[127] This distinguishes organisations from mere treaty bodies, which do not have international legal personality.

The more fine-grained question is thus whether the EEA Joint Committee is (a part of) an international organisation, or whether it is a mere treaty body. There is nothing in the EEA agreement that suggests that it establishes an organisation with international legal personality. As mentioned above, the EEA Agreement was drafted with the specific intention of avoiding delegation of sovereign powers to an international organisation. This is reflected in the design of the Joint Committee. Its decisions are taken not just unanimously, but "by agreement" between the EEA/EFTA states and the Union.[128] Moreover, the Joint Committee does not have a proper secretariat, but one official of

[125] Other demarcations of the equivalent protection-like doctrine are also possible, such as e.g. one focusing on the binding effect of the CJEU's case-law interpreting the EU Treaties rather than the treaties as such (essentially equating CJEU case-law with secondary EU law elaborating EU primary law).

[126] H.G. Schermers, N.M. Blokker, *International Institutional Law: Unity within Diversity*, Leiden: Brill Nijhoff, 2018, pp. 48-50, with further references.

[127] *Ibid*., p. 48.

[128] Art. 93, para. 2, EEA.

the EU Commission and one official nominated by the EEA/EFTA States acting jointly as secretaries.[129] Each side additionally has their own secretariat. The EU side uses the European External Action Services as their secretariat. The EEA/EFTA states coordinate their positions in the so-called Standing Committee of the EFTA States, to which secretariat services are offered by the EFTA organisation. Overall, the Joint Committee lacks any semblance of *volonté distincte* and/or international legal personality. It is thus clearly not an international organisation.

While the Joint Committee is not an international organisation, it may be a part of one. A treaty can create a body that forms part of an organisation constituted on the basis of a different treaty.[130] However, there is no larger "EEA organisation" that the Joint Committee is docked with. While the EEA Agreement does not establish any international organisation, the Surveillance and Court Agreement establishes two: the EFTA Surveillance Agency and the EFTA Court.[131] But the EEA Joint Committee is not associated with any of them.[132]

Since the Joint Committee is merely a treaty body, its decisions to incorporate EU legal acts into the annexes to the EEA Agreement must be regarded as amending treaties. As noted both by the European Commission and the EFTA Court, a decision of the EEA Joint Committee constitutes "a simplified form of an international agreement between the Community and its Member States on the one hand, and the EFTA States party to the EEA Agreement on the other".[133]

The question is then whether these amending treaties are freely entered into by, on the one hand, the EEA/EFTA states, and, on the other, the Union. Since the EEA Joint Committee decisions are taken "by agreement" between the parties, at first glance this appears to be the case.[134] While there is no doubt a high degree of political duress involved, that is of no relevance – the same was likely also the case for the instruments at issue in *Matthews*.

However, there are some aspects of the EEA Agreement that make the issue less clear. First, while there is no legal obligation to accept new EU legislation into the EEA

[129] Art. 19 of the Rules of procedure for the EEA Joint Committee.

[130] H.G. SCHERMERS, N.M. BLOKKER, *International Institutional Law*, cit., p. 304, with further references.

[131] Art. 1 of Protocol no. 6 and Art. 1 of Protocol no. 7 SCA confer legal personality upon, respectively, the EFTA Surveillance Authority and the EFTA Court.

[132] In this connection it should be noted that the European Free Trade Association (EFTA) is indeed an international organisation, set up by the 1960 EFTA Convention. However, neither the EEA Joint Committee nor the EFTA Court or the EFTA Surveillance Agency are associated with EFTA as such. The reason behind the highly confusing names of the latter two institutions was the expectation that all of the EFTA states would become parties to the EEA Agreement, but this was frustrated by the Swiss "No" to the EEA in a 1992 referendum on the matter.

[133] EFTA Court, advisory opinion of 9 October 2002, case E-6/01, *CIBA Speciality Chemicals Water Treatment*, para. 33.

[134] Art. 93, para. 2, EEA.

Agreement, its object and purpose depend on this being done. Thus, Art. 102, para. 1, EEA states that: "In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement".[135]

In the 25 years that the EEA Agreement has been in operation, there is still no clear example of a "veto" by the EEA/EFTA States against new EU legislation of EEA relevance. At best, certain adjustments may be made to adapt e.g. a regulation to the scope and context of the EEA Agreement. The EEA Agreement is, in other words, a uniquely dynamic treaty – as close to explicitly open-ended that a treaty not establishing an international organisation can be.

Second, within the EFTA pillar of the EEA, both the main part of the EEA Agreement and the EU legislation included in its annexes are interpreted and applied by independent bodies: the EFTA Court and the EFTA Surveillance Authority. Not only do they contribute significantly to the dynamism of the EEA Agreement; they are also both international organisations – thus further blurring the line between implicitly and explicitly open-ended commitments.

Particularly notable among the implicitly open-ended commitments in the main part of the EEA Agreement are the four freedoms, as well as the provisions on competition and state aid. These closely mirror their respective twin provisions in the TFEU. While this core bundle of EU/EEA law obligations form part of the constituent treaties of the Union and the main part of the EEA Agreement – and are in that sense quite "freely entered into" by the EU and EEA/EFTA States – they are also stereotypical examples of implicitly open-ended commitments. Indeed, one of the core characteristics of Union law (and thus, by extension, EEA law) is the CJEU's evolutive and pro-integration interpretations of them.[136] Some have characterised this as a constitutionalisation process – where particularly the four freedoms have taken on a (quasi-)constitutional character.[137] As pointed out by

[135] But "shall" does not imply an obligation on the EEA/EFTA States to agree to the incorporation of novel EU legislation into the Agreement, cf. e.g. para. 4 of the same article: "If [...] an agreement on an amendment of an Annex to this Agreement cannot be reached, the EEA Joint Committee shall examine all further possibilities to maintain the good functioning of this Agreement and take any decision necessary to this effect, including the possibility to take notice of the equivalence of legislation".

[136] See e.g. M.P. MADURO, *We the Court: The European Court of Justice and the European Economic Constitution*, Oxford: Hart, 1998.

[137] See, in particular, the seminal work of J. H. H. WEILER, *The Transformation of Europe*, in *The Yale Law Journal*, 1991, p. 2403 *et seq.*, with further references. It is also worth noting that the current president of the CJEU has long adopted this constitutionalist narrative, see K. LENAERTS, *Constitutionalism and the Many Faces of Federalism*, in *The American Journal of Comparative Law*, 1990, p. 205.

Stone Sweet, a "potentially explosive problem lurks behind these considerations: Constitutional Courts cannot perform their assigned tasks without making law".[138]

Surprisingly, there has yet to be a European Court of Human Rights case challenging the human rights compatibility of the four freedoms. A clear candidate for such a case presented itself following the CJEU's infamous ruling in *Laval*.[139] However, the trade unions eventually chose to bring their case to the European Committee of Social Rights rather than to the European Court of Human Rights.[140]

Now, however, the EFTA pillar of the EEA has produced a case of this kind that is currently pending before the European Court of Human Rights: *LO and NTF v. Norway*.[141] In essence, the complainants (the Norwegian Transport Workers' Union and the Norwegian Confederation of Trade Unions) argue that the Supreme Court of Norway has violated Art. 11 ECHR by giving priority to the right to provide services under EEA law in a case where a transportation company refused to enter into a collective agreement with provisions on preferential right to loading and unloading work for stevedores affiliated with the port of call. As the Supreme Court's judgment closely followed the interpretation of EEA law advocated by the EFTA Court,[142] the complaint is a clear attempt to get the European Court of Human Rights to review EFTA Court case-law. Furthermore, since the EFTA Court relied heavily on CJEU case-law,[143] the complaint is also a clear example of a possible indirect European Court of Human Rights review of CJEU case-law. And finally, as the right to provide services is guaranteed by a provision of the main part of the EEA Agreement (Art. 36 EEA), mirroring a provision of EU primary law (now Art. 56 TFEU), the case also raises questions as to the reach of *Matthews* and its "freely entered into" test.

From the reasons developed above in section V.1, we submit that the European Court of Human Rights should not apply the *Matthews* doctrine to the EEA/EFTA system when deciding *LO and NTF v. Norway*.

## VI. A jack-in-the-box in the relationship between the CJEU and the European Court of Human Rights?

Our analysis has demonstrated that an extension of the equivalent protection doctrine to the EEA/EFTA system presupposes both a rethinking of the "freely entered into" doctrine

[138] A.S. Sweet, *The European Court of Justice*, in P. Craig, G. de Búrca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, p. 130.

[139] Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval Un Partneri Ltd* [GC].

[140] European Committee of Social Rights, decision of 3 July 2013, no. 85/2012, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*.

[141] *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway*, cit.

[142] Norwegian Supreme Court, *Holship*, cit., particularly paras 72-78 and 88-99.

[143] EFTA Court, *Holship Norge AS and Norsk Transportarbeiderforbund*, cit., particularly paras 104-131.

established in *Matthews* and a holistic approach to the question of whether the EEA/EFTA system offers a level of human rights protection equivalent to that of the ECHR system.

Admittedly, it may therefore be argued that the *obiter dictum* in *Konkurrenten.no* ought to be upheld by the European Court of Human Rights in the pending case of *LO and NTF v. Norway* – albeit for other reasons than those given in the judgment. However, as suggested in the very title of this contribution, such a finding would make the EEA/EFTA system a proverbial jack-in-the-box in the relationship between the CJEU and the European Court of Human Rights. Since both the CJEU and the EFTA Court have confirmed on numerous occasions that corresponding provisions of the EU and EEA law are to be interpreted uniformly,[144] European Court of Human Rights review of the application of EEA law in the EEA/EFTA States will come very close to full (albeit indirect) review of CJEU case-law.

Therefore, the arguments in favour of an extension of the equivalent protection doctrine to the EFTA States in the EEA include not only appreciation for the international cooperation embodied in the EEA Agreement and/or considerations of comity *vis-à-vis* the EFTA Court – but also consideration of the relationship between the European Court of Human Rights and the CJEU.

As explained in the introduction, the CJEU has essentially accepted the law of the EEA/EFTA system as equivalent to EU law, holding the EEA/EFTA States to be "on the same footing as Member States of the European Union"[145] and their citizens to be in a situation "objectively comparable with that of an EU citizen to whom, in accordance with Art. 3, para. 2, TEU, the Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured".[146] In doing so, the CJEU has implicitly recognised as at least comparable the overall protection of fundamental rights offered jointly by the EFTA Court and the national courts of the EEA/EFTA States. The essence of the question on the application of an equivalent protection-like doctrine to the EEA/EFTA system is whether the European Court of Human Rights is prepared to do the same.

[144] The seminal judgment of the Court of Justice is *Ospelt and Schlössle Weissenberg*, cit., para. 29. For a recent confirmation, see *Ruska Federacija* [GC], cit.

[145] *UK v. Council*, cit., para. 59 (differentiating the EEA Agreement from the EEC-Turkey Association Agreement).

[146] *Ruska Federacija* [GC], cit., para. 58.