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The Saga of Þór Kolbeinsson

**Challenges of Imagining State Liability for Judicial
Infringements of EEA Law in Iceland**

Master's thesis in Law

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PROLOGUE

Born in Sweden, raised in Iceland, Denmark and France, I never quite saw myself living in one place forever. When I returned from France to Iceland to commence my legal studies, thinking in a traditional manner that law was a country specific matter, I worried that I had limited my future opportunities outside of Iceland. To my great surprise I discovered in class in first year that through European integration national law had been stretched beyond borders in Europe, internationalizing the legal profession for butterflies such as myself. This sparked an interest in European law, which has been the guiding light of my studies ever since.

The very reason I decided to study law was an interest in the rights of individuals, and the effective judicial protection of these rights. Being Icelandic, I have been particularly interested in how individuals in the European Economic Area obtain rights originating in European law, and whether the effective judicial protection of EFTA-EEA citizens is more limited than that of EU citizens. My supervisor, Maria Elvira Méndez-Pinedo has been an inspiration in raising awareness of individual rights, reminding students not to get lost in the legal rainforest that is European law and to always return back to the individual who at the end of the day relies on these rights. Working with her has been an intellectual adventure and I would like to express my profound gratitude for her guidance. I would also like to extend special thanks to Sara Guðjónsdóttir, for proofreading the thesis, to Ásta Sigrún Magnúsdóttir, for all her help and advice, and finally to my mother, for her endless support and patience.

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1 Introduction¹

[The] Community constitutes a new legal order of international law (...) the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.²

CJEU, Case Van Gend en Loos

Historically speaking, the judicial protection of individuals has developed considerably both in European Union (EU) and European Economic Area (EEA) law. On the EU side, the principle of direct effect and the principle of primacy established that EU law conferred rights to individuals who could claim these rights before national courts and rely on their precedence over incompatible national legislation. EU law was from the very beginning meant to be much more than traditional international law; it was to be a supranational legal order.³ The rights conferred to individuals in this new supranational legal order were to become a part of their legal heritage.

EEA law was on the other hand never intended to go as far as EU law and EFTA-EEA Member States did not foresee a transfer of sovereign powers. With the development of EEA law, particularly through the EFTA Court's active jurisprudence, EEA law has become a legal order *sui generis* located somewhere between the supranational nature of EU law and traditional international law.⁴ Ever since the EFTA Court's first ruling in the case of *Restamark*⁵ it has been established that individuals can obtain and claim rights originating in EEA law before national courts. This concept has developed through the EFTA Court jurisprudence and Carl Baudenbacher, the president of the EFTA Court, has presented the view that within the EEA legal order there is now a sense of *quasi-direct effect* and *quasi-primacy*.⁶

The development of the judicial protection of individuals in EU and EEA law is to a large extent attributable to the Court of Justice of the European Union (CJEU) and EFTA Court's legislative activities and the willingness of national courts to incorporate these principles into their national legal orders. Through judicial dialogue between national courts, the EFTA Court and the CJEU, principles have been established and transposed between EU and EEA law and on to the national legal orders of Member States. The dialogue in EU law has mostly

¹ The references and bibliography in this thesis follow the University of Iceland Law Department's guidelines for academic research dated 30 September 2008.

² *CJEU, Case 26/62, ECR 1963, p. 1 (NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen)*, para. 12.

³ Maria Elvira Méndez-Pinedo: *EC and EEA law*, p. 27.

⁴ *EFTA Court, Case E-7/97, EFTACR 1998, p. 95 (Erla María Sveinbjörnsdóttir v. Iceland)*, para. 59.

⁵ *EFTA Court, Case E-1/94, EFTACR 1994-1995, p. 15 (Ravintoloitsijain Liiton Kustannus Oy Restamark)*.

⁶ Carl Baudenbacher: "The EFTA Court Ten Years On", p. 26.

been carried out through the obligatory and binding Preliminary Reference procedure, while EEA law has been more dependent on the willingness of national courts, since the dialogue has mostly been carried out through the formally non-obligatory and non-binding Advisory Opinion procedure.⁷

One of the EEA Agreement's strongest characteristics is a constant compromise between ensuring the principle of homogeneity while at the same time respecting the sovereignty of Member States that have not agreed to transfer sovereign powers.⁸ Within this presumably impossible framework, the EFTA Court has ensured the EEA Agreement's functioning and the Agreement has, as a result, been described as an "impressive example of judicial creativity".⁹ An example of this is that although the principle of direct effect and principle of primacy formally do not exist in the EEA legal order, the EFTA Court has shaped EEA law to ensure that individuals can rely on a homogeneous effect of EEA and EU law. One of the most important principles established in this regard is the principle of State liability. The principle was already an integral part of EU law and aims to ensure that in cases where individuals cannot obtain rights conferred to them in EEA law and intended for their benefit, given certain criteria, Member States must make good for damage caused thereby.

The principle of State liability for breaches of EU and EEA law has played an important role with respect to the effective judicial protection of individuals in cases where, for reasons attributable to the State, individuals cannot rely directly on European rights. In light of the important role played by the judiciary in conferring rights to individuals and the development of European law as a whole, it may have come as no surprise that the principle of State liability was extended to apply to judiciary breaches of EU law in the case of *Köbler*.¹⁰

The EFTA-EEA Member States and many scholars believed that the principle of State liability for judicial infringements could under no circumstances apply to EEA law, since formally, there is neither an obligation to refer questions for an Advisory Opinion of the EFTA Court nor to follow these judgments.¹¹ Icelandic author Skúli Magnússon has, however, presented the view that regardless of the Agreement's text, there could in certain cases both be an obligation to refer questions to the EFTA Court and to follow its jurisprudence, since otherwise the uniform application and effectiveness of EEA law could

⁷ Maria Elvira Méndez-Pinedo: *EC and EEA Law*, p. 44.

⁸ Carl Baudenbacher: "Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area", p. 176.

⁹ *Ibid.*, p. 175.

¹⁰ *CJEU, Case C-224/01, ECR 1963, p. I-10239 (Gerhard Köbler v. Republik Österreich)*.

¹¹ See e.g. written observations from Norway in: *EFTA Court, Case E-2/10, EFTACR 2009-2010, p. 234 (Pór Kolbeinsson v. the Icelandic State)*, para. 70.

not be ensured. With this in mind and with respect to the effective judicial protection of individuals, perhaps there is reason to believe that the principle of State liability for judicial breaches should apply in EEA law as well. Furthermore, access to justice plays an essential role in EEA law as demonstrated in the EFTA Court case law and has increasingly been present in the legal discourse of EEA law.¹² The matter was discussed at a conference in Reykjavik on 9 March 2012 where there was a call for reform to ensure that individuals enjoyed access to justice in EEA law as prescribed in the European Convention of Human Rights.

Up until now the EFTA Court has ensured that individuals in EFTA-EEA Member States have been able to rely on a homogeneous effect of EU and EEA law, that is to say that whether situated in a Member State of the EU or EFTA-EEA, individuals could rely on identical rights or similar remedies. The recent EFTA Court case of *Kolbeinsson*¹³, however, demonstrates that there is a crack in the system. In cases where individuals maintain that national courts have breached EEA law, they have limited means to obtain redress.

The focus of this thesis is the principle of State liability for judicial infringements and the relationship between this principle and the effective judicial protection of individuals from the point of view of the principle of procedural homogeneity in EU and EEA law. The saga of Mr. Kolbeinsson will be used as base for exploring this topic.

Mr. Kolbeinsson suffered a work accident, but was not compensated for his permanent physical damage as prescribed by EEA law, since the Icelandic Supreme Court maintained that under Icelandic tort law he was to be held responsible for the accident due to his own contributory negligence. Mr. Kolbeinsson brought a case against the Icelandic State for damage he suffered as a result of this ruling, maintaining that it entailed either a legislative or judiciary breach of EEA law. The matter was referred to the EFTA Court for an Advisory Opinion but the Icelandic Supreme Court did not allow the question of whether there had been judicial breaches of EEA law to be referred to the EFTA Court.

The case demonstrates the importance of establishing the principle of State liability for judicial infringements of EEA law to ensure that individuals enjoy homogeneous protection of rights in EU and EEA law. How can homogeneity be ensured if individuals obtain identical rights in EU and EEA law but if the judiciary steps in the way of granting them these rights they are only compensated in EU law and not EEA law? At the same time, how can the

¹² *EFTA Court, Case E-5/10, EFTACR 2009-2010, p.320 (Dr. Joachim Kottke v. Präsidial Anstalt and Sweetyle Stiftung), para. 26.*

¹³ *EFTA Court, Case E-2/10, EFTACR 2009-2010, p. 234 (Pór Kolbeinsson v. the Icelandic State).*

principle of State liability for judicial infringements be established in a system where the Advisory Opinion procedure is neither obligatory nor binding and Member States have not transferred sovereign power?

To answer these questions the role of courts in EU and EEA law will be examined in order to determine the effects they have had on shaping the European legal order. The Advisory Opinion procedure between national courts and the EFTA court will be studied in particular, to determine whether the procedure is fully optional. This will be followed by an account of the development of the principle of State liability in EU law and the effects that the principle has had on ensuring compliance with EU law. The case of *Köbler* will be studied in particular with respect to the effective judicial protection of individuals. Following this, the principle of State liability for breaches of EEA law will be examined and likewise the effect that the principle has had on ensuring compliance with EEA law. The case of *Kolbeinsson* will be analysed in detail and the possibility of establishing the principle of State liability for judicial breaches of EEA law using the example of Iceland. Finally the effective judicial protection of individuals in EEA law will be examined from the point of view of the principle of effective judicial protection, procedural homogeneity, access to justice and the effectiveness of EEA law. This will be done in order to demonstrate that the case of *Kolbeinsson* indicates that courts cannot stretch EEA law further to ensure homogenous protection of rights in EU and EEA law through the principle of State liability and if individuals are to enjoy effective judicial protection and access to justice in EEA law, reforms are inevitable in the EEA legal order.

2 Shaping the European legal order through adjudication

One of the characteristics of Europe in the twenty-first century is a twofold judicial system of national and supranational courts whose jurisdiction sometimes coincides. Judicial dialogue between these courts has played a key role in their coexistence.¹⁴ In EU and EEA law this dialogue and the relationship between national courts, the CJEU and the EFTA Court has played an essential part in ensuring a uniform interpretation of European law and the effective judicial protection of individuals.

Judicial dialogue between national courts, the CJEU and the EFTA Court aims to ensure a uniform application of European law in all Member States and thus contributes to the homogeneity of the European legal order.¹⁵ In both EU and EEA law, judicial dialogue between courts plays an important role since, during national proceedings, individuals do not have direct access to the CJEU or the EFTA Court. In these cases individuals are dependent on judicial dialogue, initiated by a national court hearing their case, in the form of a request for a Preliminary Ruling by the CJEU or Advisory Opinion by the EFTA Court.¹⁶ Since both the CJEU and the EFTA Court have a tendency to interpret EU and EEA law in a teleological and dynamic manner, judicial dialogue has served to further develop European law.¹⁷

Individuals largely rely on national courts to obtain rights originating at the European level and are dependant on the correct implementation by these courts. Without their full participation in implementing European law, individuals would have few means to obtain rights conferred to them under European law.¹⁸ Judicial dialogue serves to ensure the uniform interpretation of European law and since one of the defining elements of the legal order is the equal access of individuals to rights conferred to them at the European level, judicial dialogue plays a fundamental role in ensuring the effective judicial protection of individuals in European law.¹⁹ The cooperation between European courts furthermore serves the purpose of clarifying European law and is fundamental in ensuring its effectiveness.²⁰

There has been some criticism as to whether the term ‘dialogue’ is appropriately used describing this cooperation since the Preliminary Ruling and Advisory Opinion procedure

¹⁴ Vassilios Skouris: “The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions”, p. 123.

¹⁵ Jan Komárek: “Federal Elements in the Community Judicial system: building coherence in the community legal order”, p. 9.

¹⁶ *Ibid*, p.13-14.

¹⁷ Tor-Inge Harbo: “The European Economic Area Agreement: A Case of Legal Plurism,” p. 212.

¹⁸ Imelda Maher: “EU law”, p. 336.

¹⁹ Jan Komárek: Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order”, p. 10.

²⁰ John Mummery: “Links with national courts”, p. 100.

only provide for national courts directing questions to the CJEU and the EFTA Court and not the other way around. Furthermore the dialogue is not direct as it is carried out from distances and on different judicial levels and it has been maintained that for those reasons there cannot be an actual conversation between national and European courts.²¹ Whether the conversation is a monologue or a two-way speech, the traditional view is that the judicial cooperation in European law has been a success in the development of European integration.²²

2.1 The role of courts in EU law

EU law is based on a two level justice system centred on the idea of the CJEU interpreting EU law and national courts applying EU law.²³ Individuals seek guidance from national courts concerning their legal questions and national courts have the possibility of referring questions relating to the interpretation of EU law to the CJEU. During national proceedings, individuals have no possibility of referring questions directly to the CJEU for a Preliminary Ruling and are, in those cases, dependant on the national court for references.²⁴

In many ways the European institutional system resembles a federal system with legislative, executive and judiciary branches in which it would seem logical that the CJEU would serve as a superior court to national courts.²⁵ The Union is however not defined as a federal system and formally there are no federal courts in the EU. The CJEU therefore does not enjoy a hierarchical institutional position in relation to national courts.²⁶ The Court's position is in fact not entirely defined. It is not categorized as a Supreme Court of the European Union but at the same time it has the final say on interpreting European Law. In this respect the Court could be defined as a *de facto* Supreme Court in the European Union.²⁷ The Court, however, lacks the formal institutional position of a Supreme Court and as a result its position is in many ways weakened.²⁸ This weak position of the Court enhances the role that national courts play in implementing EU law for individuals, since the CJEU is in many ways

²¹ Aida Torres Pérez: *Conflicts of rights in the European Union: a theory of supranational adjudication*, p. 134.

²² Hans-W. Micklitz: *The politics of judicial co-operation in the EU: Sunday trading, equal treatment and good faith*, p. 426.

²³ Paul Craig and Gráinne De Burca: *EU Law*, p. 460.

²⁴ Imelda Maher: "EU law", p. 336.

²⁵ Francis G. Jacobs: "Judicial Dialogue and the Cross Fertilization of Legal Systems: The European Court of Justice," p. 547.

²⁶ Alexander Somek: "Inexplicable Law: Legality's Adventure in Europe", p. 631.

²⁷ Jan Komárek: "Federal Elements in the Community Judicial system: building coherence in the community legal order", p. 9-10.

²⁸ *Ibid*, p. 10.

dependent on their cooperation for the development and proper functioning of the European legal system.²⁹

Although the CJEU is not formally a Supreme Court in the EU, it is a well-established principle that national courts are under an obligation to follow and respect its jurisprudence. This was initially derived from the principle of primacy and the principle of direct effect but today it is viewed as a consequence of the principle of loyal cooperation as spelled out in TFEU Article 4.3.³⁰ The principle is crystallized in TFEU Article 267 under the Preliminary Ruling procedure where national courts are under an obligation to comply with the CJEU Preliminary Ruling.

The role of courts in the EU legal order was defined in the landmark case of *Simmenthal*³¹ where the CJEU noted that:

Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legal provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.³²

National courts thus have a mandate to ensure the effectiveness of European law and as such play a fundamental role from the point of view of individuals and European integration. The importance of the Preliminary Reference procedure and compliance with the CJEU's jurisprudence is of particular importance in this respect, since the Court has the final word on the interpretation of EU law. Furthermore, because of the aforementioned weak institutional position of the CJEU, the relationship between the Court and national courts through the Preliminary Ruling procedure is important to ensure the effectiveness of EU law.

The Preliminary Rulings procedure is the most common form of interaction between national courts and the CJEU. The procedure entails that any national court of a Member State has the possibility of referring a question to the CJEU for a Preliminary Ruling and national courts of last instances have an obligation to refer questions relating to the interpretation of EU law to the CJEU.³³ The process aims to ensure uniform application of EU law while at the same time limiting to some extent the autonomy of national courts.³⁴ There is a sense of

²⁹ Claire Kilpatrick: "Turning Remedies Around: A Sectoral Analysis of the Court of Justice", p. 154.

³⁰ Dóra Guðmundsdóttir: "Getur dómstólum orðið skylda til...? Um hlutverk dómstóla aðildarríkjanna við framkvæmd réttar Evrópusambandsins og dómstóla samningsaðila við beitingu EES-réttar", p. 114.

³¹ *CJEU, Case 35/76, ECR1976, p. 1871 (Simmenthal SpA v. Ministero delle Finanze italiano)*.

³² *Ibid*, para. 20.

³³ Paul Craig and Gráinne De Burca: *EU Law*, p. 461.

³⁴ Peter-Christian Muller-Graff: "Supranationality and Legal Autonomy: Community Law and EEA compared", p. 12.

shared jurisdiction between the CJEU and national courts, since once the CJEU has given its Preliminary Ruling the case is referred back to the national court, which then gives a final judgment. These references thus create a judicial dialogue between national courts and the CJEU.³⁵

The Preliminary Procedure was established to ensure that national courts would in practice seek guidance from the CJEU and actively follow its jurisprudence. The procedure is an important element to ensure individuals, across the Member States, access to rights conferred to them in EU law in a consistent and homogeneous manner. Without a reference obligation, national courts would be able to disregard the CJEU case law, which would dismiss entirely the principle of homogeneity.³⁶ From the perspective individuals and the development of European law, the Preliminary Rulings procedure therefore plays an essential role.³⁷

With the use of the Preliminary Reference procedure, the CJEU has furthermore been able to develop European law through individuals rather than through public enforcement. The first important step was taken in the case of *Van Gend en Loos*³⁸, where the Court noted that a new legal order had been created in Europe, and making it both available and attainable to individuals was a fundamental part of this proclamation.³⁹ The founding treaties of the European Union were not elaborate on the Union's constitutional principles and many of the most fundamental principles of EU law have, as a consequence, been established by the CJEU. Although the immense amount of European legislation would suggest otherwise, EU law is thus in many ways a judge-made law.⁴⁰ Because of the weak institutional position of the CJEU and lack of clear superiority in relation to national courts, the Court has been dependant on national courts welcoming these principles into their national legal orders to ensure their effectiveness.

Judicial dialogue is however not merely a tool for the CJEU to supervise national courts, but can also serve as means for national courts to monitor the CJEU.⁴¹ In this respect it is

³⁵ Francis G. Jacobs: "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice", p. 552.

³⁶ Jan Komárek: "Federal Elements in the Community Judicial system: building coherence in the community legal order", p. 10.

³⁷ Paul Craig and Gráinne De Burca: *EU Law*, p. 460.

³⁸ *CJEU, Case 26/62, ECR 1963, p. 1 (NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen)*.

³⁹ Claire Kilpatrick: "Turning Remedies Around: A Sectoral Analysis of the Court of Justice", p. 154.

⁴⁰ Francis G. Jacobs: "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice", p. 548.

⁴¹ The Rt. Hon Lady Justice Arden DBE: "Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe", p. 13.

noteworthy that EU law, in many ways, derives from the constitutional law of Member States and both national courts and the CJEU influence each other and contribute to each other's development.⁴²

As previously noted, the Preliminary Rulings procedure is obligatory when there are no national remedies to a decision of a national court of last instance and when the validity of a Community Act is in question. There is however an exception to the rule established in the case of *CILFIT*⁴³ where the CJEU noted that national courts of last instance are not under an obligation to ask for a Preliminary Ruling on issues that are irrelevant to their decision, when the question at hand has already been interpreted by the CJEU or when the European law at hand is so clear that it leaves no room for interpretation (f. *acte clair*).⁴⁴ On the criteria of a matter being considered an *acte clair*, the Court noted:

[...] The correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility of resolving it.⁴⁵

The Preliminary Rulings procedure is thus obligatory for national courts of last instance except when the matter at hand is so abundantly clear that it leaves no room at all for interpretation in twenty-seven different States. The Court was thus careful and established that it is not only for the national court to determine whether the matter at hand is obvious in nature. The matter should be obvious for all national courts, in all Member States of the EU as well as to the CJEU itself. It is important to limit the possibilities for national courts to disregard the Preliminary Reference procedure since the procedure entails a guarantee for individuals to ensure that their rights under EU law are interpreted in a correct manner.⁴⁶ The *CILFIT* test entails that the possibilities for national courts not making references to the CJEU on questions relating to the interpretation of European law are very limited and the general rule is to refer questions concerning the interpretation of EU law to the CJEU.

⁴² Aida Torres Pérez: *Conflicts of rights in the European Union: a theory of supranational adjudication*, p. 117.

⁴³ *CJEU, Case 283/81, ECR 1982, p. 3415 (Sri CILFIT and Lanificio di Gavardo SpA v. Ministry of Health)*.

⁴⁴ Jan Komárek: "Inter- Court Constitutional Dialogue after the Enlargement- Implications of the Case of Professor Köbler", p. 89.

⁴⁵ *CJEU, Case 26/62, ECR 1963, p. 1 (NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen)*, para. 16.

⁴⁶ Nicolos Zingales: "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law", p. 425.

National courts play an essential role in European integration since they are the ones to refer questions for a Preliminary Ruling. These questions have on numerous occasions shaped the EU legal order and resulted in judgments establishing the very core principles of EU law.⁴⁷ As previously described, the dialogue between national courts and the CJEU serves to ensure that individuals can obtain rights conferred to them by European law, in a uniform manner throughout the EU. Since national courts are under an obligation to consult with the CJEU concerning the interpretation of these rights, the judicial dialogue plays a fundamental role in ensuring the effective judicial protection of individuals in EU law. As previously noted, individuals do not always have direct access to the CJEU and the Preliminary Reference procedure must be examined from that perspective.⁴⁸ The correct application of European law by national courts is an essential tool to ensure that individuals can rely on European rights. It is therefore not surprising that when national courts fail to comply with the Preliminary Ruling procedure or apply EU law in an incorrect manner, it can amount to a breach of EU law for which the Member State can be held liable. This will be elaborated on in chapter three.

2.2 The role of courts in EEA law

EEA law is, in the same way as EU law, based on a two layer judicial system with national courts on the one hand and the EFTA Court on the other.⁴⁹ These two judicial layers cooperate through the Advisory Opinion procedure prescribed in Article 34 of the Agreement on the Establishment of a Surveillance Authority and a Court of Justice. The procedure is largely tailored after TFEU Article 267 and offers national courts the possibility of referring questions concerning the interpretation of EEA law to the EFTA Court.⁵⁰ Formally there is an important distinction to be made between Preliminary Rulings of the CJEU and Advisory Opinions of the EFTA Court since the latter are, formally, not binding. Interestingly however it was always foreseen that, although formally not binding, the Advisory Opinions would be of great importance, as they would ensure the uniform interpretation of EEA law inherent to the Agreement.⁵¹ This has been the case in practice and the effectiveness of the Advisory Opinions are similar to that of the Preliminary Rulings of the CJEU since national courts have

⁴⁷ Jan Komárek: “Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order”, p. 26.

⁴⁸ Skúli Magnússon: “Málskot ákvarðana um að leita ráðgefandi álits EFTA-dómstólsins frá sjónarhóli EES-réttar”, p. 6.

⁴⁹ María Elvira Méndez-Pinedo: *EC and EEA law*, p. 37.

⁵⁰ Skúli Magnússon: “On the Authority of the Advisory Opinions”, p. 536.

⁵¹ Sven Norberg etc.: *The European Economic Area. EEA Law. A Commentary on the EEA Agreement*, p. 195.

been open to incorporating them into national regimes in the EEA.⁵²

EFTA-EEA national courts have actively followed the EFTA Court Advisory Opinions and this has played a fundamental part in the effectiveness of EEA law. This willingness to integrate Advisory Opinions is evident, amongst other, from national case law. In the Icelandic Supreme Court case of *Fagtún*⁵³ the Supreme Court asserted that Advisory Opinions from the EFTA Court should be followed unless strong arguments would lead to the opposite result.⁵⁴ Lichtenstein has a record number of references *per capita* and because the State relies on a monistic approach to EEA law the acceptance of jurisprudence has been substantial.⁵⁵ There has perhaps been a greater sense of reluctance in Norway towards the EFTA Court and some Norwegian authors have maintained that Advisory Opinions should be considered strictly advisory and as such it is always up to national courts to decide whether to follow Advisory Opinions.⁵⁶ The Norwegian Supreme Court addressed the matter in the case of *Finanger I*⁵⁷, where it established that Advisory Opinions from the EFTA Court should carry great weight in the Supreme Court's considerations, noting that the EFTA Court specialises in interpreting EEA law and as such is quite knowledgeable on the subject. The Court however also noted that the EFTA Court does not have exclusive competences to interpret EEA law and that national courts not only have a right but also a duty to interpret EEA law in their judgments. In later judgments, the Norwegian Supreme Court has clarified this position and established that there would have to be substantial and important arguments for deviating from EFTA Court jurisprudence, particularly where there was a long line of cases on the matter.⁵⁸

In the 2012 *Fredriksen* report on Norway and the EEA Agreement, a sceptical perspective

⁵² Andrew Evans: *The integration of the European Community and third states in Europe: a legal analysis*, p. 370.

⁵³ *Supreme Court of Iceland, Case No. 169/1998, Fagtún (Hrd. 1998, p. 2608)*.

⁵⁴ Sven Norberg etc.: *The European Economic Area. EEA Law. A Commentary on the EEA Agreement*, p. 205.

In Icelandic the Court noted: "Álit EFTA-dómstólsins eru ekki bindandi að íslenskum rétti, sbr. 1. gr. laga nr. 21/1994, en heimildir íslenskra dómstóla til að leita slíks álits eru til þess veittar að stuðla að samkvæmni og einsleitni í skýringum á ákvæðum EES-samningsins og þar með á samræmdri framkvæmd samningsins á öllu hinu Evrópska efnahagssvæði, en það er eitt af markmiðum samningsins, eins og meðal annars kemur fram í 4. mgr. aðfararorða hans og nánar er kveðið á um í 1. þætti 3. kafla hans. Hafa Íslendingar skuldbundið sig til að gera allar viðeigandi ráðstafanir til að stuðla að þessum markmiðum, sbr. 3. gr. EES-samningsins. Af þessu leiðir að íslenskir dómstólar eiga að hafa hliðsjón af ráðgefandi áliti EFTA-dómstólsins við skýringar á efni ákvæða EES-samningsins. Ekkert þykir fram komið, sem leitt getur til þess að vikið verði frá framangreindu ráðgefandi áliti EFTA-dómstólsins um efni ákvæða 11. gr. EES-samningsins."

⁵⁵ Carl Baudenbacher: "The EFTA judicial system reaches the age of majority- Accomplishments and problems", p. 10.

⁵⁶ Erling Selvig: *The European Economic Area Enlarged*, p. 66.

⁵⁷ *Supreme Court of Norway, Case No. 55/1999, Finanger I (HR-2000-00049B 1811)*.

⁵⁸ Tor-Inge Harbo: "The European Economic Area Agreement: A Case of Legal Plurism", p. 205.

is put forth in relation to the Norwegian view on the role and case law of the EFTA Court.⁵⁹ The report demonstrates that there has been reluctance on behalf of Norwegian courts making references to the EFTA Court. The reasons given are amongst other the advisory nature of the EFTA Court judgments, the small number of cases and limited powers of the Court. The report seems to imply that the EFTA Court is responsible for the relatively small number of references from Norway. Carl Baudenbacher, the president of the EFTA Court, has publicly rejected the criticism set forth in the report. Both at a seminar at the EFTA Secretariat on 19 January 2012 and at a Conference on the Preliminary Reference Procedure and Access to Justice in the EEA in Reykjavik on 9 March 2012, he maintained that the criticism was both unjustified and in complete disarray with reality. He has pointed out that Icelandic and Liechtensteiner courts have not held back on references for these reasons and it is therefore hard to see how the Norwegian perspective can be reasoned.⁶⁰ Whether the criticism is justifiable or not, it is evident that a reluctance on behalf of the largest EFTA-EEA Member State referring questions to the EFTA Court could pose significant problems due to the important role played by the judiciary. This development must be observed closely with respect to the integration and development of EEA law.

The Advisory Opinion procedure, as described above, seeks inspiration from the Preliminary Rulings of the CJEU and the EFTA Court has followed CJEU Case law on admissibility.⁶¹ It is important to note that although the Advisory Opinion procedure is formally not binding under Article 34 of the Agreement on the Establishment of a Surveillance Authority, there is however not necessarily reason to deduce that there never could be an obligation to refer questions for an Advisory Opinion of the EFTA Court. As noted above, Article 34 is tailored after TFEU Article 267 and in practice the Advisory Opinion procedure has been interpreted in light of the EU law where the Preliminary Rulings procedure is obligatory.⁶² The EFTA Court has described the Advisory Opinion procedure in the following way:

[...] the advisory opinion is a specially established means of judicial co-operation between the Court and national courts with the aim of providing the national courts with the necessary elements of EEA law to decide the cases before them. According to Article 34 of the Surveillance and Court Agreement a national court or tribunal is entitled, if it considers it

⁵⁹ Departementenes servicesenter Informasjonsforvaltning: *Utenfor og innenfor: Norges avtaler med EU*, chapter 10.

⁶⁰ Carl Baudenbacher: "The EFTA judicial system reaches the age of majority- Accomplishments and problems", p. 9-10.

⁶¹ Carl Baudenbacher: "The EFTA Court Ten Years On", p. 23.

⁶² Skúli Magnússon: "Málskot ákvarðana um að leita ráðgefandi álits EFTA-dómstólsins frá sjónarhóli EES-réttar", p. 15.

necessary to enable it to give judgment, to request the EFTA Court to give such an opinion. From the wording, which in essential parts is identical to that in Article 177 EC [now TFEU Article 267], it follows that it is for the national court to assess whether an interpretation of the EEA Agreement is necessary for it to give judgment.⁶³

The EFTA Court has also noted that the procedure is “a means of inter-court cooperation in cases where the interpretation of EEA law becomes necessary, [and that] this procedure contributes to the proper functioning of the EEA Agreement to the benefit of individuals and economic operators”.⁶⁴ The EFTA Court’s very purpose and the role of its judgments are to be similar to that of the CJEU and with that in mind it is difficult to see how one could be justify that Advisory Opinions should have a weaker effect than Preliminary Rulings of the CJEU.⁶⁵

It is important to establish whether the Advisory Opinion procedure is in practice obligatory since such an obligation could give indication as to whether a failure on behalf of a national EFTA-EEA Court to make references could give rise to liabilities on behalf of an EFTA-EEA Member States to the same effect as in EU law. If such an obligation exists in EEA law and gives rise to State liability, the effective judicial protection of individuals would in many ways be enhanced and brought closer to that of EU law as will be demonstrated later.

2.2.1 The principles of loyalty, homogeneity and reciprocity

Although there is no doubt that formally speaking the Advisory Opinion procedure is neither obligatory nor binding, the view has emerged that, in practice, this is not as clear-cut as the text of the Agreement indicates. Icelandic author Skúli Magnússon has expressed the view that in light of the principle of loyalty and homogeneity there may in fact both be an obligation to ask for an Advisory Opinion and follow the judgments of the EFTA Court.

The loyalty principle expressed is one of the key components in ensuring that individuals can rely on and obtain rights originating in EEA law. The principle is expressed in Article 3 of the EEA Agreement, which corresponds to TFEU Article 4.3, and states that Member States of the EEA are committed to “take all appropriate measures, whether general or particular, to ensure the fulfilment of obligations arising” from the EEA Agreement while at the same time “abstaining from any measure which could jeopardize the attainment of the objectives of the Agreement”. The principle applies to all branches of the State, including the

⁶³ EFTA Court, *Case E-1/95, EFTACR 1994-95*, p. 145 (*Ulf Samuelsson v. Svenska staten*), para. 13.

⁶⁴ EFTA Court, *Case E-2/03, EFTACR 2003*, p. 185 (*Ákærvaldið v. Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson*).

⁶⁵ Skúli Magnússon: “Hversu ráðgefandi eru ráðgefandi álit EFTA dómstólsins”, p. 327.

judiciary. National courts are therefore under an obligation to take all appropriate measures to ensure that individuals obtain rights from EEA law.⁶⁶

The principle of homogeneity also plays a fundamental part in ensuring that individuals in the EEA obtain rights in the same manner as their counterparts in EU law. An important element of the principle of homogeneity is the equality and reciprocity criteria of EEA law and the institutional homogeneity of EEA and EU law. Although this organizational structure does not mean that the EEA and EU legal orders should be identical, it does mean that the enforcement of identical rights should give the same result.⁶⁷ If questions were not referred for an Advisory Opinion on the EFTA side in the same way as questions are referred to the CJEU for a Preliminary Ruling on the EU side, the equality and reciprocity criteria would not be met. Furthermore, if national courts would interpret all matters related to EEA law without ever referring questions to the EFTA Court the uniform interpretation of EEA law could not be guaranteed.⁶⁸ In light of the aforementioned it would seem logical that when important questions are raised before national courts concerning the interpretation of the EEA Agreement national courts should refer the matter for an Advisory Opinion of the EFTA Court to ensure a homogeneous interpretation and respect the principle of loyalty and reciprocity.

Much like in EU law, national courts have a certain mandate in the EEA legal order. In the case of *Criminal proceedings against A* the EFTA Court noted that:

[...]it is inherent in the objectives of the EEA (...), as well as in Article 3 EEA, that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law. Consequently, they must apply the interpretative methods recognized by national law as far as possible in order to achieve the result sought by the relevant EEA rule.⁶⁹

National courts therefore have a duty to confer rights to individuals in conformity with EEA law and it is thus hard to see how the Advisory Opinions of the EFTA Court can in practice be considered merely advisory. National courts play a fundamental role in safeguarding individuals' European rights and in ensuring a consistent interpretation of EEA law. It would seem contradictory if the judiciary was under an obligation to ensure the fulfilment of EEA obligations but was not bound by legal interpretations of the EFTA Court. In any case it is clear that if national courts were at full liberty in choosing whether and how

⁶⁶ Hans Petter Graver: "The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States", p. 17.

⁶⁷ Skúli Magnússon: "On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court", p. 532.

⁶⁸ *Ibid*, p. 535.

⁶⁹ *EFTA Court, Case E-1/07, EFTACR 2007, p. 246 (Criminal proceedings against A), para. 39.*

to apply the Advisory Opinions of the EFTA Court this would surely affect the consistent interpretation of EEA law between Member States, something which is not consistent and not in line with the loyalty principle as set out in Article 3 of the Agreement.⁷⁰

In order to conform to the principles of homogeneity, loyalty and reciprocity as well as the EEA mandate of national courts, Advisory Opinions must, at the very least, be taken seriously. The problem remains what happens if the EFTA Court is not seized upon essential issues of EEA law.⁷¹

2.2.2 Consequences of not referring questions to the EFTA Court

As previously noted the role of national courts in EU and EEA law was demonstrated in the case of *Simmenthal* and *Criminal proceedings against A*. These courts have a mandate to interpret national law as far as possible in conformity with EU and EEA law. The EFTA Court also has a mandate to interpret EEA law. Its mandate is two-fold. On the one hand, the court gives, formally non-binding, Advisory Opinions on references from national courts have been discussed above. On the other hand, the EFTA Court also has a mandate to give binding judgments in EFTA Surveillance Authority (ESA) infringement cases against Member States.⁷² In practice the EFTA Court makes no distinction between the value of precedence of Advisory Opinions and binding judgments and follows its jurisprudence whether it originates from binding judgments or Advisory Opinions.⁷³

If a national court were to refer a question for an Advisory Opinion but disregard the judgment from the EFTA Court, the consequences for such could be the same as in EU law. It is true that under the Agreement on the Establishment of a Surveillance Authority and a Court of Justice there is formally no obligation to follow these judgments. However, if the obligation to refer and comply stems from the principle of homogeneity, loyalty and reciprocity, disregarding the EFTA Court judgment would, as such, be in breach of the aforementioned principles. In light of the State obligation of *pacta sunt servanda*, this could - give rise to an infringement case against the Member State at hand by ESA. Since the EFTA Court follows its precedence regardless of whether they originate from a reference for an Advisory Opinion or from binding judgments, it would seem evident that the EFTA Court would reiterate its Advisory Opinion, this time in the form of a binding judgment and thus the

⁷⁰ Skúli Magnússon: “Hversu ráðgefandi eru ráðgefandi álit EFTA dómstólsins”, p. 326-327.

⁷¹ Sigurður Línal and Skúli Magnússon: *Réttarkerfi Evrópusambandsins og Evrópska efnahagssvæðisins*, p. 156.

⁷² See Article 118(2) of the EEA Agreement and Articles 31, 32 and 36-39 of the Agreement on the Establishment of a Surveillance Authority and a Court of Justice.

⁷³ Skúli Magnússon: “Hversu ráðgefandi eru ráðgefandi álit EFTA dómstólsins”, p. 323.

effect of the Advisory Opinion becomes similar to that of a binding Preliminary Ruling from the CJEU.⁷⁴

One could imagine the same consequences for a national court's refusal to refer a question to the EFTA Court. Carl Baudenbacher has maintained that ESA could bring such a case about if a national court of last instance were to refuse to ask for an Advisory Opinion in a high profile case, citing the case of *Gaming Machines Case E-1/06*.⁷⁵ This could also be the case for a systematic refusal of a national court to refer questions for an Advisory Opinion of the EFTA Court. A present example is that of the Supreme Court of Norway which has between 2002 and 2012 not referred a single case to the EFTA Court. When not a single case has been referred for a whole decade, this would seem to give indication that it is done in a manifest and systematic manner. The risk is that when higher courts do not refer questions for a Preliminary Ruling, lower courts will not either and this position of the Norwegian Supreme Court could therefore have very serious consequences for the effective judicial protection of individuals which depend on a uniform interpretation of EEA law.⁷⁶ Carl Baudenbacher has for these reasons indicated that perhaps ESA should look into this lack of references.⁷⁷ Were ESA to launch an infringement procedure against Norway for the Norwegian Supreme Court's lack of references this might very well revolutionise the whole EEA legal order and certainly call into question judicial independence, something that has consistently been upheld by Norway. It is in any case clear that if such a case were to be brought before the EFTA Court by ESA under Article 31 of the Agreement on the Establishment of a Surveillance Authority and a Court of Justice, the judgment of that case would be binding.⁷⁸

At present, an infringement procedure has never been carried out by ESA on the grounds of a national court disregarding the Advisory Opinion procedure and it is of course difficult to prove intention when the policy of ESA has been non-action. It should however be noted in this regard that an infringement procedure was once carried out against Norway for a failure to respect the EFTA Court binding judgment in a previous infringement case.⁷⁹ Furthermore on one occasion ESA came close to bringing an infringement case for a judgment of the

⁷⁴ Sigurður Línal and Skúli Magnússon: *Réttarkerfi Evrópusambandsins og Evrópska efnahagssvæðisins*, p. 156.

⁷⁵ Skúli Magnússon: "On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court", p. 540 and *EFTA Court, Case E-1/06, EFTACR 2007, p.8 (EFTA Surveillance Authority v. The Kingdom of Norway)*.

⁷⁶ Carl Baudenbacher: *The EFTA Court in Action. Five Lectures*, p. 21.

⁷⁷ Carl Baudenbacher: "The EFTA judicial system reaches the age of majority- Accomplishments and problems", p. 8.

⁷⁸ Skúli Magnússon: "Hversu ráðgefandi eru ráðgefandi álit EFTA dómstólsins", p. 323-324.

⁷⁹ *EFTA Court, Case E-18/10, EFTACR 2011, p. 202 (EFTA Surveillance Authority v. The Kingdom of Norway)*.

Icelandic Supreme Court. In its reasoned opinion from 24 February 2010, ESA criticized the interpretation of the Supreme Court of Iceland in its judgment No. 375/2004,⁸⁰ which amongst other concerned the interpretation of Directive 77/187/EC. ESA noted that:

The principle of protection of the rights of individuals under Community law entails that all State authority, including the judiciary and the legislature, are bound by performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.⁸¹

The matter was not brought to the EFTA Court since Iceland complied in time by amending national legislation.⁸² The wording of the Reasoned Opinion however suggests that ESA considers that breaches of the judiciary could give rise to an infringement case just like acts of the legislator. As previously noted, these are similar consequences to a dismissal on behalf of a national court of a Member State of the European Union where the procedure is binding, something that would suggest that the Advisory Opinion procedure is more similar to that of the EU procedure than the text of the EEA Agreement seems to suggest.

2.2.3 Are Advisory Opinions from the EFTA Court obligatory and binding for national courts?

It has already been noted that EFTA-EEA national courts have in their rulings established that as a general rule the judgments of the EFTA Court should be followed unless there are specific reasons not to. The EFTA Court has also described the role of its judgments in such a way that they are to provide national courts with the necessary tools to decide on cases before them.⁸³ It is furthermore worth noting that, to date, national courts have followed all Opinions of the EFTA Court and from that point of view they have the same authority and effect as Preliminary Rulings of the CJEU in practice.⁸⁴

Advisory Opinions of the EFTA Court play a fundamentally important role in ensuring the homogeneous interpretation of EEA law. It would seem evident that if national courts were to disregard the reference procedure as a general principle, homogeneity could not be guaranteed and the consistent interpretation of EEA law would be greatly jeopardized. Disregarding the Advisory Opinion procedure entirely could thus hardly be considered

⁸⁰ *Supreme Court of Iceland, Case No. 375/2004, Bláðamannafélag Íslands v Frétt ehf. (Hrd. 2005,p. 787).*

⁸¹ *ESA Reasoned Opinion 24 February 2010* and Margrét Einarsdóttir: “Advisory Opinions”, *lecture held at the Conference on the Preliminary Reference Procedure and Access to Justice in the EEA, Reykjavik 9 March 2012.*

⁸² Ólafur Jóhannes Einarsson: “Hæstiréttur og EES-samningurinn. Samningsbrotamál og skaðabótaábyrgð”, p. 643-645.

⁸³ *EFTA Court, Case E-1/95, EFTACR 1994-95, p. 145 (Ulf Samuelsson v. Svenska staten)* and Skúli Magnússon: “On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court”, p. 537.

⁸⁴ Carl Baudenbacher: “EFTA Court: An Actor in the European Judicial Dialogue”, p. 360.

compatible with Member State obligations under EEA law.⁸⁵ As described above, the consequences could give rise to an infringement procedure against a Member State by ESA and the consequences for dismissing the formally non-binding Advisory Opinion procedure would thus be the same as dismissing the binding Preliminary Ruling procedure.⁸⁶ If EFTA-EEA Member States suffer the same consequences as Member States of the EU for dismissing the reference procedure it is hard to see how the written obligation in EU law is different from that of EEA law.

Even if Advisory Opinions are considered to be somehow weaker than Preliminary References, national courts would still have a general obligation to follow the Opinions to the extent possible and in that respect the Opinions are more than a legal view of the EFTA Court and much rather a legal obligation.⁸⁷ Since the Advisory Opinions are meant to serve a similar purpose as the Preliminary Rulings of the CJEU, it is clear that the legal effect of Advisory Opinions should, in practice, be quite similar to that of the Preliminary Rulings.⁸⁸

Advisory Opinions have played a tremendously important role in the shaping of EEA law. Perhaps their importance has been even greater because they were initially not meant to have a (formally) binding character and the development of EEA law has thus relied considerably on the cooperation between national courts in EEA law and the EFTA Court. Norwegian author, Tor-Inge Harbo has presented the view that national courts have from the beginning chosen to follow the EFTA Court judgments and thus created a certain “heterarchy rather than hierarchy” within the EEA legal order, giving a sense of constitutional pluralism in EEA law. Within EEA law the relationship between the EFTA Court and national courts is thus not merely a one-way speech but rather a real judicial dialogue with mutual influence.⁸⁹

This relationship between national courts and the EFTA Court plays an important role in ensuring that individuals in the EFTA-EEA Member States can rely on rights originating from EEA law and that these rights are interpreted in a uniform manner. If national courts do not interpret EEA law correctly, individuals can suffer the consequences and their effective judicial protection cannot be guaranteed. The key role that national courts play in EEA law is very similar to that of national courts in EU law. This would suggest that there is a similar need for consequences when national courts fail to comply with the reference procedure in

⁸⁵ Skúli Magnússon: “On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court”, p. 541.

⁸⁶ Margrét Einarsdóttir: “Advisory Opinions”, *lecture held at the Conference on the Preliminary Reference Procedure and Access to Justice in the EEA, Reykjavik 9 March 2012*.

⁸⁷ Skúli Magnússon: “Hversu ráðgefandi eru ráðgefandi álit EFTA dómstólsins”, p. 327.

⁸⁸ *Ibid*, p. 328.

⁸⁹ Tor-Inge Harbo: “The European Economic Area Agreement: A Case of Legal Plurism,” p. 223.

EEA law as in EU law, where as previously mentioned such a failure can give rise to Member State liability. This subject will be addressed in chapter four.

2.3 Judicial dialogue between European courts

Judicial dialogue in EU and EEA law has not only been carried out between national courts in the EFTA-EEA States and the EFTA Court on the one side and EU national courts and the CJEU on the other, but also between courts in the two legal orders. There has been an active judicial dialogue between the EFTA Court and the CJEU and this dialogue has served as an important tool to transform principles between the two legal orders.

To understand the judicial dialogue between the EFTA Court and the CJEU it is important to examine the issue historically. During the drafting period of the EEA Agreement, an EEA Court was foreseen to have jurisdiction over matters concerning the EEA Agreement in all EEA Member States, including those of the EU. This would have meant that the CJEU and the new EEA Court would both have had simultaneous jurisdiction in matters concerning the four freedoms, competition and State Aid in Member States of the European Union. The CJEU opposed this arrangement in *Opinion 1/91*⁹⁰ and established that the CJEU had sole jurisdiction over matters falling under the EEA Agreement in Member States of the EU.⁹¹ Since EFTA States do not have any representation in EU institutions, the idea of these institutions taking binding decisions upon them was inconceivable. The contracting parties however agreed that there was an evident need for a court and a surveillance authority that would have jurisdiction over EEA matters in EFTA Member States. As a result the EFTA Court and the EFTA Surveillance Authority were established under the Agreement on the Establishment of a Surveillance Authority and a Court of Justice.⁹² This ‘two pillar’ system, of the EU institutions on the one hand and the EFTA institutions on the other, is unique and one of the defining elements in the *sui generis* status of the EEA agreement, which is also the only EU association agreement that is multilateral as opposed to bilateral.⁹³

Since the EEA Agreement is interpreted and applied in two different systems, it was from the very beginning considered essential that there should be a certain dialogue between the EFTA Court and the CJEU to apply a homogenous approach to corresponding legislation and

⁹⁰ CJEU, *Opinion 1/91*, ECR 1991, p. I-6079.

⁹¹ Henry G. Schermers and Denis F. Waelbroeck: *Judicial protection in the European Union*, p. 259.

⁹² Magnus Bjarnason: “The political economy of joining the European Union: Iceland's position at the beginning of the 21st century,” p. 38.

⁹³ Michael Emerson etc.: *Navigating by the stars: Norway, the European Economic Area and the European Union*, p. 5.

ensure a uniform interpretation of the Agreement in the two systems.⁹⁴ The Agreement foresaw in Article 6 that the EFTA-EEA courts would be under a formal obligation to follow the CJEU case law that had fallen before the ratification of the Agreement. This obligation is considered to apply to national courts, the EFTA Court and ESA.⁹⁵ In practice the judicial dialogue between the EFTA Court and CJEU jurisprudence by no means ended at the day of the ratification of the EEA Agreement and it is evident from the EFTA Court jurisprudence that no distinction is made between case law from before and after 2 May 1992. In fact it is clear from Article 106 of the Agreement that the EEA Agreement signatories and authors foresaw continuous homogeneity between the EFTA Court and the CJEU after the ratification of the EEA Agreement.⁹⁶

The dialogue between EU and EEA courts is by no means limited to the EFTA Court and the CJEU and is transferred to the national level through national courts and their dialogue with the EFTA Court and CJEU.⁹⁷ Because of the relationship between the EEA Agreement and the EU Treaties, it would seem natural that national courts in the EEA, whether Member States to the European Union or EFTA, should follow judgments of the CJEU and the EFTA Court.⁹⁸ The principle of homogeneity plays a key role in this respect. Judicial dialogue between national courts, the EFTA Court and the CJEU is derived from Recital 4 of the Preamble of the EEA Agreement, which states:

[...] the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties.

The EEA Agreement not only foresaw that the homogeneity principle laid out in Article 1 of the Agreement and the loyalty principle laid out in Article 3 of the Agreement would extend to the legislative branches of the State but also the judiciary. The active participation of the judiciary in ensuring homogeneity is important since national courts play the role of conferring rights originating from European law to individuals. It is thus evident that if judicial homogeneity were not guaranteed, legislative homogeneity would be seriously

⁹⁴ Sven Norberg etc.: *The European Economic Area. EEA Law. A Commentary on the EEA Agreement*, p. 193.

⁹⁵ Davíð Þór Björgvinsson: “Þýðing fordæma dómstóls EB við framkvæmd og beitingu EES samningsins”, p. 96.

⁹⁶ Titus Van Stiphout: “Homogeneity vs. Decision-Making Autonomy in the EEA Agreement”, p. 444.

⁹⁷ Maria Elvira Méndez-Pinedo: *EC and EEA law*, p. 256.

⁹⁸ John Temple Lang: “Article 10 EC- The Most Important *General Principle* of Community law”, p. 108.

undermined.⁹⁹ In fact this was noted in the aforementioned CJEU Opinion 1/91 where the Court noted:

It follows from those considerations that homogeneity of the rules of law throughout the EEA is not secured by the fact that the provisions of Community law and those of the corresponding provisions of the agreement are identical in their content or wording.¹⁰⁰

It is clear that even though national rules in the EEA are homogeneous to rules in the EU they would have little meaning if national courts did not actively participate in conferring these rights to individuals, who for the most part seek guidance from national courts concerning these rights. If EU and EEA law are to be homogeneous it is furthermore clear that national courts must interpret EEA law in a uniform manner and effective judicial dialogue between national courts, the EFTA Court and the CJEU plays a key role in ensuring such an interpretation. Judicial dialogue is therefore fundamental in ensuring homogeneity of the EU and EEA legal orders.

In practice, interactions between EU and EEA law through the judiciary have been quite lively since the Commission and EU Member States have certain rights to intervene in cases being heard by the EFTA Court and ESA and to the same effect EEA Member States have the right to intervene in cases before the CJEU. Even the location of the two courts in Luxembourg gives a feel of a close cooperation between the two courts.¹⁰¹ It is worth noting that the EEA Agreement allows for direct judicial dialogue between national courts in the EEA and the CJEU under Article 107 of the Agreement and Protocol 27, which authorize courts to request a Preliminary Ruling from the CJEU under certain conditions. This option has however never been chosen and since EEA Member States do not have representation in the CJEU it would seem unlikely that they would choose the CJEU as a forum for interpreting EEA law.¹⁰²

Although it is clear that a homogenous interpretation of EEA law is fundamental in ensuring its effectiveness, it is important to note that the CJEU has no formal obligation to follow EFTA Court jurisprudence.¹⁰³ As a result, the judicial dialogue between the EFTA Court and the CJEU has admittedly mostly been a monologue where the EFTA Court seems to follow the CJEU to a much greater extent than the CJEU has followed the EFTA Court.

⁹⁹ Titus Van Stiphout: "Homogeneity vs. Decision-Making Autonomy in the EEA Agreement", p. 439.

¹⁰⁰ *CJEU, Opinion 1/91, ECR 1991, p. I-6079, para. 22.*

¹⁰¹ Carl Baudenbacher: "The Legal Nature of EEA Law in the Course of Time- a Drama in Six Acts, and More May Follow", p. 48.

¹⁰² Henry G. Schermers and Denis F. Waelbroeck: *Judicial protection in the European Union*, p. 259.

¹⁰³ Davíð Þór Björgvinsson: "Þýðing fordæma dómstóls EB við framkvæmd og beitingu EES samningsins", p. 112.

For these reasons the CJEU has sometimes been referred to as the EFTA Court's big brother.¹⁰⁴ Despite all this, the two courts generally interpret legislation that is identical in EU and EEA law, in a similar manner.¹⁰⁵ At the EFTA Court's tenth anniversary in 2004, Vassilios Skouris, the President of the CJEU stated that: "Ignoring EFTA Court precedence would simply be incompatible with the overriding objective of the EEA Agreement, which is homogeneity".¹⁰⁶

It is worth noting that the CJEU has in its judgments recognized that there is a "need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly".¹⁰⁷ There are also examples of the CJEU referring to the EFTA Court judgments in cases where the EFTA Court has previously dealt with a matter that is appearing before the CJEU for the first time. An example of this is the CJEU Case *Commission v. Denmark*¹⁰⁸, where the CJEU systematically referred to an EFTA Court ruling. There are also examples of the CJEU following the EFTA Court jurisprudence without actual reference to the EFTA Court.¹⁰⁹ This was for example the case in the *Dorsch case*¹¹⁰ where the CJEU followed the EFTA Court *Restamark* jurisprudence.¹¹¹ Thus although there is no obligation to follow case law from the EFTA Court, the CJEU recognizes its importance.

The relationship and remarkable similarities between EEA and EU law would, as Carl Baudenbacher has explored in depth, support an active judicial dialogue between courts in the two pillars. With respect to the principle of homogeneity, national courts in the EEA should take note of the CJEU case law and to the same effect, national courts in the EU should take note of the EFTA Court, particularly in matters that the CJEU has not yet dealt with but the EFTA Court has a clear case law.¹¹²

As mentioned in the beginning of this chapter, the coexistence of national and supranational courts is one of the characteristics of Europe in the twenty-first century. This coexistence is dependent on an active dialogue between the different courts and in practice many of the most important principles of European law have, through this dialogue, been

¹⁰⁴ Henry G. Schermers and Denis F. Waelbroeck, *Judicial protection in the European Union*, p. 260.

¹⁰⁵ Tor-Inge Harbo: "The European Economic Area Agreement: A Case of Legal Plurism", p. 223.

¹⁰⁶ Carl Baudenbacher: "The EFTA judicial system reaches the age of majority- Accomplishments and problems", p. 4.

¹⁰⁷ CJEU, Case C-471/04, ECR 2006, p. I-2107 (*Offenbach am Main-Land v. Keller Holding GmbH*) and Titus Van Stiphout: "Homogeneity vs. Decision-Making Autonomy in the EEA Agreement", p. 445.

¹⁰⁸ CJEU, Case C-192/01, ECR 2003, p. I-09693 (*Commission v. Denmark*).

¹⁰⁹ Davíð Þór Björgvinsson: "Þýðing fordæma dómstóls EB við framkvæmd og beitingu EES samningsins", p. 112.

¹¹⁰ CJEU, Case 54/96, ECR 1997, p. I-04961 (*Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*).

¹¹¹ Titus Van Stiphout: "Homogeneity vs. Decision-Making Autonomy in the EEA Agreement", p. 445-446.

¹¹² John Temle Lang: "Article 10 EC- The most Important 'General Principle of Community Law'", p. 108.

transmitted between judicial layers ensuring that individuals throughout Europe enjoy homogeneous rights interpreted in a uniform manner. The importance of national courts has been fundamental in this cooperation and their responsibility towards individuals is paramount in European law.

National courts play an important role in ensuring the effectiveness of EU and EEA law. The homogeneity and uniform interpretation of EU and EEA law could not be guaranteed without their full participation and the effective judicial protection of individuals would be seriously harmed. For those reasons the principle of State liability in EU law has been considered to extend to judicial infringements of EU law and the questions that arises is whether the same applies in EEA law with respect to the differences of the Preliminary Ruling and Advisory Opinion procedure as described above. Many of the most fundamental principles of EU law have been transposed to EEA law through the judicial dialogue between courts and this includes the principle of State liability, which will now be examined.

3 Ensuring compliance with EU law through the doctrine of State liability

3.1 Development of State liability in EU law

The way in which individuals obtain rights originating at the European level has developed considerably since the landmark ruling of the CJEU in the case of *Van Gend & Loose*¹¹³, when the principle of direct effect was established in European law. Along with the principle of primacy, established in *Costa v. Enel*,¹¹⁴ the principle of direct effect opened the door for individuals to obtain and be able to rely on European rights from national courts. The two principles have been considered of fundamental importance in ensuring that rights conferred to individuals at the European level are obtainable and equally accessible to citizens throughout the European Union.¹¹⁵

The principles of primacy and direct effect however do not necessarily provide individuals with effective judicial protection when there are inconsistencies between EU and national law and they cannot rely directly on European law. The risk of such has increased significantly with the extensive use of directives as a means of European integration. By setting out harmonized obligations and relying on Member State cooperation for their implementation on the national level, European law has been able to develop extensively in the past years and enter new and otherwise untouched fields. The cost of this rapid development has however been an increased risk of European law and national law conflicting, particularly in cases where Member States do not implement directives into national law in time.¹¹⁶ When this is the case, the particular Member State has breached its obligations under EU law and as a result individuals can suffer damage.

European law provides for three possible scenarios of public action to ensure Member State compliance and prevent these kinds of inconsistencies and other breaches of European law. The first possibility is that the Commission initiates infringement proceedings against a Member State under TFEU Articles 258-260 for breaches of EU law. The second possibility is that individuals can bring an infringement case under TFEU Article 340. Finally, there is the duty of national courts to interpret national law according to European law.¹¹⁷ The principle of State liability for breaches of EU law has emerged as a private alternative and

¹¹³ CJEU, Case 26/62, ECR 1963, p. 1 (*NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*).

¹¹⁴ CJEU, Case 6/64, ECR 1964, p. 585 (*Flaminio Costa v. ENEL*).

¹¹⁵ Bert Van Roosebeke: *State Liability for Breaches of European Law: An Economic Analysis*, p. 84.

¹¹⁶ Nicolos Zingales: "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law", p. 419-420.

¹¹⁷ *Ibid*, p. 420.

surplus to the aforementioned public enforcement efforts by the Commission to ensure that individuals are compensated for Member State breaches of EU law.¹¹⁸

There are no provisions on State liability for breaches of EU law in the treaties and traditionally liabilities for breaches of EU law were considered a national issue once European legislation had been incorporated into national law. However, with the landmark case of *Francovich*¹¹⁹ State liabilities for infringements of EU law were given basis in European law.¹²⁰ With its ruling, the CJEU served on the one hand to protect individuals and on the other to ensure Member State compliance with European law by creating financial consequences for failure to do so.¹²¹ This is important since the effectiveness of European law could be seriously harmed if individuals cannot rely on rights originating at the European level and their effective judicial protection could be jeopardized.¹²²

3.1.1 Francovich: Stating the principle

The principle of State liability for breaches of EU law was, as referred to above, first established in the case of *Francovich*. The case concerned the Italian State's failure to implement Directive 80/987/EC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. Since the Directive had not been implemented, no steps had been taken to establish guarantees for wages owed by insolvent employers. The case concerned former employees of an insolvent employer who had not been paid wages owed by their former employer. They brought a claim against the Italian State, maintaining that if the State had implemented the Directive correctly they would have obtained their wages. As a result of the Italian State's failure to implement the Directive, they had suffered damage and for those reasons they maintained that the State should be held liable for paying the wages owed by their former employer.¹²³ The CJEU agreed with this reasoning and established that Member States were to be held liable for damage they caused individuals when breaching European law.¹²⁴ The CJEU maintained that European law had to be interpreted in such a way that individuals could seek compensation

¹¹⁸ Bert Van Roosebeke: *State Liability for Breaches of European Law: An Economic Analysis*, p. 2.

¹¹⁹ CJEU, *Joined Cases C-6/90 and 9/90*, ECR 1991, p. I-5357 (*Andrea Francovich and Danila Bonifaci and others v Italian Republic*).

¹²⁰ Maria Elvira Méndez-Pinedo: *EC and EEA law*, p. 221.

¹²¹ Takis Tridimas: "State Liability for Judicial Acts Remedies Unlimited?", p. 147.

¹²² Nicolos Zingales: "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?", p. 425.

¹²³ Paul Craig and Gráinne De Burca: *EU Law*, p. 329.

¹²⁴ CJEU, *Joined Cases C-6/90 and 9/90*, ECR 1991, p. I-5357 (*Andrea Francovich and Danila Bonifaci and others v. Italian Republic*), para. 35.

for damages caused by Member State breaches of EU law in order to ensure the effectiveness of EU law.¹²⁵ The principle of State liability for breaches of EU law was in this sense inherent to the treaties because without the proper enforcement the European originating rights could be illusory.

This new remedy under EU law was in many ways interesting and even surprising in light of the fact that the CJEU had in an earlier case, *Rewe-Handelsgesellschaft*,¹²⁶ declared that there would be no new remedies under European law.¹²⁷ Nonetheless the CJEU declared in the case that under European law, Member States would be held liable towards individuals for breaches of EU law, if three conditions were met. First the legislation at hand must confer rights to individuals, second the contents of those rights must be identifiable in the provisions of the directive at hand and third there must be a causal link between the breach of the Member State's obligation and the damage suffered by the individual.¹²⁸

The *Francovich* case was revolutionary but it was nonetheless limited to the non-implementation of directives and gave little guidance as to whether the principle might apply to other breaches of EU law. Furthermore although the three conditions for State liability were set out in the case, the judgment shed limited light on the extent to which the principle might be applicable.¹²⁹ The CJEU thus left out important aspects of the principle allowing its future case law to settle those questions. This silence of the Court is however of particular importance as it has allowed the CJEU to develop the principle of State liability for breaches of EU law one step at the time, pushing the outer limits further each time. This method has given the CJEU the chance to establish a principle of quite an extensive liability against the political will of Member States. When regarding the principle as it is today, it is hard to imagine how such an extensive liability for breaches of EU law could have been accepted in a single case two decades ago.¹³⁰

3.1.2 *Brasserie du Pêcheur and Factortame: Applying the principle to all EU law*

The first important case following *Francovich* was the joined case of *Brasserie du Pêcheur and Factortame*.¹³¹ The cases concerned breaches of Treaty provisions, and not directives as

¹²⁵ Nicolos Zingales: "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law", p. 425.

¹²⁶ CJEU, Case 158/80, ECR 1981, p. 1805 (*Rewe-Handelsgesellschaft Nord M.B.H. v. Hauptzollamt Kiel*).

¹²⁷ Paul Craig and Gráinne De Burca: *EU Law*, p. 328.

¹²⁸ Maria Elvira Méndez-Pinedo: *EC and EEA law*, p. 224.

¹²⁹ Paul Craig and Gráinne De Burca: *EU Law*, p. 330.

¹³⁰ Bert Van Roosebeke: *State Liability for Breaches of European Law: An Economic Analysis*, p. 87.

¹³¹ CJEU, Joined Cases C-46/93 and 48/93, ECR 1996, p. I-1029 (*Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*).

had been the case in *Francovich*, and in both cases domestic legislation was contrary to these provisions. The CJEU declared that no distinction was to be made between primary and secondary law when determining State liability in the case of breaches of EU law.¹³² The Court established that the principle of State liability was derived from the core principle of effectiveness and the loyalty principle as laid out in Article 4.3 TFEU. The Court furthermore noted that no distinction was to be made between breaches carried out by national authorities or Community authorities and thus established that the EU could, itself, be held liable for actions of its institutions.¹³³

One of the most important aspects of the case was that the CJEU established general conditions for State liability, which further developed the conditions that had been set forth in *Francovich*, which had been limited to directives.¹³⁴ First the rule of law must confer rights to individuals, second the breach must be sufficiently serious and finally there must be a causal link between the breach of EU law and the damage sustained by the injured parties.¹³⁵ These three criteria have ever since been utilized as a base for determining whether a State is to be held liable for breaches of EU law.

Member States have often taken a restrictive approach towards legislative activities of the CJEU and the Court has therefore been forced to take a balanced approach in its judgments. Of particular notice in the case of *Brasserie du Pêcheur/Factortame*, is the Court's careful demand for a breach being 'sufficiently serious.' This criterion allows certain flexibility towards breaches of EU law and prevents every single minor misstep on the part of Member States to give rise to liability. The criterion has served to ease the Member State nerves towards this new remedy for individuals.¹³⁶

3.1.3 Post Francovich jurisprudence: Developing common corpus juris

The post-*Francovich* jurisprudence following *Brasserie du Pêcheur/Factortame* has further clarified and developed the principle of State liability. Below is an account of some of the most important cases.

In the case of *British telecommunications*¹³⁷, the CJEU dealt with a matter concerning the incorrect transposition of a directive. Before this case, the CJEU had only dealt with matters

¹³² Maria Elvira Méndez-Pinedo: *EC and EEA law*, p. 225.

¹³³ Paul Craig and Gráinne De Burca: *EU Law*, p. 330-332.

¹³⁴ Maria Elvira Méndez-Pinedo: *EC and EEA law*, p. 226.

¹³⁵ *Ibid*, p. 229.

¹³⁶ Nicolos Zingales: "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law", p. 425.

¹³⁷ *CJEU, Case C-392/93, ECR 1996, p. I-1631 (R v. HM Treasury, ex p British Telecommunications)*.

related to the non-implementation of Directives. The CJEU assessed whether there had been a breach of EU law and thus demonstrated that even though it is principally up to the national court of a Member State to assess the breach, the CJEU also has jurisdiction to do so when it has the necessary information to make such an assessment.

The case of *Hedley Lomas*¹³⁸ concerned the issuing of licences for the export of live sheep from the United Kingdom to Spain, which were considered quantitative restrictions. The CJEU further developed the ‘sufficiently serious’ criterion in cases where Member States have limited discretion for the implementation of European law and established that when Member States have little or no discretion for implementation, the infringement of EU law in itself constitutes a sufficiently serious breach of EU law.

In the case of *Dillenkofe*¹³⁹ the Court noted that the failure of a Member State to take any measures to implement a directive by its deadline constituted in itself a sufficiently serious breach of EU law.

In *Palmisani*¹⁴⁰ the CJEU established that Member States could impose time limits for individuals to bring about liability claims for breaches of EU law if such a limitation was not less favourable than for similar domestic claims.

In the case of *Konle*¹⁴¹ the Court noted that Member States could not shield themselves behind their internal organization in order to refrain from paying reparations for breaches of EU law. The Court noted that it did not matter which public authority had breached EU law, the Member State was in any case responsible.

In the case of *Rechberger*,¹⁴² which concerned the incorrect implementation of the Package Holidays Directive, the sufficiently serious condition was considered to be met since the breach considered an Article in the Directive, which allowed for no discretion at all.

In the case of *Haim v. KVN*¹⁴³ the CJEU established that an autonomous public body could be held liable for breaches of EU law since reparations were supposed to be granted according to domestic rules. The Court furthermore set out factors to take into consideration when determining whether a breach was sufficiently serious. These included the clarity of the

¹³⁸ CJEU, Case C-5/94, ECR 1996, p. I-2553 (*R v. Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas*).

¹³⁹ CJEU, Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, ECR 1996, p. I-04845 (*Erich Dillenkofe, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v. Bundesrepublik Deutschland*).

¹⁴⁰ CJEU, Case C-261/95, ECR 1997, p. I- I-04025 (*Palmisani v. Istituto nazionale della previdenza sociale*).

¹⁴¹ CJEU, Case C-302/97, ECR 1999, p. I-3099 (*Klaus Konle v. Republik Österreich*).

¹⁴² CJEU, Case C-140/97, ECR 1999, p. I-3499 (*Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v. Republik Österreich*).

¹⁴³ CJEU, Case C-424/97, ECR 2000, p. I-5123 (*Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein*).

rule at hand, whether the breach was intentional, whether the infringement was excusable and any position taken by the EU institutions on the matter.

In *Stockholm Lindöpark v. Sweden*,¹⁴⁴ which concerned the incorrect transposition of the Sixth Directive on Tax, the Court confirmed the *Hedley Lomas* judgment noting that the Directive was so clear that it left little or no discretion during the implementation. Breaches were therefore considered sufficiently serious.

The CJEU has developed the criteria for State liability extensively in the post-*Francovich* jurisprudence. The interpretation of the criterion for a breach being sufficiently serious has been particularly present in this case law and the Court has shed light on which methods be used to determine how serious an infringement of EU law must be in order to be considered sufficiently serious.¹⁴⁵

3.2 Köbler: State liability for judicial infringements of EU law

Although State liability for breaches of EU law had been developing in the years following *Francovich*, few foresaw the revolutionary approach taken by the CJEU in the case of *Köbler*,¹⁴⁶ when the principle of State liability was extended to apply to judiciary infringements of EU law.

Many had upheld that in light of the principle of sovereign immunity it was inconceivable that Member States could be held liable for judiciary infringements of European law.¹⁴⁷ However, as described in chapter two, national courts play an essential role in ensuring the effectiveness of European law and have a duty to interpret national law in conjunction with EU law. The most effective way of ensuring that individuals obtain rights conferred to them at the EU level is the correct application of EU law before national courts. Since the Commission's public infringement procedures are heavy and time-consuming, the role of national courts in conveying rights to individuals is further enhanced.¹⁴⁸

The responsibility of national courts towards individuals and the effectiveness of European law is therefore extensive and this was one of the very reasons for establishing that the principle of State liability should also apply to breaches of national courts. Because of this key role, it was considered particularly important to ensure that national courts would abide to

¹⁴⁴ CJEU, Case C-150/99, ECR 2001, p. I-493 (*Svenska staten v. Stockholm Lindöpark AB and Stockholm Lindöpark AB v. Svenska staten*).

¹⁴⁵ Paul Craig and Gráinne De Burca: *EU Law*, p. 338.

¹⁴⁶ CJEU, Case C-224/01, ECR 1963, p. I-10239 (*Gerhard Köbler v. Republik Österreich*).

¹⁴⁷ Nicolos Zingales: "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law", p. 426.

¹⁴⁸ *Ibid*, p. 421.

and follow European law. By imposing State liability for judicial infringements of EU law, the CJEU thus aimed to remove the barrier that courts of last instances could create between individuals and their rights under European law, attainable through the CJEU.¹⁴⁹

3.2.1 *Facts of the case*

The case concerned Mr. Köbler, an Austrian citizen and university professor. Mr. Köbler had been employed as a university professor in Austria from 1 March 1986 and on 28 February 1996 he applied for a special length-of-service increment for university professors who had served for at least fifteen years. Mr. Köbler had indeed served as a university professor for fifteen years, but only for ten years in Austria. The other five years of work had been carried out in other Member States of the European Union.¹⁵⁰ Mr. Köbler was not granted the length-of service increment as Austrian law prescribed that the fifteen-year term necessary for obtaining the increment had to have been completed within the State of Austria. As a result Mr. Köbler brought a case before Austrian courts claiming that the legislation constituted indirect discrimination.

During the proceedings, the Austrian Supreme Administrative Court, *Verwaltungsgerichtshof*, referred the matter for a Preliminary Ruling to the CJEU on 22 October 1997 and with a letter dated 11 March 1997 the Registrar of the CJEU replied asking whether in light of the judgment of the CJEU from 15 January 1998 in the case *Schöning-Kougebetopoulou*,¹⁵¹ the Court thought it necessary to continue with its preliminary ruling request. The *Verwaltungsgerichtshof* asked the parties of the Austrian case their opinion on the CJEU Registrar's question on 25 March 1998 and on 24 June 1998 the Austrian Court withdrew the preliminary question. Later the same day, the *Verwaltungsgerichtshof* gave a judgment in the case of Mr. Köbler, dismissing his claims stating that the special length-of-service increment was a loyalty bonus and therefore could be derogated from Community law provisions on freedom of movement for workers.¹⁵²

Mr. Köbler once again brought a new case before Austrian courts, this time a damage claim against the Austrian State on the ground that the *Verwaltungsgerichtshof* had in its judgment of 24 June 1998 breached EU law and as a result of this breach he had suffered

¹⁴⁹ Jan Komárek: "Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order", p. 3.

¹⁵⁰ CJEU, Case C-224/01, ECR 1963, p. I-10239 (*Gerhard Köbler v. Republik Österreich*), para. 5-6.

¹⁵¹ CJEU, Case C-15/96, ECR 1998, p. I-47 (*Kalliope Schöning-Kougebetopoulou v. Freie und. Hansestadt Hamburg*).

¹⁵² CJEU, Case C-224/01, ECR 1963, p. I-10239 (*Gerhard Köbler v. Republik Österreich*), para. 7-10.

losses.¹⁵³ During the proceedings the Austrian Court referred the following question for preliminary ruling to the CJEU:

(1) Is the case-law of the Court of Justice to the effect that it is immaterial as regards State liability for a breach of Community law which institution of a Member State is responsible for that breach (see Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029) also applicable when the conduct of an institution purportedly contrary to Community law is a decision of a supreme court of a Member State, such as, as in this case, the Verwaltungsgerichtshof?

(2) If the answer to Question 1 is yes: Is the case-law of the Court of Justice according to which it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law (see inter alia Case C-54/96 *Dorsch Consult* [1997] ECR I-4961) also applicable when the conduct of an institution purportedly contrary to Community law is a judgment of a supreme court of a Member State, such as, in this case, the Verwaltungsgerichtshof?

(3) If the answer to Question 2 is yes: Does the legal interpretation given in the abovementioned judgment of the Verwaltungsgerichtshof, according to which the special length-of-service increment is a form of loyalty bonus, breach a rule of directly applicable Community law, in particular the prohibition on indirect discrimination in Article 48 [of the Treaty] and the relevant settled case-law of the Court of Justice?

(4) If the answer to Question 3 is yes: Is this rule of directly applicable Community law such as to create a subjective right for the applicant in the main proceedings?

(5) If the answer to Question 4 is yes: Does the Court ... have sufficient information in the content of the order for reference to enable it to rule itself as to whether the Verwaltungsgerichtshof in the circumstances of the main proceedings described has clearly and significantly exceeded the discretion available to it, or is it for the referring Austrian court to answer that question?¹⁵⁴

3.2.2 Findings of the CJEU: Stating the principle

The CJEU made a note on the importance of national courts in the protection of individual rights deriving from EU legislation and maintained that the full effectiveness of EU law would be weakened if individuals could not obtain reparations for judicial infringements. The Court maintained that if there were no reparations for the judicial infringements of a court of last instance, a higher court could not correct the breach at a later stage and as such an individual would have no remedies for the infringement of EU law.¹⁵⁵ The Court emphasized, in paragraph 50 of the judgment, that the case concerned the infringement of the Supreme Administrative Court of Austria, which was a court of last instance, and there was thus no alternative way to correct the mistake. The CJEU outlined the Preliminary Ruling procedure under Article 267 TEU, under which courts, against whose decisions there is no judicial

¹⁵³ CJEU, Case C-224/01, ECR 1963, p. I-10239 (*Gerhard Köbler v. Republik Österreich*), para. 12.

¹⁵⁴ *Ibid*, para. 14.

¹⁵⁵ *Ibid*, para. 33-34.

remedy under national law, are obliged to make a reference to the CJEU regarding interpretations of EU law.¹⁵⁶ In paragraph 36 of the judgment, the Court stated that it was inherent to the protection of rights of individuals within EU law that there must be a remedy for breaches of EU law at a national level, even if the breach is caused by the infringement of a court of last instance.

Several governments intervened and raised the question of the competence of courts to determine reparations for damage resulted from judicial infringements.¹⁵⁷ The Court however emphasized, in paragraph 45 of the judgment, that State liability was inherent to the Community legal order. National courts were under the responsibility of affording individuals with remedies for breaches of EU law and the principle could not be compromised on the grounds that national courts lacked the competence to do so. According to the Court, Member States had to ensure the effective protection of individuals under Community law and grant them effective remedies and the CJEU could not resolve problems arising under national law on these grounds.¹⁵⁸ An interesting argument raised by the Court, in paragraph 49 was that it referred to the European Court of Human Rights jurisprudence on liability for Member States to the European Convention on Human Rights of judicial infringements that had been generally accepted and concluded that with respect to all the above State liability was also applicable for judicial infringements of EU law.

The CJEU recalled the three conditions for State liability and noted that these were also applicable for judicial infringements. On the condition of a breach being sufficiently serious the Court however noted that State responsibility for judicial infringements could only apply in “exceptional cases where the court has manifestly infringed the applicable law”.¹⁵⁹ The Court also gave some indication as to how to determine what would constitute a manifest infringement of applicable law, noting that:

Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.¹⁶⁰

The Court furthermore emphasized the need for a sufficiently serious breach and noted that in the case of national courts adjudicating at last instance, consideration must be granted

¹⁵⁶ *CJEU, Case C-224/01, ECR 1963, p. I-10239 (Gerhard Köbler v. Republik Österreich), para. 35-6.*

¹⁵⁷ *Ibid, para. 44.*

¹⁵⁸ *Ibid, para. 47.*

¹⁵⁹ *Ibid, para. 51-53.*

¹⁶⁰ *Ibid, para. 53.*

to the judicial function and legal certainty. Importantly the Court established that a competent national court should determine whether an infringement was manifest in this sense.¹⁶¹

The Court found in paragraph 103 of the judgment that the first criterion for the principle of State liability was met, the disputed provision undoubtedly conferred rights on individuals. With respect to the second criterion, as to whether there had been a breach of Community law, the Court noted that it was clear that the Austrian *Verwaltungsgerichtshof* did not consider the special length-of-service increment in question to be a loyalty bonus. However the CJEU had already in the aforementioned case of *Schöning-Kougebetopolou* stated that connecting a salary with the length of employment without taking into consideration work carried out in other Member States was likely to infringe EC Article 48.¹⁶² The *Verwaltungsgerichtshof*, as previously mentioned, gave a judgment on 24 June 1988 stating that the special length-of-service increment was in fact a loyalty bonus and since the benefit was a loyalty bonus, it could be justified even if it was discriminatory.¹⁶³ The CJEU however maintained that the *Schöning-Kougebetopolou* case could in no way be interpreted in such a way, that loyalty bonuses could be exempted from the principle of non-discrimination and the *Verwaltungsgerichtshof* had in fact misinterpreted the case. The CJEU noted that the *Verwaltungsgerichtshof* could for those reasons not conclude that it was an *acte clair* or that there was no room for reasonable doubt and therefore should not have withdrawn its request for a preliminary ruling. As such there had been a breach of EC Article 117.¹⁶⁴

With respect to the third and final criterion, whether the breach had been sufficiently serious, the Court noted that no EU law covered expressively when a rewarding measure for employees can be considered a loyalty bonus and at the time there were no indications of such in the CJEU's case law. Furthermore, the *Verwaltungsgerichtshof* has withdrawn its request for a Preliminary Ruling in good faith even if it was on the ground of its incorrect reading of the CJEU's case law. For those two reasons, the CJEU did not consider the breach sufficiently serious to give rise to State liability for the judicial infringement of EU law.¹⁶⁵

3.2.3 Köbler: Breaking the old taboo of judicial independence

The case of Gerald Köbler extended the principle of State liability for infringements to all governmental organs, including the judiciary. To many this came as a great surprise but it

¹⁶¹ CJEU, Case C-224/01, ECR 1963, p I-10239 (*Gerhard Köbler v. Republik Österreich*), para. 59.

¹⁶² *Ibid*, para. 107-109.

¹⁶³ *Ibid*, para. 113-115.

¹⁶⁴ *Ibid*, para. 117-118.

¹⁶⁵ *Ibid*, para. 122-126.

should be noted that CJEU had in the case of *Brasserie de Pêcheur/Factortame* indicated that such a liability might in fact exist in EU law.¹⁶⁶ Most notably the Court in *Brasserie de Pêcheur/Factortame* stated that:

[...] a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.

The fact that, according to national rules, the breach complained of is attributable to the legislature cannot affect the requirements inherent in the protection of the rights of individuals who rely on Community law and, in this instance, the right to obtain redress in the national courts for damage caused by that breach.¹⁶⁷

It is thus clear that the CJEU had previously given a clear indication that the principle of State liability for breaches of EU law could extend to the judiciary.¹⁶⁸ When reasoning Member State liability for acts of the judiciary, the Court noted that under international law, States are regarded as a wholesome legal entity and held responsible for acts of all arms, legislative, executive and judiciary.¹⁶⁹ This same principle should apply within the Union. In fact as national courts play a fundamental role in the development and effectiveness of EU law they are of particular importance in the EU legal order.¹⁷⁰ It is important to note that national courts of last instance are both under an obligation to refer questions for a Preliminary Ruling of the CJEU and to follow its judgments and if there were no recourses for the failure of a court to refer, the obligation as such could become illusory.¹⁷¹ The real effectiveness of EU law is only ensured if national courts throughout the Union give the correct interpretation to EU law. An inevitable effect of State liability for breaches of EU law is that national courts will be more prone on using the preliminary ruling procedure, which should serve to ensure a uniform interpretation of EU law.¹⁷²

¹⁶⁶ J.H. Jans: "State Liability and Infringements Attributable to National Courts: A Dutch Perspective on the Köbler vase", p. 166.

¹⁶⁷ CJEU, *Joined Cases C-46/93 and 48/93*, ECR 1996, p. I-1029 (*Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*), para. 35-36.

¹⁶⁸ Nicolos Zingales: "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law", p. 427.

¹⁶⁹ CJEU, *Case C-224/01*, ECR 1963, p. I-10239 (*Gerhard Köbler v. Republik Österreich*), para. 31.

¹⁷⁰ Takis Tridimas: "State Liability for Judicial Acts Remedies Unlimited?", p. 150.

¹⁷¹ Alexander Somek: "Inexplicable Law: Legality's Adventure in Europe", p. 632.

¹⁷² Oreste Pollicino: "The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudence Supranational Law?", p. 90

Two fundamental questions arise with the establishment of State liability for breaches of the judiciary; the question of the independence of national courts and the principle of *res judicata*.

Several governments intervened in the case claiming amongst other that extending the principle of State liability to the judiciary would impede the independence of national courts. Judicial independence is twofold; on the one hand it concerns the institutional position of courts and on the other the independence of judges. These governments held that liability for judicial infringements could affect both the intellectual independence of judges and the institutional position of the judiciary in relation to the executive.¹⁷³ The United Kingdom maintained that judiciary's position in society, its authority and its reputation, would be seriously harmed if a Member State could be held liable for its judgments. More importantly national courts independence would be seriously jeopardized and the UK noted in particular that the judiciary independence enjoys constitutional protection in all Member States.¹⁷⁴ The CJEU was of the opposite opinion noting that the possibility of reviewing judgments of national courts would in fact improve national legal systems, which would serve to strengthen the authority of national courts.¹⁷⁵ The Court's approach was that since Member States had accepted the primacy of EU law and that they could be held liable for breaches of the legislative and executive branches of the government there is no reason for the judiciary being free from all responsibility and challenges.¹⁷⁶

In this context it is important to note the essential importance of independent courts in the legal order, something European States have been developing since Montesquieu published his ideas on the separation of powers. National courts generally serve their function within a general framework and enjoy considerable independence from the State itself. Member States have different regulations concerning the liability of judges within this framework and while some have no responsibility, others do. Traditionally the responsibility of the judiciary has been decided on a national level.¹⁷⁷ On the subject the Court noted:

As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance

¹⁷³ Bernhard Hofstötter: *Non-Compliance of National Courts*, p. 92.

¹⁷⁴ *CJEU, Case C-224/01, ECR 1963, p. I-10239 (Gerhard Köbler v. Republik Österreich)*, para. 26.

¹⁷⁵ *Ibid*, para. 43.

¹⁷⁶ Takis Tridimas: "State Liability for Judicial Acts Remedies Unlimited?", p. 150.

¹⁷⁷ Nicolos Zingales: "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law", p. 423

will be called in question.¹⁷⁸

With respect to the autonomy of the national court the CJEU thus noted that State liability for judicial infringements did not concern the personal liability of a judge, but rather that of a State and as such did not affect the independence of national judges. There is however a weak element in the paragraph the judgment cited above, as it is not realistic towards its audience, since in almost all Member States of the EU, liability of the sort is interconnected with a personal liability of judges. This certainly can give rise to questions concerning the independence of the judiciary as the personal responsibility of national judges is increased.¹⁷⁹

The French government intervened in the case maintaining that State liability for breaches of the judiciary was in itself contrary to the principle of *res judicata* and cited the CJEU judgment in *Eco Swiss*.¹⁸⁰ The Court agreed fully with the importance of the principle of *res judicata* and in fact quoted the same case as France did to emphasize its importance. However the Court noted that recognizing that the principle of liability of Member States for breaches of the judiciary was not in itself contrary to the principle of *res judicata*. The Courts reasoning was that since a liability case did not necessarily involve the same parties as the original case and had an entirely different purpose, it could not be considered to be contrary to the principle of *res judicata*. Individuals could seek reparations for breaches of EU law by the judiciary, but not a revision of the original case altering its judgment.¹⁸¹ It is evident that the CJEU upholds another, and perhaps weaker, meaning of the concept of *res judicata* in its judgment and this was met with some criticism.¹⁸² The Court seems to view the principle of *res judicata* as a part of the national legal orders of Member States that has to prevail for the EU principle of effectiveness.¹⁸³ It is clear that on some level the principle of *res judicata* must be jeopardised when lower courts hear cases and evaluate the work of superior courts.¹⁸⁴ The question that inevitably arises is whether the Court's reasoning covers the subject fully as there can in fact be examples of judicial breaches that could lead to the reviewing of an original national judgment.¹⁸⁵

Although many questions arose as a result of the *Köbler* ruling, the most difficult one was

¹⁷⁸ CJEU, Case C-224/01, ECR 1963, p. I-10239 (*Gerhard Köbler v. Republik Österreich*), para. 42.

¹⁷⁹ Nicolos Zingales: "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law", p. 434.

¹⁸⁰ CJEU, Case C-126/97, ECR 1999, p. I-3055 (*Eco Swiss China Time Ltd v. Benetton International NV*).

¹⁸¹ CJEU, Case C-224/01, ECR 1963, p. I-10239 (*Gerhard Köbler v. Republik Österreich*), para. 38-39.

¹⁸² Nicolos Zingales: "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law", p. 432.

¹⁸³ Bernhard Hofstötter: *Non-Compliance of National Courts*, p. 97.

¹⁸⁴ Peter J. Wattel: "Köbler, CILFIT and Welthgrove: We Can't Go On Meeting Like This", p. 177.

¹⁸⁵ See on this subject possible breaches of Directive 85/334/EEC (EIA Directive) and Jan Komárek: "Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order", p. 27.

perhaps how to determine what could be considered a sufficiently serious breach of the judiciary to give rise to State liability. The CJEU had established that breaches could give rise to liabilities but at the same time the seemingly serious breach in the case of *Köbler* was not considered serious enough.¹⁸⁶ The post-*Köbler* jurisprudence has given some indications as to what could be considered a sufficiently serious breach of the judiciary to give rise to State liability.

3.3 Kühne & Heitz and Commission v. Italy: Follow up case law

When interpreting the case of *Köbler* it is important to take note of two cases, *Kühne & Heitz*¹⁸⁷ and *Commission v. Italy*,¹⁸⁸ which were heard by the CJEU at a similar time and affect the principle of State liability for judicial infringements of EU law.¹⁸⁹ The cases shed light on alternative means to obtain redress for breaches carried out by the judiciary and the effect of such on the principle of State liability for breaches of EU law.

3.3.1 Kühne & Heitz: Principle of *res judicata* revised

The argument that the principle *res judicata* is at risk of being harmed by establishing the principle of State liability applying to breaches of the judiciary seems to be given even more support in the case of *Kühne & Heitz*.¹⁹⁰ The case concerned an administrative decision on custom tariffs which the company concerned, *Kühne & Heitz*, challenged before national courts. The national court dismissed the appeal without referring the question for a Preliminary Ruling. Three years later the CJEU established in another case that the company's interpretation of the custom tariffs had been correct. It was thus evident that the national court had not applied EU law correctly and as a consequence *Kühne & Heitz* brought a new case to be reimbursed for the refunds they had overpaid. This time the national court referred the matter for a Preliminary Ruling of the CJEU. The national court was surprisingly honest and admitted to have mistakenly taken the view that there was no need to refer the matter for a Preliminary Ruling. The national court furthermore explained the delicate position that the company was in since the company had exhausted domestic remedies.¹⁹¹ The

¹⁸⁶ Björn Beutler: "State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringements of the Applicable Law an Insurmountable Obstacle?", p. 782.

¹⁸⁷ *CJEU, Case C-453/00, ECR 2004, p. I-00837 (Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren)*.

¹⁸⁸ *CJEU, Case C-129/00, ECR 2003, p. I-14637 (Commission v. Italy)*.

¹⁸⁹ Jan Komarek: "Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order", p. 11.

¹⁹⁰ *Ibid*, p.28.

¹⁹¹ *CJEU, Case C-453/00, ECR 2004, p. I-00837 (Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren), para. 7-19.*

question of legal certainty was thus even cleared than in the case of *Köbler*. When addressing the issue of legal certainty the CJEU noted, in paragraph 24 of the judgment, that:

Legal certainty is one of a number of general principles recognised by Community law. Finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty and it follows that Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way.

The Court however noted that administrative bodies were under an obligation to follow European law “even to legal relationships which arose or were formed before the Court gave its ruling on the question on interpretation”.¹⁹² Since Dutch law permitted administrative bodies to reopen final administrative decisions, provided that interests of third parties were not affected, the Court noted that it was for the national court to demonstrate whether there were grounds to reopen the administrative decision in the present case.¹⁹³ Finally, in paragraph 28 of the judgment, the Court laid out conditions for the reopening of administrative decisions and noted that:

[...] the principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where under national law, it has the power to reopen that decision;

the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;

that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and

the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.

The CJEU thus established that under certain circumstances, EU law provides for an obligation to reopen a previous and final administrative decision that is considered to be in violation of EU law. The Court however established an important reservation in this respect by noting that the review cannot affect third parties to ensure the principle of legal certainty.¹⁹⁴

Reading the case in conjunction with the case of *Köbler* the principle of *res judicata* seems to be under attack. The *Köbler* judgment established that European law had been

¹⁹² CJEU, Case C-453/00, ECR 2004, p. I-00837 (*Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*), para. 22.

¹⁹³ *Ibid*, para. 25.

¹⁹⁴ Bernhard Hofstötter: *Non-Compliance of National Courts*, p. 180.

breached but the breach was not sufficiently serious to give rise to reparations. The *Kühne & Heitz* judgment however opens up the opportunity for Mr. Köbler to seek to reopen the initial decision of the administrative authority that rejected his claim since it has been established that the dismissal was in violation of EU law.¹⁹⁵

3.3.2 *Commission v. Italy: First infringement case for judicial breaches of EU law*

The case *Commission v. Italy*¹⁹⁶ marked the Commission's first infringement procedure for breaches of EU law attributable to the judiciary. The case concerned Italian legislation, which had on two occasions been established to be in violation of EU law, but was still in force in and actively applied by national and administrative courts in Italy.¹⁹⁷ The case thus concerned both legislative and judiciary breaches of EU law.

The CJEU noted that all organs of a Member State are under an obligation to comply with EU law. The Court stated that the case at hand concerned a law, which was in itself neutral in respect of EU law and thus its effect had to be determined in light of national courts' interpretation.¹⁹⁸ Furthermore, the Court noted:

In that regard, isolated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it.¹⁹⁹

The Commission had maintained in particular that the Supreme Court preserved and applied the law and this influenced lower courts.²⁰⁰ This was an interesting approach since until this case, the Commission had taken a consistent approach of non-action for breaches or mistakes of national courts, because of the sensitivity of the judiciary. The CJEU therefore, for the first time, had the opportunity to set the line for judiciary breaches of EU law.²⁰¹ The Court however chose to take a more balanced approach by establishing that the breach was not attributable to the judiciary but rather to the failure of amending the legislation concerned.²⁰²

¹⁹⁵ Jan Komarek: "Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order", p. 20.

¹⁹⁶ *CJEU, Case C-129/00, ECR 2003, p. I-14637 (Commission v. Italy)*.

¹⁹⁷ Jan Komarek: "Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order", p. 23.

¹⁹⁸ *CJEU, Case C-129/00, ECR 2003, p. I-14637 (Commission v. Italy), para. 29-31*.

¹⁹⁹ *Ibid, para. 32*.

²⁰⁰ *Ibid, para. 11*.

²⁰¹ Jan Komarek: "Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order", p. 23.

²⁰² *CJEU, Case C-129/00, ECR 2003, p. I-14637 (Commission v. Italy), para. 41*.

It is important to note the difference between infringement procedures carried out by the Commission and cases that individuals bring before national courts. The infringement procedure presents an institutional approach and the results of an infringement procedure are declaratory in nature. This means that if the Commission is successful in establishing that actions by a Member State amount to an infringement of EU law, the consequences of such do not affect individuals *per se*. If an individual claims to have suffered damage on the grounds of such a breach, he or she will have to bring a case before national courts and the infringement will have to meet the criteria for State liability in order for the individual to be able to obtain redress for such a breach.²⁰³

Since the CJEU chose to establish that the breach was attributable to the legislative branch of the State and not the judiciary, the question that arises as a result of the judgment is whether the Court would generally rather chose to establish that a breach of EU law was attributable to the legislative or executive branches of the State, rather than to the judiciary because of the sensitive nature of the judiciary. Unlike the case of *Köbler*, in this case the CJEU had the choice of establishing a legislative breach and chose to do so rather than to establish a judiciary breach.²⁰⁴ Furthermore, since the judicial infringement in the case of *Köbler* was not considered to be sufficiently serious and in the case of *Commission v. Italy* the CJEU chose to establish legislative infringements rather than judiciary, at the time it was not entirely clear whether, in practice, State liability for judicial infringements was a real possibility. This was to be clarified in the post-*Köbler* jurisprudence.

3.4 Traghetti del Mediterraneo: Manifest infringements are sufficiently serious

The case of *Traghetti del Mediterraneo*²⁰⁵ clarified to some extent the principle of State liability for judicial infringements of EU law. Reiterating that the principle applied to courts of all levels, the CJEU noted that State liability would not only come into question when a national court refused to apply EU law, but that it could also apply where EU law had been poorly interpreted. By the notion of poor interpretation the Court referred to a manifestly inappropriate interpretation of EU law.²⁰⁶

The case concerned *Traghetti del Mediterraneo* (TMD) a maritime transport undertaking that ran a ferry service from Italy to Sardinia and Sicily. The company had gone into

²⁰³ Bernhard Hofstötter: *Non-Compliance of National Courts*, p. 188.

²⁰⁴ Jan Komarek: "Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order", p. 25.

²⁰⁵ CJEU, *Case C-173/03, ECR 2006, p. I-1209 (Traghetti del Mediterraneo SpA v. Italy)*.

²⁰⁶ Damien Chalmers etc.: *European Union Law*, p. 311-12.

liquidation and the TMD administrator brought proceedings against a competitor company, Tirrenia di Navigazione (Tirrenia), claiming it has abused its dominant position in the market with fares below cost while receiving public subsidies. The Naples Court of Appeal however dismissed the claims on the grounds that the public subsidies were justified and necessary for public interest reasons as they were intended for the development of the *Mezzogiorno* and furthermore they did not affect the operation of sea links. For those reasons the *Tirrenia* could not be considered to have acted in a manner of unfair competition. TMD was not satisfied with the judgment and brought the case before the *Corte Suprema di Cassazione* asking for a Preliminary Ruling of the CJEU of the interpretation of the affected Community law in the case. The Court however refused to ask for a Preliminary Ruling maintaining that the CJEU case law of the matter was consistent and clear. The Court's judgment was to dismiss TMD's claims just as the lower courts had done.²⁰⁷

TMD consequently brought proceedings, this time against the State of Italy, for the wrongful interpretation of the *Corte Suprema di Cassazione* and for the breach of its obligation to make a reference for a Preliminary Ruling under Article 234 EC (now TFEU 267).²⁰⁸ The *Tribunale di Genova* referred the following question to the CJEU for a Preliminary Ruling:

Where a Member State is deemed liable for the errors by its own courts in the application of Community law and in particular for failure by a court of last instance to make a reference to the Court of Justice under the third paragraph of Article 234 EC, is affirmation of that liability impeded in a manner incompatible with the principles of Community law by national legislation on State liability for judicial errors which:

precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions,

limits State liability solely to cases of intentional fault and serious misconduct on the part of the court?²⁰⁹

At the time of the proceedings, Italian law provided for liability damages in the case of judicial infringements but the conditions to obtain redress for such breaches were so strict that it was seemingly impossible to obtain reparations. Italian legislation restricted State liability when the damage was caused as a result of an interpretation or assessment of facts or evidence and this made obtaining reparations, in practice, an almost impossible task.²¹⁰

²⁰⁷ CJEU, *Case C-173/03, ECR 2006, p. I-1209 (Traghetti del Mediterraneo SpA v. Italy)*, para. 7-15.

²⁰⁸ *Ibid*, para. 16.

²⁰⁹ *Ibid*, para. 20.

²¹⁰ Björn Beutler: "State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringements of the Applicable Law an Insurmountable Obstacle?", p. 783.

The CJEU addressed the referred question in *Traghetti del Mediterraneo* differently than in *Köbler* and did not assess whether the national court had committed a manifest breach of EU law. The Court reiterated its *Köbler* judgment particularly regarding the specific role of the judiciary.²¹¹ The CJEU furthermore noted that if State liability were to be excluded where infringements arose from judicial interpretations of provisions of law, the principle of State liability for judicial infringements of EU law would be rendered meaningless.²¹² Such exclusion would deprive the *Köbler* judgment of all practical effect. The Court noted:

[...] Although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of Community law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law, as set out in paragraphs 53 to 56 of the judgment in Case C-224/01 *Köbler* [2003] ECR I-10239.²¹³

The CJEU thus established that although State liability for judicial infringements of EU law was not to be unlimited, it was to be abundantly clear that obtaining redress for judicial breaches of EU law should, in practice, be possible.

An interesting element in the judgment is that the CJEU applied the same reasoning concerning the importance of the judiciary and the Preliminary Ruling procedure as in previous case law but applied the argumentation in a new context. The Court entered a new field, that of the national procedural autonomy of Member States and established that national legislation could not restrict the possibility for individuals obtaining redress for actions of the judiciary in such a way as to make it impossible in practice.²¹⁴ Some have argued that this could create a constitutional imbalance and is perhaps not a wishful development.²¹⁵ The purpose is however to ensure that individuals are able, in practice, to obtain redress when they cannot rely directly on EU law for reasons attributable to the judiciary.

3.5 Commission v. Spain: Guaranteeing judicial independence

In the case of *Commission v. Spain*²¹⁶ the CJEU seems to take another step towards stricter State liability for judicial breaches. The case concerned a judgment by the Spanish Supreme

²¹¹ Björn Beutler: “State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringements of the Applicable Law an Insurmountable Obstacle?”, p. 783.

²¹² CJEU, Case C-173/03, ECR 2006, p. I-1209 (*Traghetti del Mediterraneo SpA v. Italy*), para. 36.

²¹³ *Ibid*, para. 40.

²¹⁴ Matthias Ruffert: “Case C-173/03, *Traghetti del Mediterraneo SpA in Liquidation v. Italian Republic*, Judgment of the Court (Great Chamber) of 13 June 2006, nyr”, p. 483.

²¹⁵ Nicolos Zingales: “Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law”, p. 424.

²¹⁶ CJEU, Case C-154/08, ECR 2009, p. I-00187 (*Commission v. Spain*).

Court where VAT regulations had been interpreted without a reference to the CJEU. The Spanish Supreme Court interpreted the regulations in such a way as to exclude Registrars fiscal activities from the VAT. The Commission of the European Union disagreed with this interpretation and lodged an infringement procedure against Spain under TFEU Article 258 on the grounds of the Spanish Supreme Court's infringement of EU law.

Interestingly the case was only heard by a Court Chamber of five judges and without a written opinion from the Advocate General. Furthermore the case mostly dealt with the VAT question advocating only three paragraphs (124-126) to the fact that the case was being brought forward on the grounds of a national court's breach of EU law.²¹⁷ These three paragraphs were dedicated to answer Spain's claim that it could not be held responsible for acts of a constitutionally independent court. The CJEU answered these concerns by referring to the case of *Commission v. Italy*²¹⁸ stating that in principle infringement procedures under TFEU Article 258 could be brought about on the grounds of a constitutionally independent judicial institution, such as the Supreme Court.²¹⁹ It is important to note that the infringement case is carried out against Member States and not the judiciary itself, and as such the independence of national courts should be guaranteed.

The case is interesting for several reasons. This was only the second case brought before the CJEU because of judicial infringements of EU law within a Member State. The only other example had been that of *Commission v. Italy*, which did not only concern judicial infringements but also administrative and legislative breaches of EU law and the outcome of the case had, as described above, been that the infringement was attributable to the legislator and not the judiciary.²²⁰ Furthermore, the judicial breach at hand was the result of a single judgment by the Spanish Supreme Court and as such not a systematic breach of EU law. A single ruling was thus considered sufficient to give rise to an action of non-compliance under TFEU Article 258.²²¹

Traditionally the Commission has been reluctant to bring cases before the CJEU for judicial breaches because of the potential effect it could have on *res judicata* and the

²¹⁷ López Escudero, Manuel: "Case C-154/08, Commission v. Spain, Judgment of the Court of Justice (Third Chamber) of 12 November 2009", p. 231.

²¹⁸ *CJEU, Case C-129/00, ECR 2003, p. I-14637 (Commission v. Italy)*.

²¹⁹ López Escudero, Manuel: "Case C-154/08, Commission v. Spain, Judgment of the Court of Justice (Third Chamber) of 12 November 2009", p. 233.

²²⁰ *Ibid*, p. 235.

²²¹ Pedro Tenrio: "A contribution from the Spanish Constitutional Court to the European Construction Process: Request for Preliminary Ruling", p. 50.

cooperative relationship of the CJEU and national courts.²²² The case of *Commission v. Spain* seems to indicate that the Commission and the CJEU will no longer refrain from holding the State responsible for judicial infringements and are taking a stricter approach. Furthermore the judgment serves as a warning to national courts; the Commission is observing the implementation of European law by national courts and will act if necessary through direct infringement proceedings against the Member State.

3.6 Analysis of the sufficiently serious test

In light of the post-*Köbler* jurisprudence and the seemingly lowering criteria for what actions of the judiciary can give rise to State liability, special attention must be given to the third condition of State liability for breaches of EU law; the condition that a breach must be sufficiently serious.

In *Köbler*, the CJEU set the mood when noting that a manifest breach would in any case be considered sufficiently serious.²²³ This was in line with the CJEU earlier jurisprudence from *Brasserie de Pêcheur/Factortame* when the Court assessed whether the sufficiently serious criterion was met by establishing whether a breach was intentional or inexcusable.²²⁴ In the case of *Köbler* the Court set out examples of what would be considered a manifest infringement and thus sufficiently serious to give rise to State liability for judicial infringements:

Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.²²⁵

In *Köbler* the CJEU established that dismissing the obligatory Preliminary Reference procedure under TFEU 267 could be considered sufficiently serious and give rise to State liability.²²⁶ However, as previously noted, the Austrian Supreme Administrative Court in the case dismissed the reference obligation but yet the breach was not considered sufficiently serious. Instead of examining whether the Austrian Court's failure to refer the case for a Preliminary Ruling could be considered sufficiently serious, the CJEU merely stated that the

²²² López Escudero, Manuel: "Case C-154/08, *Commission v. Spain*, Judgment of the Court of Justice (Third Chamber) of 12 November 2009", p. 234.

²²³ *CJEU, Case C-224/01, ECR 1963, p. I-10239 (Gerhard Köbler v. Republik Österreich), para. 56*

²²⁴ Alexander Somek: "Inexplicable Law: Legality's Adventure in Europe", p. 639.

²²⁵ *CJEU, Case C-224/01, ECR 1963, p. I-10239 (Gerhard Köbler v. Republik Österreich), para. 55.*

²²⁶ Jan Komárek: "Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order", p. 13.

Austrian Court had misread a judgment by the CJEU and for those reasons considered it unnecessary to refer the matter for a Preliminary Ruling. The judgment thus established that dismissing the Preliminary Reference procedure could be considered sufficiently serious to give rise to State liability while at the same time limiting such possibilities to cases where the national court could not be excused for a simple misunderstanding.²²⁷ Controversially, this reasoning would suggest that national courts could, for the most part, be excused for not referring questions for a Preliminary Ruling.²²⁸

This conclusion met some criticism and some have maintained that the Austrian court made many mistakes that were not excusable in the case of *Köbler*.²²⁹ Concerns were raised over whether the principle of State liability for judicial breaches was unattainable in practice since every single error could thus be considered an ‘honest mistake’ and some have even maintained that the Court disregarded its own calculations of what can be considered as sufficiently serious in the case of *Köbler*.²³⁰ The CJEU however reasoned these limitations with the specific role of the judiciary and the need for legal certainty.²³¹

In future case law, namely in *Traghetti*, the CJEU has made it clear that the principle of State liability is to be obtainable in practice. In *Traghetti* the Court noted that national courts must never impose stricter requirements of a manifest infringement than set out in *Köbler*.²³² This was reiterated in a recent judgment of the CJEU in another the infringement case against Italy, *Commission v. Italy*,²³³ where the Court stated that the exclusion of State liability or the limitation of State liability to cases of intentional fault or gross negligence is a violation of EU law.²³⁴

In light of the above it would seem that two elements are of particular importance when determining whether a breach is sufficiently serious. First whether the law in the area is clear and precise and second whether the national court has consciously disregarded its duty to ask for a Preliminary Ruling. The question of whether the law is clear and precise gives indication as to whether an error in judgment by a national court can be considered excusable or not. In

²²⁷ Georgios Anagnostaras; “Erroneous judgements and the prospect of damages: the scope of the principle of governmental liability for judicial breaches” *European law review*”, p. 745.

²²⁸ Jan Komárek: “Inter- Court Constitutional Dialogue after the Enlargement- Implications of the Case of Professor Köbler”, p. 86.

²²⁹ Björn Beutler: “State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringements of the Applicable Law an Insurmountable Obstacle?”, p. 780-81.

²³⁰ Jan Komárek: “Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order”, p. 17.

²³¹ Björn Beutler: “State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringements of the Applicable Law an Insurmountable Obstacle?”, p. 780.

²³² *Ibid*, p. 784.

²³³ *CJEU, Case C-379/10, NYR (Commission v. Italy)*.

²³⁴ *Ibid*, para. 39.

this respect it is important to note that when evaluating whether or not an error can be considered excusable or not, the assessment takes into account information that the national court had at the time of its ruling.²³⁵ However, when the law is ambiguous the national court has an obligation to refer a question for Preliminary Ruling to the CJEU and failing to do so can itself give rise to liabilities.²³⁶

3.8 Remarks on State liability for judiciary infringements of EU law

The CJEU does not have a federal position as a court of appeals in the EU. However, with the establishment of State liability for judicial infringements one may very well argue that the CJEU has, at least to some extent, created a backdoor appeals procedure, allowing it in some respect to review decisions by national courts that affect EU law.²³⁷

The CJEU seems to be moving closer to the European Court of Human Rights in this respect, but there is an absolute and fundamental difference between the two courts as individuals do not always have direct access to the CJEU and during national proceedings they are dependent on national courts making a reference through the obligatory Preliminary Reference procedure. In the same way, the CJEU must rely on national courts and their willingness to refer questions for Preliminary Ruling in order to ensure the effectiveness of European law. Traditionally this cooperation between national courts and the CJEU has been considered a success in the development of European integration.²³⁸ With the establishment of State liability for judicial breaches of EU law this cooperation may be in danger since the CJEU now, to some extent, has the role of evaluating the work of national courts.²³⁹ It is clear that the discretion which national courts enjoy in the absence of EU law concerning remedies for breaches of individuals' rights is becoming smaller.²⁴⁰

Establishing the principle of State liability for judicial infringements can pose significant problems to national judicial systems, as it opens up the possibility of lower courts reviewing judgments from higher courts. Another problem that arises is the possibility of a national court reviewing its own work. If an individual brings a claim for reparations against a

²³⁵ Georgios Anagnostaras; "Erroneous judgements and the prospect of damages: the scope of the principle of governmental liability for judicial breaches" *European law review*", p. 744.

²³⁶ *Ibid*, p. 745.

²³⁷ Jan Komárek: "Inter- Court Constitutional Dialogue after the Enlargement- Implications of the Case of Proffessor Köbler", p. 93.

²³⁸ Hans-W. Micklitz: *The politics of judicial co-operation in the EU: Sunday trading, equal treatment and good faith*, p. 426.

²³⁹ Jan Komárek: "Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order", p. 22.

²⁴⁰ Georgios Anagnostaras: "Erroneous judgements and the prospect of damages: the scope of the principle of governmental liability for judicial breaches", p. 741.

Member State for breaches of the judiciary and the case is appealed, it may very well end up before the court of last instance that initially breached EU law. It is hard to see how the European Convention of Human Rights' call for an impartial judge would be guaranteed in such a case.²⁴¹ The CJEU however established in the case of *Köbler* that it is up to Member States to ensure a forum to hear claims on the grounds of judicial infringements of EU law.²⁴²

With the establishment of the principle of State liability for judicial infringements EU law one could imagine that there should be a significant increase in requests for Preliminary Rulings, as national courts would consult with the CJEU on many, or all, questions concerning European law to prevent the State being held liable for compensation.²⁴³ If national courts were to refer every single question raised by individuals at the national level with a remote connection to EU law to the CJEU however clear the issue were to be, this would of course block the work of the CJEU completely rendering the whole procedure useless.²⁴⁴ As previously mentioned, the CJEU established in the case of that national courts at last instance are not under an obligation to ask for a Preliminary Ruling on issues that have already been interpreted by the CJEU or when European law is so clear that it leaves no room for interpretation (f. *acte clair*).²⁴⁵ For the same reasons, the call for a breach being sufficiently serious and the threshold for such being higher in the case of judicial breaches play an important role to ensure the functioning of national judicial systems.

The principle of State liability for breaches of EU law is an important addition to the principles of direct effect and primacy to ensure the compliance of national courts with European law and to ensure the effective protection of individuals. With respect to the important role that national courts play in the development of European law and in ensuring the effective judicial protection of individuals there was no reason to limit the principle of State liability to legislative and executive breaches of EU law. Individuals should enjoy protection of their European rights against breaches of any organ of a Member State of the EU. Even though the criteria for State liability for judicial infringements are to some extent stricter than with respect to legislative and executive infringements, it is clear that by extending the principle to apply to the judiciary the effective judicial protection of individuals is enhanced.

²⁴¹ Takis Tridimas: "State Liability for Judicial Acts Remedies Unlimited?", p. 154.

²⁴² Angela Ward: *Judicial Review and the Rights of Private Parties in EU Law*, p. 245.

²⁴³ Peter J. Wattel: *Köbler, CILFIT and Welthgrove: We Can't Go On Meeting Like This*", p. 178.

²⁴⁴ Nicolos Zingales: "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law", p. 422.

²⁴⁵ Jan Komárek: "Inter- Court Constitutional Dialogue after the Enlargement- Implications of the Case of Professor Köbler", p. 89.

4 Ensuring compliance with EEA law through the doctrine of State liability

4.1 Development of State liability

EEA and EU law form a two-pillar system with Member States of the EFTA on the one side and Member States of the EU on the other. In the areas of fundamental freedoms, competition and State aid the EFTA States have harmonized their legislation to match the corresponding legislation in EU law. As previously described, the institutional framework has however not been harmonized and there are two separate enforcement mechanisms to almost identical legislation in the two pillars.²⁴⁶

Despite the similarities between the two legal orders, EEA law differs considerably from EU law since many of the most characteristic elements of EU law formally do not exist in EEA law. These include the principle of direct effect, a fundamental contributor to the EU legal order and the principle of primacy, which only exists in EEA law to the extent proscribed in Protocol 35 to the EEA agreement. For these reasons, when the principle of State liability for breaches of EEA law was established in EEA law, some maintained that it only found basis in the EFTA Court's judicial activism and not the Agreement itself.²⁴⁷

In this context it is important to note that at the time of the drafting of the EEA Agreement, the CJEU had already given its judgment in the *Francovich* case, yet there was no mention of the principle in the Agreement nor its *travaux préparatoires*. Even in the first years following the EEA Agreement's entering into force, some scholars maintained that it would be unthinkable that the *Francovich* doctrine should apply in the EEA legal order.²⁴⁸ In the past decade and-a-half the cards have turned and the EFTA Court's jurisprudence, as well as the practice in Member States, have made it clear that State liability for breaches of EEA law is a generally accepted principle of EEA law.²⁴⁹ This development is perhaps not surprising in light of the active judicial dialogue between EU and EFTA-EEA courts, the aim of homogeneity and the remarkable similarities between EEA and EU provisions.²⁵⁰

Today, EEA law provides for two possible scenarios in the case of Member State infringements. First according to Article 31(1) and (2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority (ESA) can bring infringement cases against Member States to the

²⁴⁶ Carl Baudenbacher: "If Not EEA State Liability, Then What: Reflections Ten Years after the EFTA Court's Sveinbjörnsdóttir Ruling", p. 338.

²⁴⁷ Maria Elvira Méndez-Pinedo: *EC and EEA law*, p. 237.

²⁴⁸ Davíð Þór Björgvinsson: *EEA réttur og landsréttur*, p. 202.

²⁴⁹ Carl Baudenbacher: "If Not EEA State Liability, Then What: Reflections Ten Years after the EFTA Court's Sveinbjörnsdóttir Ruling", p. 344.

²⁵⁰ Maria Elvira Méndez-Pinedo: *EC and EEA law*, p. 238.

EFTA Court. There is a fundamental difference between this procedure in EEA law and EU law since ESA does not have the authority to sanction Member States the way the Commission of the EU is entitled to under TFEU Article 260.²⁵¹ Second, individuals can bring about cases before national courts and rely on the Advisory Opinion procedure of the EFTA Court. Again there is the fundamental difference of the Advisory Opinions procedure being formally neither binding nor obligatory. However, as described in chapter two, when looking into the practice of EEA law it becomes clear that the difference between EU and EEA law in this respect is perhaps not as great as one would believe.²⁵²

4.1.1 Erla María Sveinbjörnsdóttir: Stating the principle

The EEA Agreement contains no provisions regarding State liability and it was not until the landmark case of *Sveinbjörnsdóttir*²⁵³ that such a principle was recognized as an integral part of the EEA legal order. The case concerned the interpretation of Article 6 of the Icelandic Wage Guarantee Fund Act (*i. Lög um ábyrgðarsjóð launa vegna gjaldþrota No. 53/1993*). The Icelandic legislation excluded claims from certain family members against an insolvency estate from the State's Wage Guarantee Fund. Mrs. Sveinbjörnsdóttir, the former owner's sister, maintained that such an exclusion was not compatible with Council Directive 80/987/EEC of 20 October 1980 (as amended by Council Directive 87/164/EEC of 2 March 1987), in particular Article 1, paragraph 2, and Article 10 of the Directive. Reykjavik District Court (*i. Héraðsdómur Reykjavíkur*) submitted a request for an Advisory Opinion on the interpretation of the Directive and on whether, if the Icelandic legislation was not in line with the Directive, the Icelandic State could be held liable for damage towards Mrs. Sveinbjörnsdóttir.²⁵⁴

The EFTA Court referred to the purpose of the EEA Agreement as laid down in Article 1(1) and 1(2) of the Agreement.²⁵⁵ The Court stressed the importance of the principle of homogeneity and noted that material provisions in the EEA agreement corresponded, within the agreed scope of cooperation, to corresponding provisions of EU law. Furthermore, the Agreement had established EEA mechanisms to ensure a homogeneous interpretation and

²⁵¹ Ólafur Jóhannes Einarsson: "Hæstiréttur og EES-samningurinn. Samningsbrotamál og skaðabótaábyrgð", p. 637.

²⁵² Skúli Magnússon: "On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court", p. 529.

²⁵³ *EFTA Court, Case E-7/97, EFTACR 1998, p. 95 (Erla María Sveinbjörnsdóttir v. Iceland)*.

²⁵⁴ *Ibid*, para. 7.

²⁵⁵ *Ibid*, para. 49.

application of this corresponding legislation.²⁵⁶ The Court also noted that the objective of the EEA Agreement was to ensure individuals with “equal treatment and conditions of competition and adequate means of enforcement” and that an integral part of the Agreement was that individuals should be able to obtain rights from EEA law.²⁵⁷

The EFTA Court stressed that the EEA Agreement held a *sui generis* position as an international instrument and had a special place in the Member States’ legal systems. In paragraph 59 of the judgment, the Court noted that although the Agreement was far less reaching than the EU Treaty, it went beyond traditional international law instruments. The principle of State liability could, *inter alia*, be derived from Article 3 of the EEA agreement, which obliges Member States to take all appropriate measures to ensure the fulfilment of their obligations under the EEA.²⁵⁸ The Court established, in paragraph 63 of the judgment, that the principle was an integral part of the EEA Agreement, and the fact that Member States had not transferred legislative powers under Article 7 of the EEA agreement and Protocol 35 was irrelevant to this principle.

Perhaps not surprisingly the governments of Iceland, Norway and Sweden intervened in the case and maintained that the EEA Agreement did not impose an obligation on the EFTA States to make good for loss and damages caused to individuals by failure to implement EEA legislation correctly in their national legal orders. Interestingly, however, the Commission of the EU maintained the same view. ESA however submitted just like the plaintiff that the principle was an integral part of the EEA Agreement.²⁵⁹ Through the course of time the EFTA Court and ESA have been criticized for taking a stricter approach in implementing EEA law than EU institutions and in this sense being ‘more Catholic than the Pope.’ The case of *Sveinbjörnsdóttir* is perhaps an example of this, as the Commission of the EU did not foresee the principle of State liability applying in EEA law.

4.1.2 *Karl K. Karlsson: Applying the principle to all EEA law*

The principle of State liability was further developed in the case of *Karl K. Karlsson*²⁶⁰, where the EFTA Court set out the conditions for State liability in EEA law. The case concerned the State monopoly on the import and wholesale distribution of alcoholic

²⁵⁶ EFTA Court, Case E-7/97, EFTACR 1998, p. 95 (*Erla María Sveinbjörnsdóttir v. Iceland*), para. 53-54.

²⁵⁷ *Ibid*, 57-59.

²⁵⁸ *Ibid*, para. 61.

²⁵⁹ *Ibid*, para. 44-45.

²⁶⁰ EFTA Court, Case E-4/01, EFTACR 2002, p. 240 (*Karl K. Karlsson hf v. The Icelandic State*).

beverages in force in Iceland until 1 December 1995.²⁶¹ In paragraph 25 of the judgment, the EFTA Court reiterated its *Sveinbjörnsdóttir* ruling noting that the principle of State liability for breaches of EEA law was an integral part of the EEA Agreement itself. The Court however took the precautionary step of reserving itself the right to develop the principle in a different manner in EEA law than in EU law when noting that.²⁶²

The finding that the principle of State liability is an integral part of the EEA Agreement differs, as it must, from the development in the case law of the Court of Justice of the European Communities of the principle of State liability under EC law. Therefore, the application of the principles may not necessarily be in all respects coextensive²⁶³

Much like in the CJEU Case of *Brasserie de Pêcheur/Factortame*, the EFTA Court established that the principle of State liability for breaches of EEA law not only applicable to secondary law but also primary law; the Agreement itself. The Court furthermore established three criteria for State liability for breaches of EEA law. First, rule of law must confer rights to individuals, second, the breach must be sufficiently serious, finally and third, there must be a causal link between the breach and the damage to individuals.²⁶⁴ Coincidentally, these are the same as set out in CJEU case of *Francovich* and developed in *Brasserie du Pêcheur* and *Factortame*. The Court also noted in paragraph 33 of the judgment that conditions for compensation had to be obtainable and not less favourable than those relating to similar domestic claims.

With respect to the second criterion for State liability, the EFTA Court referred directly to paragraph 57 of the CJEU *Brasserie Du Pêcheur* Case on what could be considered sufficiently serious when describing which breaches might meet the criterion of a breach being ‘sufficiently serious’ noting, in paragraph 40 of the judgment, that a persistent breach despite settled case law would constitute a sufficiently serious breach.

The Court finally noted that in principle it is for national courts to decide whether the conditions for State liability for breaches of EU law have been met.²⁶⁵ It is worth noting that Mr. Karlsson could not demonstrate a direct causal link between the breach of the Icelandic State and the damage sustained and was as a result not awarded compensation for the breach of EEA law.

²⁶¹ EFTA Court, Case E-4/01, EFTACR 2002, p. 240 (*Karl K. Karlsson hf v. The Icelandic State*), para. 2.

²⁶² Stefán Már Stefánsson: “State liability in Community Law and EEA Law”, p. 155.

²⁶³ EFTA Court, Case E-4/01, EFTACR 2002, p. 240 (*Karl K. Karlsson hf v. The Icelandic State*), para. 30.

²⁶⁴ *Ibid*, para. 31-32.

²⁶⁵ *Ibid*, para. 48.

4.1.3 Criminal proceedings against A: Summing the nature and effectiveness of EEA law

The principle was once again touched upon in a case from Lichtenstein concerning the *Criminal proceedings against A*,²⁶⁶ which concerned the freedom of lawyers to provide services in the EEA. In its judgment, the EFTA Court explained the procedure of interpreting EEA law and demonstrated the very purpose of State liability and to what effect the principle could appear.

The Court reiterated the purpose of the EEA Agreement, noting its *sui generis* status in relation to traditional international law and EU law and that with respect to Article 7, Protocol 35 and the homogeneity objective, national courts were under an obligation to interpret national law in line with EEA law where possible.²⁶⁷ The Court, however, noted that:

[...]The EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law.²⁶⁸

National courts are therefore under an obligation to apply EEA rules in the national legal orders of Member States. However when this is not possible, rise may be given to State liability, which by now is an integral part of the EEA Agreement. With respect to the conditions for State liability, the Court referred to the criteria as set forth in *Sveinbjörnsdóttir* and *Karlsson*.²⁶⁹

The case *Criminal proceedings against A* demonstrated the very purpose of the principle of State liability in EEA law, which is to ensure that if individuals cannot rely on rights from EEA law directly they should be able to obtain reparations. This is of course of particular importance since the principle of primacy and direct effect are not as active in EEA law as they are in EU law and thus from the perspective of the effectiveness of EEA law and the rights of individuals, State liability plays an important role. At the time of *Criminal Proceedings Against A* the principle of State liability was only considered to apply to legislative and executive breaches of EEA law. However with respect to the purpose described in the case, that individuals should be able to obtain reparations when they cannot rely directly on rights for fault of the State, one could deduce that perhaps the principle should also apply when the judiciary organs of the States carries out breaches and individuals suffer damage.

²⁶⁶ EFTA Court, Case E-1/07, EFTACR 2007, p. 246 (*Criminal proceedings against A*).

²⁶⁷ *Ibid*, para. 37-39.

²⁶⁸ *Ibid*, para. 43.

²⁶⁹ *Ibid*, para. 40-42.

4.1.4 *Celina Nguyen*: Confirming the principle in Norwegian law

The principle of State liability for breaches of EEA law was further confirmed and developed in the case of *Celina Nguyen*.²⁷⁰ The case concerned the interpretation of the Motor Vehicle Directive. Norwegian legislation excepted redress for non-economic loss from the national and compulsory insurance system. The EFTA Court however maintained that such exclusion was incompatible with the Motor Vehicle Directive and a breach of EEA law.²⁷¹ The Court noted that this exclusion of compensations for non-economic loss constituted a sufficiently serious breach in itself since the case law concerning the Motor Vehicle Directive was clear that such exclusion was impermissible.²⁷² The Court noted:

Furthermore, if a breach of EEA law has persisted despite settled case law from which it is clear that the conduct in question constitutes an infringement, the breach will be sufficiently serious (see *Karlsson*, at paragraph 40). In this regard, the Court notes that in *Ferreira* the Court of Justice of the European Communities ruled that the Member States must ensure that the civil liability arising under their domestic law is covered by insurance which complies with the provisions of the Directives (see paragraph 29 of the judgment). In the context of the case before the national court, it is undisputed that Norway has maintained a rule excepting redress for pain and suffering from the compulsory insurance coverage despite the fact that redress is a form of civil liability.²⁷³

The case of *Celina Nguyen* represented the first case directed to the EFTA Court from Oslo District Court and marked the integration of the principle of State liability for breaches of EEA law into the Norwegian legal order. Norwegian courts had already based a judgment on the principle in the case of *Finanger*²⁷⁴ in the same manner as prescribed by the EFTA Court but without taking the step of referring the questions for an Advisory Opinion of the EFTA Court. The case of *Celina Nguyen* therefore represents a clear confirmation that Norwegian courts apply the principle both without and with the help of the EFTA Court.²⁷⁵

4.2 Case of Þór Kolbeinsson: Imagining State liability for judicial infringements of EEA law

Initially there was reluctance in the EEA regime to accept the principle of State liability for breaches of EEA law by legislative and executive branches of the State. The judicial and national responses to the case law of the EFTA Court establishing and developing the principle of State liability however show that the principle has been widely accepted and

²⁷⁰ EFTA Court, Case E-8/07, EFTACR 2008, p. 224 (*Celina Nguyen v. Staten v/Justis- og politidepartementet*).

²⁷¹ *Ibid*, para. 29.

²⁷² *Ibid*, para. 36.

²⁷³ *Ibid*, para. 40.

²⁷⁴ Supreme Court of Norway, Case No. 55/1999, *Finanger I* (HR-2000-00049B 1811).

²⁷⁵ Carl Baudenbacher: "If Not EEA State Liability, Then What: Reflections Ten Years after the EFTA Court's Sveinbjornsdottir Ruling", p. 351 and 355.

deployed in the EFTA-EEA Member States. With the EFTA Court's recent judgment in *Kolbeinsson*²⁷⁶ however, EEA law once again seems to be at crossroads as the Court seems to indicate that the EU principle of State liability for judicial infringements established in the CJEU case of *Köbler*, could similarly apply in the EEA legal regime, at least when the effective judicial protection of individuals is at stake.

If the principle of State liability for judicial breaches of EEA law is established it is clear that the effective judicial protection of individuals would be enhanced, as they would be able to obtain reparations when they are not able to obtain rights originating from EEA law for the fault of any branch of the State, including the judiciary. However, as has been noted, the EFTA-EEA Member States have been reluctant to transfer sovereign powers and the judiciary has traditionally been a particularly sensitive subject. As described in chapter two, the EFTA-EEA Member States did not, formally speaking, accept the same transfer of judicial powers to the EFTA Court as Member States to the EU did to the CJEU since the Advisory Opinion procedure was in theory supposed to be Advisory and never obligatory. As has been described it is not entirely clear that EFTA-EEA national courts have absolute freedom in this respect and accepting the principle of State liability for judicial breaches would suggest that national courts in EFTA-EEA Member States do not have full freedom of interpretation of EEA law. Establishing the principle of State liability for judicial infringements of EEA law could therefore call into question the sensitive subject of transfer of sovereign rights from the EEA Member States.

4.2.1 Facts of the case

The case concerned Mr. Kolbeinsson, an Icelandic carpenter, who suffered an accident while working on a construction site when he fell five meters to the ground through gypsum boards. Mr. Kolbeinsson was seriously injured as a result of the accident and his disability was evaluated to be 100% for nine months following the accident and 20% permanently. His permanent personal injury was evaluated to amount to 15%. The financial losses of Mr. Kolbeinsson as a result of the accident were evaluated to amount to isk. 4.573.103.²⁷⁷

At the time of the accident, the Icelandic Occupational Safety and Health Administration was called to examine the accident and concluded in a report that:

²⁷⁶ EFTA Court, *Case E-2/10, EFTAGR 2009-2010*, p. 234 (*Pór Kolbeinsson v. the Icelandic State*).

²⁷⁷ Amount evaluated by Reykjavik District Court, see *Supreme Court of Iceland, Case No. 246/2005, Pór Kolbeinsson (Hrd. 2005, p. 5252)*.

The circumstances at the site of the accident were that no measures of any type had been taken there, either above or below the joists, to prevent the workers from falling, as is obligatory under Article 31.2 and 33.6 in Part B of Annex IV to the Regulation No. 547/1996. Nor were safety-belts, attached to a life-line, used as prescribed in Article 33.9 of the same rules. It appears that the cause of the accident can be solely attributed to the fact that neither were measures taken to prevent the workers from falling nor were safety belts in use on the site.²⁷⁸

With a judgment on 20 December 2005,²⁷⁹ the Icelandic Supreme Court nevertheless dismissed Mr. Kolbeinsson's claim for compensation from his employer with reference to the factual situations of the case and Article 26(1) of the Icelandic Act No. 46/1980 on Working Conditions, Health, Hygiene and Safety in Work places. The Supreme Court regarded the obligation to take safety measures to have been the responsibility of Mr. Kolbeinsson, and not his employer, since he was an experienced carpenter. This was in line with firmly established case law concerning Icelandic tort law.²⁸⁰

Mr. Kolbeinsson had obtained isk. 930.386 in compensation from the compulsory employees' Accident Insurance (i. *Slysatrygging launþega*) and isk. 676.989 from the public Social Insurance Administration (i. *Tryggingastofnun ríkisins*). The rest of the damage he had suffered, amounting to isk. 4.573.103, was not to be compensated on the grounds of his own contributory negligence.

As a result of the Supreme Court judgment, Mr. Kolbeinsson brought a new case for compensation, this time against the Icelandic State for losses he had sustained as a result of the Supreme Court's interpretation of the Icelandic tort law. During the proceedings Mr. Kolbeinsson demanded a request for an Advisory Opinion concerning two matters, first whether there had been judicial breaches of EEA law and second whether there had been legislative breaches. The Icelandic Supreme Court however only referred the question concerning a legislative breach of EEA law to the EFTA Court. The referred questions was the following:

1. Is it compatible with the provisions of Council Directive No 89/391/ECC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work and Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) that a worker, due to his own contributory negligence, is held liable for losses suffered as a result of an accident at work, when it has been established that the employer has not on his own initiative complied with rules regarding safety and conditions in the work place?

2. If the answer to the above question is in the negative, is the Icelandic State then liable to award damages to a worker who suffered an accident at work and, contrary to the

²⁷⁸ EFTA Court, Case E-2/10, EFTACR 2009-2010, p. 234 (*Pór Kolbeinsson v. the Icelandic State*), para. 4.

²⁷⁹ Supreme Court of Iceland, Case No. 246/2005, *Pór Kolbeinsson* (Hrd. 2005,5252).

²⁸⁰ EFTA Court, Case E-2/10, EFTACR 2009-2010, p. 234 (*Pór Kolbeinsson v. the Icelandic State*), para. 5.

aforementioned directives, had to partly or wholly bear the losses suffered, due to his own contributory negligence, on the grounds that the State had not correctly implemented these directives into Icelandic law?²⁸¹

4.2.2 Findings of the EFTA Court: Opening up the possibility of State liability for judicial infringements

Regarding the first question, whether it was compatible with the Directives to hold a worker liable for losses suffered as a result of an accident because of his own contributory negligence, the EFTA Court held, in paragraph 55 of the judgment, that workers' safety and health at work obligations could not affect the principle of the responsibility of the employer in the area who bears the main responsibility. Only in exceptional cases the responsibility could lie fully with the worker. These exceptional cases would only be cases where an accident was for example purposely caused by the worker or caused with gross negligence of the worker. However even in such cases the complete denial of compensation would be disproportionate.²⁸² The Court noted, in paragraph 63 of the judgment, that it was up to the national court to assess in light of the EFTA Court's interpretation whether it was contrary to the Directives to dismiss entirely Mr. Kolbeinsson's claim for compensation under tort law.

With respect to the second question, whether the Icelandic State had failed to implement the Directive correctly, Mr. Kolbeinsson submitted before the EFTA Court that the Icelandic legislation on contributory negligence had been sufficiently flexible for the Supreme Court to interpret Icelandic law in accordance with EEA law. He maintained that the Supreme Court had interpreted the Directives incorrectly and by doing so the Court had carried out a judiciary infringement of EEA law. The breach has thus not been one of the legislator but rather one of the judiciary. Furthermore, Mr. Kolbeinsson held that even though the national court had only referred the question of whether there had been legislative breaches of EEA law, the question was open enough for the EFTA Court to interpret whether there had been judiciary infringements of EEA law as well.²⁸³

Interestingly, the EFTA Court maintained that it was bound by the question referred to it by Reykjavik district court, which had been whether the legislator had breached EEA law by incorrectly implementing the directives at question. The Court maintained that it could not address the issue of whether there had been a judicial infringement of EEA law directly since it fell outside the scope of the referred question. It did however note that:

The issue of State liability for losses resulting from incorrect application of EEA law by

²⁸¹ *EFTA Court, Case E-2/10, EFTACR 2009-2010, p. 234 (Pór Kolbeinsson v. the Icelandic State), para. 8.*

²⁸² *Ibid, para. 58.*

²⁸³ *Ibid, para. 65.*

national courts falls outside the scope of this question. The Court observes, however, that if States are to incur liability under EEA law for such an infringement as alleged by the Plaintiff, the infringement would in any case have to be manifest in character, see for comparison Köbler, cited above, paragraph 53.²⁸⁴

The EFTA Court reiterated the three criteria for State liability set out in *Karlsson* and developed in *Nguyen*, noting that in the case of Mr. Kolbeinsson the Directives at hand were clearly intended to confer rights on individuals. The Court furthermore stated that it was for a national court to decide whether it was contrary to Directives 89/291 and 92/57 to deny all compensations to Mr. Kolbeinsson under tort law but noted that if the national court found the denial to be incompatible with EEA law it would have to determine whether the breach was sufficiently serious.²⁸⁵ The Court noted that it had repeatedly held that:

[...] Whether a State has committed a sufficiently serious breach of EEA law through the exercise of its legislative powers depends on whether the State has manifestly and gravely disregarded the limits on the exercise of its powers, see *Nguyen*, paragraph 33, with reference to further case law. Important circumstances in this respect are the clarity and precision of the rule infringed, the measure of discretion left to the national authorities by that rule, whether the infringement and the damage caused was intentional or involuntary, and whether any error of law was excusable or inexcusable, see *Karlsson*, cited above, paragraph 38. Moreover, the presence or absence of settled case law with regard to the interpretation of the rule in question is relevant, see, inter alia, *Nguyen*, paragraph 34.²⁸⁶

The answer to the second question was therefore that an EEA Member State could be held responsible for a breach of the rule of contributory negligence inherent to the Directives at hand if the breach was sufficiently serious, something that was up for national courts to determine.²⁸⁷

4.2.3 Analysis of *Pór Kolbeinsson*

The most interesting part of the EFTA judgment in the case of *Kolbeinsson* is perhaps not the answer to the questions referred to the Court but rather an *obiter dicta* of what the Court wanted to make clear; whether the principle of State liability for judiciary infringements existed under EEA law.

The Norwegian government intervened in the case and claimed that State liability for the incorrect application of EEA law by national courts could not be applicable in the EEA legal order, since unlike in EU law where the request for a Preliminary Ruling is mandatory, the

²⁸⁴ EFTA Court, *Case E-2/10, EFTACR 2009-2010, p. 234 (Pór Kolbeinsson v. the Icelandic State)*, para. 77.

²⁸⁵ *Ibid*, para. 79-81.

²⁸⁶ *Ibid*, para. 82.

²⁸⁷ *Ibid*, para. 85.

request for an Advisory Opinion of the EFTA court is neither obligatory nor binding.²⁸⁸ The EFTA Surveillance Authority (ESA) on the other hand maintained that State liability for judicial infringements could apply in the EEA legal order, given that EEA law had been manifestly infringed.²⁸⁹

As previously noted, the EFTA Court held that it could not address the issue directly as it fell outside the scope of the question referred to it by the Icelandic national court. It did however allude strongly to the possibility of the principle of State liability for judiciary infringements also applying in the EEA legal order. By referring to the *Köbler* case and the conditions for State liability for judicial infringements in paragraph 77 of the judgment, the Court seems to suggest that if it had been given an opportunity to answer whether the principle existed under EEA law, the answer could have been positive.

The principle of homogeneity is by its very nature limited to areas where EEA law and EU law are corresponding and even though State liability for judicial infringements had been established in EU law, the idea of the principle applying in EEA law was not necessarily evident. The Norwegian claim described above elaborates well on the struggle between the principle of homogeneity and the sovereign independence of national courts. This struggle creates difficulties in accepting State liability for judicial breaches of EEA law as the principle can pose some problems as to the independence of national courts, as was described in chapter two. Furthermore, Member States of the EEA are formally not under an obligation to refer questions for an Advisory Opinion to the EFTA Court and Opinions are formally not binding. The same reasoning therefore does not necessarily apply to the EEA and EU legal order with respect to the principles asserted *Köbler*.

Some had on the other hand predicted that the principle would in fact be applicable in EEA law, particularly as a result of the Norwegian case of *Finanger II*.²⁹⁰ In the case, the Supreme Court of Norway noted that the principle of State liability in EEA law should be the same as that in EU law because otherwise individuals would not enjoy the same guarantee of rights in the two legal orders. The principle of homogeneity could in this sense not be guaranteed if State liability for judicial infringements applied in EU law but not EEA law. The fact that the principles of direct effect and primacy formally do not exist in EEA law

²⁸⁸ EFTA Court, *Case E-2/10, EFTACR 2009-2010*, p. 234 (*Pór Kolbeinnsson v. the Icelandic State*), para. 70.

²⁸⁹ *Ibid*, para. 74.

²⁹⁰ Supreme Court of Norway, *Case No 2005/412, Finanger II (HR-2005-01690 1365)* and Halvard Haukeland Fredriksen: “Tatlig erstatningsansvar for nasjonale domstolars brudd på EØS-retten?”, p. 486 and 495.

renders the principle of State liability even more important in ensuring homogeneity.²⁹¹ Carl Baudenbacher noted in an article published in 2009: “The EFTA Court has not yet dealt with a case of judicial wrongdoing, but academic literature appears to assume that the CJEU’s *Köbler* jurisprudence would equally apply in EEA law.”²⁹²

It is important to note that Mr. Kolbeinsson maintained that there had been a judiciary breach of EEA law but the Icelandic Supreme Court only permitted a reference to the EFTA Court concerning the question of legislative breaches.²⁹³ The Supreme Court’s reasoning was simply that a question concerning the mal-interpretation of EEA law by national courts could not be referred to the EFTA Court.²⁹⁴ The question that inevitably arises is whether this freedom of the judiciary to pick and chose which questions are referred to the EFTA Court and the EFTA Court’s seeming lack of jurisdiction over matters falling outside the scope of questions referred to it, creates a system where, in practice, there can be no State liability for judicial breaches because the judiciary would never refer a question to EFTA Court concerning its own breach. In the CJEU *Köbler* case the national court took the step of asking for a Preliminary Ruling on the question of whether there had been a judiciary breach of EU law. Whether a national court would refer such a question to the EFTA Court under EEA law remains for the future to answer.

4.2.4 Tension between the new doctrine and Icelandic procedural law

If the principle of State liability for judicial breaches of EEA law is established, this could pose problems in the EEA legal order as it stands today. In light of the differences between the transfer of sovereign powers of Member States of the EU on the one hand and that of the EFTA-EEA Member States on the other, it is clear that establishing the principle in EEA law could pose several problems on the national level, namely concerning the principle of *res judicata*.

In the case of *Kolbeinsson*, Article 116 of the Icelandic Code of Civil Procedure number

²⁹¹ Ólafur Jóhannes Einarsson: “Hæstiréttur og EES-samningurinn. Samningsbrotamál og skaðabótaábyrgð”, p. 657.

²⁹² Carl Baudenbacher: “If Not EEA State Liability, Then What: Reflections Ten Years after the EFTA Court’s Sveinbjornsdottir Ruling”, p. 357.

²⁹³ Stefán Geir Þórisson: “Dómur EFTA dómstólsins í máli nr. e-2/10 Þór kolbeinsson gegn íslenska ríkinu”, p. 25-26.

²⁹⁴ *Supreme Court of Iceland, Case No. 246/2005, Þór Kolbeinsson (Hrd. 2005,5252)*, in Icelandic: “Að því verður á hinn bóginn að gæta að í málatilbúnaði varnaraðila er auk þessa öðrum þræði byggt á þeirri skoðun hans að niðurstaða fyrra dómsmálsins kunni að hafa ráðist af því að „Hæstiréttur hafi fyrir mistök túlkað íslenskan rétt í andstöðu við tilskipanir Evrópusambandsins“, sem reyndar verður ekki séð að varnaraðili hafi á nokkru stigi borið fyrir sig í því máli, en að hugleiðingum af þeim toga geta spurningar, sem lagðar verða fyrir EFTA-dómstólinn, ekki lotið.”

91/1991 and Article 24(1) of the Act on the Judiciary No 15/1998 could pose particular problems in this respect. According to the aforementioned Articles, a judgment from the Icelandic Supreme Court is final and will not be revised by a lower court. If the District Court of Reykjavik were to be presented with the question of whether a Supreme Court ruling had infringed EEA law there is a risk of the court shielding itself behind these Articles maintaining that it cannot re-evaluate a judgment of a higher court substantially.²⁹⁵

If the principle of State liability is established to apply to judiciary breaches of EEA law it is of course paramount that Member State national courts have jurisdiction to hear claims concerning these breaches. Otherwise the principle would be deprived of all practical effect and the effectiveness of EEA law would not be ensured. When the principle of State liability for judiciary breaches was established in EU law, the CJEU stressed that Member States are under an obligation to ensure that individuals have access to a court with jurisdiction to hear cases concerning State liability for judiciary breaches of EU law and to ensure that courts cannot shield themselves behind national legislation prohibiting lower courts hearing cases concerning mistakes of higher courts.²⁹⁶ If the principle is considered to apply to EEA law, it is hard to see how the same would not apply.

The interpretation of the aforementioned Articles would seem to play the most important role to ensure that a lower court could hear the case. It would thus seem that if these Articles pose problems to ensure the effectiveness of EEA law they would have to be interpreted in such a way as to not infringe EEA law. If, however, this is not possible, national legislation or constitutional law would have to be adjusted in such a way as to not infringe EEA law.²⁹⁷

4.3. State liability in EEA law: Trends and challenges

The unthinkable became reality with the case of *Sveinbjörnsdóttir*. The EFTA-EEA tradition of strict dualism was hit with breaking news: the independence of the legislative and executive branches of the State could be called into question. Although initially reluctant, the EFTA States soon accepted the principle of State liability for breaches of EEA law and it became a recognized principle in the EEA legal order. The principle in EEA law received

²⁹⁵ This was the case in the judgment of *Reykjavik District Court, 5 April 2011 (Case No. E-10868/2009)* where the District Court maintained that it could not review a judgment from the Supreme Court in the case of Mr. Kolbeinsson. The judgment was however rendered void for other reason with a judgment from the *Supreme Court in Case No. 405/2011 (NYR)* and at the time of this writing the District Court has not given a new judgment in the case.

²⁹⁶ Angela Ward: *Judicial Review and the Rights of Private Parties in EU Law*, p. 245.

²⁹⁷ See e.g. *EFTA Court, Case E-1/07, EFTACR 2007, p. 246 (Criminal proceedings against A)*, para. 39, where the EFTA Court noted that: “[...]it is inherent in the objectives of the EEA (...), as well as in Article 3 EEA, that national courts are bound to interpret national law (...) as far as possible in conformity with EEA law.”

support beyond the EFTA Court in the case of *Walter Rechberger and others v. Austria*²⁹⁸, where the CJEU noted that liability in EEA law had been established in the EFTA *Sveinbjörnsdóttir* case and was an important aspect of the uniform interpretation and application of the EEA Agreement.²⁹⁹

Because of the lack of direct effect and primacy in EEA law, the principle of State liability was quickly seen as an important tool in ensuring that individuals have the possibility to obtain rights conferred to them from EEA law and if they cannot enjoy those rights directly, for reasons attributable to the legislative or executive branches of the State, they can be granted reparations. In this respect the principle is in fact more important in EEA law than in EU law where primacy and direct effect provide individuals with a deeper sense of protection.³⁰⁰ The principle furthermore serves to ensure the *quasi-direct effect* (once provisions have been implemented into the national legal order of Member States, they can be invoked before national courts) and *quasi-primacy* (those provisions that have been incorporated into the national legal orders have primacy over national legislation) since their principle establishes financial burdens for failure to implement EEA law into national legal systems. The principle of State liability in this sense contributes to the effectiveness of EEA law.³⁰¹

In light of the tradition of judicial dialogue between EU and EEA courts and the EFTA Court's willingness to follow the CJEU case law, it may have been a logical next step to establish the principle of State liability for judicial infringements in EEA law once the principle had been established in the EU legal order. As previously described, one of the reasons given by the CJEU when establishing the principle in EU law was that it was inherent to the protection of rights of individuals that there must be a remedy for breaches of EU law, even if the breach is caused by a national court.³⁰² If the principle of State liability in EEA law was intended to serve the purpose of ensuring that individuals could rely on rights conferred to them in EEA law, it would be hard to justify that this should not apply to the judiciary. Furthermore, if State liability for legislative and executive breaches of EEA law as not considered involving a transfer of sovereign powers, why would State liability for

²⁹⁸ CJEU Case C-140/97, ECR 1999, p. I-03499 (*Walter Rechberger and others v. Austria*).

²⁹⁹ Carl Baudenbacher: "If Not EEA State Liability, Then What: Reflections Ten Years after the EFTA Court's *Sveinbjörnsdóttir* Ruling", p. 345.

³⁰⁰ Skúli Magnússon: "Um hið sérstaka eðli samnings um evrópska efnahagssvæðið", p. 477-478.

³⁰¹ Carl Baudenbacher: "If Not EEA State Liability, Then What: Reflections Ten Years after the EFTA Court's *Sveinbjörnsdóttir* Ruling", p. 357-358.

³⁰² CJEU, Case C-224/01, ECR 1963, p. I-10239 (*Gerhard Köbler v. Republik Österreich*), para. 36.

judiciary breaches be considered to involve such?³⁰³

The EFTA Court's reference to the CJEU case of *Köbler* in the case of *Kolbeinnsson* is a sign that EEA law could once again take a further step to influence the mechanisms of national legal orders.³⁰⁴ It is of course important to note that in the case the question of whether there had been judiciary breaches of EEA law was not referred to the EFTA Court and as such all conclusions drawn from the case are built on guesswork and it remains for the future cases of the EFTA Court to answer if as a matter of principle, State liability extends to the judiciary. However the Court's wording as well as the literature presented by the president of the EFTA Court and mentioned above seems to indicate that if the EFTA Court had the opportunity to establish the principle of State liability for judiciary infringements, it might very well have done so.

Two fundamental issues prevent the principle from being automatically accepted in the EEA legal order. The traditional view has been that it is never obligatory to seek an Advisory Opinion and formally the Opinions are not binding. This fundamental difference between EEA and EU law is perhaps the strongest argument against the principle of State liability for judicial infringements applying in EEA law. This traditional view, originating in the text of the Agreement itself, is however undergoing serious challenges as elaborated upon in chapter two. The emerging view is that perhaps national courts do not have full liberty of choice concerning this issue and that they might sometimes both be obligated to ask for an Advisory Opinion and follow the judgments of the EFTA Court.³⁰⁵ If national courts are in certain cases under an obligation to ask for an Advisory Opinion of the EFTA Court, it is clear that there could be grounds for the principle of State liability applying when a national court has dismissed a demand for such. It is however abundantly clear that if national courts of the EFTA States are never under an obligation to ask for an Advisory Opinion, the principle of State liability for failing to seek an Advisory Opinion could never be the reality.³⁰⁶

If national courts are, in certain cases, under an obligation to refer questions for an Advisory Opinion of the EFTA Court, the question that arises is whether a dismissal to do so could give rise to State liability in every single case or if the dismissal would have to be systematic for actions to be brought on these grounds. As noted above, the consequences for

³⁰³ Ólafur Jóhannes Einarsson: "Hæstiréttur og EES-samningurinn. Samningsbrotamál og skaðabótaábyrgð", p. 655.

³⁰⁴ Stefán Geir Þórisson: "Dómur EFTA dómstólsins í máli nr. e-2/10 og dómur Héraðsdóms Reykjavíkur í máli nr. e-10868/2009 þór Kolbeinnsson gegn íslenska ríkinu – seinni grein", p. 27.

³⁰⁵ Ólafur Jóhannes Einarsson: "Hæstiréttur og EES-samningurinn. Samningsbrotamál og skaðabótaábyrgð", p. 657.

³⁰⁶ *Ibid*, p. 658.

refusing to refer questions for an Advisory Opinion could give rise to ESA initiating an infringement case against the Member State at hand and as previously stated Carl Baudenbacher has maintained that perhaps a single dismissal in a high profile case could give rise to such an infringement case.³⁰⁷ Since there is no case law on this issue it is hard to determine when a dismissal or series of dismissals by a national court could give rise to an infringement case.

However, even if national courts were never to refer questions for an Advisory Opinion, their judgments might give rise to State liability for the mal-application of EEA law. Such a mal-interpretation would presumably have to be manifest in character and meet the criteria for State liability. As previously noted, Advisory Opinions by the EFTA Court have in practice been actively followed and the EFTA Court has therefore never examined the issue. It is however clear that if a national court were to disregard an EFTA Court judgment in a sufficiently serious manner, the Member State could be in breach of the EEA Agreement. Such a scenario could give rise to State liability for judicial infringements and ESA could act by initiating an infringement procedure.³⁰⁸

Furthermore, if the principle State liability for judicial infringements exists in EEA law it is clear that the three criteria set forth in the CJEU case of *Francovich* and the EFTA Court case of *Karlsson* must be met. During the proceedings of *Kolbeinsson*, ESA submitted that the principles established in the *Köbler* case applied under EEA law as well. ESA referred to the condition of a manifest infringement of EEA law as proscribed in *Köbler* paragraph 53 and noted that this was a “higher threshold” than the traditional criteria for a sufficiently serious breach of EEA law.³⁰⁹ On the EU side there have been considerable speculations on this criterion in the post-Köbler jurisprudence.³¹⁰ The wording of the Court, and particularly that of ESA, as well as the principle of homogeneity would suggest that the sufficiently serious criterion is perhaps stricter with respect to the judiciary than the legislative and executive authorities.

If, in principle, State liability for judicial infringements is applicable in EEA law the problem arises that national courts phrase the question referred to the EFTA Court themselves. In light of the EFTA Court’s position in *Kolbeinsson*, this is perhaps the largest obstacle in establishing the principle in EEA law since the EFTA Court seems to have taken

³⁰⁷ Skúli Magnússon: “On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court”, p. 540.

³⁰⁸ Carl Baudenbacher: “EFTA Court: An Actor in the European Judicial Dialogue”, p. 360.

³⁰⁹ *EFTA Court, Case E-2/10, EFTACR 2009-2010, p. 234 (Pór Kolbeinsson v. the Icelandic State), para. 74.*

³¹⁰ See Chapter 3.5 on the sufficiently serious criterion in EU law.

the view that it is, at least to some extent, limited by the wording of questions referred to them by national courts.³¹¹ If the EFTA Court upholds this view, the consequences could be that if national courts in an EEA Member State decided to form an alliance, ensuring that the question of whether State liability for judicial infringements applies in EEA law is never referred to the EFTA Court, theoretically they could. It is, however, important to bear in mind that ESA could in such a case bring forth infringement cases for these manifest refusals, but the question is at what point ESA would take that step. It is worth noting that ESA has not acted on the refusal of the Icelandic Supreme Court to refer the question of judicial infringements of EEA law in the case of *Kolbeinsson*.

This is a clear example of the struggle between the nature of the EEA Agreement, its practice and the judicial activism of the EFTA Court as well as the constant struggle between homogeneity and the sovereignty of Member States. If there is no obligation under EEA law to refer questions to the EFTA Court, individuals clearly have a weaker stand than EU citizens before national courts when trying to obtain rights originating at the European level as the uniform interpretation and application of EEA law could not be ensured. It is hard to see how this is in conformity with the principle described in the preamble to the EEA Agreement concerning the “role of individuals through the exercise of their rights and through the judicial defence of these rights.”³¹² The effective judicial protection of individuals would be weaker in EEA law than EU law if the principle of State liability for judicial infringements is not established in EEA law.

In many ways EEA law seems to work in practice because there is political will to ensure that the legal system is functional and in reality, the legal system is perhaps not that different from EU law.³¹³ The reason is in many ways attributable to the EFTA Court’s active jurisprudence, which has ensured that many of the principles established in EU law to protect the rights of individuals are present in EEA law and thus ensured a sense of homogeneity of effect.³¹⁴ Through judicial dialogue, the EFTA Court has followed to results of the CJEU but because of the differences between the two legal orders, the EFTA Court has in many of these cases needed to apply different reasoning to arrive to the same conclusion.³¹⁵ This homogeneity of effect has for example ensured that despite the limited direct effect and primacy of EEA law, individuals have been able to rely on the principle of State liability

³¹¹ Skúli Magnússon: “On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court”, p. 530.

³¹² *Ibid*, p. 534.

³¹³ Carl Baudenbacher: “EFTA Court: An Actor in the European Judicial Dialogue”, p. 358.

³¹⁴ Halvard Haukeland Fredriksen: “The EFTA Court 15 Years On”, p. 738.

³¹⁵ Carl Baudenbacher: *The EFTA Court in Action. Five Lectures*, p. 54.

when they cannot rely directly on rights originating in EEA law. The EFTA Court has until now ensured that individuals can expect a similar result when claiming rights originating in EEA law as in EU law. However, the case of *Kolbeinsson* demonstrates that there is a loophole in the system relating to the effects of judicial infringements of EEA law. If the principle of State liability for judicial infringements is not established in EEA law, individuals in EFTA-EEA Member States cannot expect a similar result as in EU law when a national court steps in the way of granting them rights originating in EEA law. This would not be compatible with the principle of homogeneity, as the homogeneity of effect could not be guaranteed. Furthermore if the principle of State liability for judicial breaches of EEA law were not established, individuals in the EFTA-EEA Member States would enjoy much weaker judicial protection than individuals in the EU.

The question, however, that remains to be answered is whether it is compatible with the current EEA legal regime to establish the principle of State liability for judicial infringements of EEA law. Furthermore, whether full procedural homogeneity is required between EU and EEA law in light of the effective judicial protection of individuals and access to justice as recognized by the European Convention of Human Rights.

5 The effective judicial protection of individuals in EEA law

Although the scope of EEA law is indisputably narrower than that of EU law, the EEA Agreement has from the very beginning been interpreted in a way as to minimize these differences.³¹⁶ It must however not be forgotten that at the time of the drafting of the EEA Agreement, many of the contracting parties to the Agreement took part precisely because, as opposed to the EU legal order, EEA law was not meant to have a supranational character and the contracting States did not foresee a transfer of sovereign rights.³¹⁷ With the development of time, it is however clear that the EEA Agreement has become much more than a traditional international agreement and rather, to quote the EFTA Court, a living instrument and a legal order *sui generis*.³¹⁸

In the EFTA Court's very first judgment of *Restamark*,³¹⁹ the Court established that individuals could obtain rights under EEA law and in future case law the EFTA Court has demonstrated that, just like the CJEU, its role is to protect the rights of individuals.³²⁰ In light of the limited primacy and direct effect of EEA law, the EFTA Court has had to develop EEA law to ensure that individuals can obtain rights originating in EEA law regardless of whether they are situated in EFTA-EEA Member States or in Member States of the EU. One of the most important steps in this regard was to establish the principle of State liability for breaches of EEA law. The principle has, as described in chapters three and four, served to enhance the judicial protection of individuals by allocating reparations when, for reasons attributable to a Member State, they cannot rely directly on European rights and have, as a consequence, suffered damage.³²¹

On the EU side, the principle of State liability has complemented the principles of direct effect and primacy, particularly in cases where individuals cannot rely directly on EU law, for example when Directives have not been correctly implemented. When establishing the principle of State liability in the case of *Francovich*, the CJEU noted:

The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held

³¹⁶ Sven Norberg etc.: *The European Economic Area. EEA Law. A Commentary on the EEA Agreement*, p. 185.

³¹⁷ Skúli Magnússon: "Judicial Homogeneity in the European Economic Area and the Authority of the EFTA Court - Some Remarks on an Article by Haukeland Fredriksen", p. 239.

³¹⁸ *EFTA Court, Case E-7/97, EFTACR 1998, p. 95 (Erla María Sveinbjörnsdóttir v. Iceland), para. 59.*

³¹⁹ *EFTA Court, Case E-1/94, EFTACR 1994-1995, p. 15 (Ravintoloitsijain Liiton Kustannus Oy Restamark).*

³²⁰ Carl Baudenbacher: "The EFTA Court Ten Years On", p. 28-29.

³²¹ Skúli Magnússon: "Um Hið Sérstaka Eðli Samnings um Evrópska Efnahagssvæðið", p. 474.

responsible.³²²

The principle therefore serves to ensure the effectiveness of EU law and as a double insurance for individuals in the sense that, if individuals cannot obtain rights originating in EU law for the fault of a Member State, they may be able to obtain reparations from the State for damage they have suffered as a result.³²³ As mentioned in chapter two, European law is in many ways judge-made law as the CJEU has established many of the most important principles of the legal order. With the establishment of State liability, there is also a sense of ‘judge-made law on remedies’.³²⁴

Within EEA law the principle of State liability may play an even more important role to ensure the effective judicial protection of individuals than it does in EU law. As previously described, the principles of direct effect and primacy are limited to a *quasi* effect.³²⁵ As a result individuals are dependent on the correct implementation and application of EEA law by Member States and cannot rely on EEA law directly to the same extent that EU citizens are able to. The principle of State liability for breaches of EEA law ensures individuals compensation when Member States do not fulfil their EEA obligations.³²⁶ There is therefore an incentive for States to comply with their EEA obligations, as there can be financial consequences for disregarding EEA obligations just like in EU law.³²⁷

5.1 The principle of effective judicial protection

The principle of effective judicial protection is well established in EU law. The principle was recognized in the case of *Johnson*³²⁸ where the CJEU noted that effective judicial protection was a general principle of EU law stemming from the constitutional traditions of Member States.³²⁹ The principle was initially derived from the principle of loyal cooperation but is now explicitly recognized in TEU Article 19(1).³³⁰ Within the EU legal order, an important

³²² CJEU, *Joined Cases C-6/90 and 9/90*, ECR 1991, p. I-5357 (*Andrea Francovich and Danila Bonifaci and others v Italian Republic*), para. 33.

³²³ Nicolos Zingales: “Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law”, p. 425.

³²⁴ Hans-W. Micklitz: “The ECJ Between the Individual Citizen and the Member States- a Plea for a Judge-Made European Law on Remedies”, p. 366.

³²⁵ Carl Baudenbacher: “If Not EEA State Liability, Then What: Reflections Ten Years after the EFTA Court's Sveinbjornsdottir Ruling”, p. 357-358.

³²⁶ Stefán Már Stefánsson: “State liability in Community Law and EEA Law”, p. 155.

³²⁷ Takis Tridimas: “State Liability for Judicial Acts Remedies Unlimited?”, p. 147.

³²⁸ CJEU, *Case 222/84*, ECR 1986, p. 1651 (*Johnston v. Chief Constable of the Royal Ulster Constabulary*).

³²⁹ *Ibid*, para. 18.

³³⁰ Skúli Magnússon: “On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court”, p. 534.

system has been set up to ensure the full effectiveness of judicial protection with the combination of Articles 263, 277, and 267 TFEU.³³¹

Although there is no explicit reference to the effective judicial protection of individuals in the EEA Agreement, it has been maintained that the principle also applies in EEA law. The view is that the principle can be derived from the principle of homogeneity and the Agreement's reference to the "role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights."³³² With respect to the preamble's call for a uniform interpretation and the "equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition", it would seem contradictory that the principle of effective judicial protection would apply in EU law and not EEA law.

It is however important to keep in mind the position of the EFTA-EEA Member States when entering in to the EEA Agreement. The EEA legal order was never meant to have the supranational character of EU law and EFTA-EEA Member States have not officially transferred any sovereign powers to the EFTA Court.³³³ National governments have, on numerous occasions, upheld this position before the EFTA Court and claimed that the different purpose and narrower scope of the EEA Agreement should result in a less far-reaching interpretation of EEA law. This argument has however been rejected on every occasion by the EFTA Court, which has upheld the opposite view maintaining that there is in fact a presumption that identical provisions should be interpreted in an identical way.³³⁴ In the case of *Ásgeirsson*, the Court explicitly noted that:

This legal order as established by the EEA Agreement is characterized by the creation of an internal market, [...] the protection of the rights of individuals and economic operators and an institutional framework providing for effective surveillance and judicial review.³³⁵

It is thus clear that although the EFTA-EEA Member States envisaged a dualistic approach to EEA law, in reality EEA law goes beyond traditional international law and is a legal order *sui generis*. Furthermore, the repeated references to the protection of individuals in

³³¹ Giacomo Di Federico: *The EU Charter of Fundamental Rights. From Declaration to Binding Instrument*, p. 99.

³³² Skúli Magnússon: "On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court", p. 529.

³³³ Carl Baudenbacher: "Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area", p. 176.

³³⁴ Carl Baudenbacher: "The EFTA judicial system reaches the age of majority- Accomplishments and problems", p. 3 and *EFTA Court, Case E-2/06, EFTACR 2007, p. 164 (EFTA Surveillance Authority v. The Kingdom of Norway)*, para. 59.

³³⁵ *EFTA Court, Case E-2/03, EFTACR 2003, p. 185 (Ákærvaldið v. Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson)*, para. 28.

the Agreement, the homogeneity principle and the loyalty principle have resulted in the EFTA Court creating a sense of *quasi direct effect* and *quasi primacy* of EEA law. Along with the principle of State liability, this has served to improve the judicial protection of individuals in the EEA legal order. It can thus be maintained that even though Article 7 of the EEA Agreement and Protocol 35 limit the transfer of sovereign powers from Member States, it is clear that EEA law confers rights to individuals and these rights have to be protected in order to ensure their effectiveness.³³⁶

In light of the aforementioned, it would seem that the principle of effective judicial protection is, at least to some extent, applicable in EEA law. What remains to be answered is whether the principle restricts the autonomy of national legal orders in the EFTA-EEA Member States, which have not transferred sovereign judicial powers to the same extent as Member States of the EU.³³⁷

5.2 Access to justice considerations and the ECHR

Although there is limited room in this research to elaborate in detail on the principle of access to justice, it is important to mention briefly implications that access to justice and the European Convention on Human Rights may have in relation to the principle of effective judicial protection.

Access to justice is a key element of the principle of effective judicial protection and is considered a basic human right in the modern and egalitarian legal system.³³⁸ In Europe the principle goes as far back as 1215 and *Magna Carta*, which stated “to no one will we sell, to no one will we deny or delay right or justice.”³³⁹ In EU law, the principle was established in the CJEU case of *Johnson*³⁴⁰, and is expressed in TFEU Article 67(4). In relation to the CJEU, access to justice is twofold. On the one hand individuals have direct access to the Court under TFEU Articles 263 and 277 where they can challenge the legality of acts. On the other hand they can seek rights from national courts who can then refer questions for a Preliminary Ruling by the CJEU.³⁴¹ As has been described, there is a lower standard of access

³³⁶ Carl Baudenbacher: “The Implementation of Decisions of the CJEU and of the EFTA Court”, p. 385.

³³⁷ Skúli Magnússon: “On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court”, p. 535.

³³⁸ María Elvira Méndez Pinedo: “Access to Justice: A World Wide Movement to Make Rights Effective”, p. 143.

³³⁹ Hans-W. Micklitz: “The ECJ Between the Individual Citizen and the Member States- a Plea for a Judge-Made European Law on Remedies ”, p. 394.

³⁴⁰ *CJEU, Case 222/84, ECR 1986, p. 1651 (Johnston v. Chief Constable of the Royal Ulster Constabulary)*.

³⁴¹ European Union Agency for Fundamental Rights: *Access to justice in Europe: an overview of challenges and opportunities*, p. 33.

to justice in the latter case since individuals are, in those cases, dependent on national courts making a reference to the CJEU.

The European Union Agency for Fundamental Rights has examined the principle of access to justice in EU law and established that access to justice does not only entail access to a court but is also considered to entail the realistic possibility of obtaining reparations for harm suffered for breaches of EU law.³⁴² In simple terms, access to justice thus entails, in relation to the effective judicial protection of individuals in EU law, that individuals are to be able to obtain rights conferred to them at the European level through the judiciary means proscribed to them in the EU legal order. If, on the other hand, they are not able to obtain rights directly, they are to be afforded with reparations for the harm suffered.

The principle of access to justice is outlined in Article 6 of the European Convention of Human Rights (ECHR) and all Member States of the European Union and the European Economic Area are Member States to the Convention. The relationship between the ECHR and the international participation of Member States to the Convention was established in the case of *M & Co. v. Germany*³⁴³, where the European Commission of Human Rights upheld the “equivalent protection test”. The test entails that Member States to the Convention can only transfer sovereign powers to international organization when such a transfer ensures the equivalent protection of human rights as guaranteed in the ECHR.³⁴⁴ EU and EFTA-EEA Member States are therefore obligated to ensure that individuals have access to justice concerning rights conferred to in EU and EEA law, just like to rights conferred to them in their respective national legal orders.

In the *Bosphorus Airways judgment*³⁴⁵, the European Court of Human Rights established that with respect to Member States of the European Union, there should be a presumption of compliance with the ECHR concerning the application EU legislation.³⁴⁶ The Court noted that this presumption of compliance was supported by the repeated references to the ECHR in the CJEU case law, the EU Treaty reference to the protection of human rights and the enforcement mechanisms of EU law.³⁴⁷ The Court further reasoned its judgment with reference to the fact that Member States of the EU did not have full discretion over matters

³⁴² European Union Agency for Fundamental Rights: *Access to justice in Europe: an overview of challenges and opportunities*, p. 55.

³⁴³ *ECHR, M & Co. v. Germany*, 9 February 1990 (1325/87).

³⁴⁴ Davíð Þór Björgvinsson: “Fundamental Rights in EEA law”, p. 4.

³⁴⁵ *ECHR, Bosphorus Hava Yolları Turizm ve Tıraet Anonim Şirketi v Ireland.*, 30 June 2005 (45036/98).

³⁴⁶ Davíð Þór Björgvinsson: “Fundamental Rights in EEA law”, p. 5

³⁴⁷ Davíð Þór Björgvinsson: “On the Interplay between EC Law, EEA Law and the ECHR”, p. 91.

relating to the application of EU law.³⁴⁸ The ECHR however set forth the reservation that compliance would only be assumed when rights from the ECHR were protected and not infringed.³⁴⁹

With respect to access to justice there would thus be a presumption of compliance with Article 6 of the ECHR concerning the application of EU law, so long as this was not explicitly contrary to the Article. In light of the relationship between EU and EEA law one might wonder whether this same presumption could apply in EEA law. Icelandic author and Judge at the European Convention of Human Rights, Davíð Þór Björgvinsson, has observed that the presumption of compliance of EU law to the ECHR seems to be derived from elements of EU law that are lacking in EEA law. These include the principle of primacy, the principle of direct effect and the formal obligation to refer questions to the CJEU. These elements of EU law are limited to a *quasi* effect in EEA law and it is therefore difficult to predict whether the same compliance would be presumed when applying EEA law.

Furthermore the enforcement mechanisms of EU and EEA law are, to some extent, different. Individuals in EFTA-EEA Member States do not have the same non-judicial remedies as individuals in the EU law who can complain to the European Commission, the Committee of Petitions of the European Parliament and the European Ombudsman. Furthermore, individuals in the EEA do not have the possibility of bringing cases directly to the CJEU. Access to justice is, in this sense, more limited for individuals in EFTA-EEA Member States than in Member States of the EU.³⁵⁰

If there was to be a presumption of compliance to the ECHR when applying EEA law, it might, in light of the differences between EU and EEA law, therefore be justified with different reasoning.³⁵¹ Davíð Þór Björgvinsson has observed that perhaps there is a triple standard of human rights. One for EU Member States, one for EFTA-EEA Member States and one for other Member States to the ECHR.³⁵²

With respect to the principle of access to justice in EU and EEA law, another case of the ECHR sheds important light on the Preliminary Ruling procedure. In the case of *Ullens de Schooten and Rezabek v. Belgium*³⁵³, the ECHR established that Article 6(1) of the Convention does not obligate national courts to refer questions to another court, whether it is national or international. However according to Article 6(1), a refusal to refer matters to

³⁴⁸ Davíð Þór Björgvinsson: "On the Interplay between EC Law, EEA Law and the ECHR", p. 90.

³⁴⁹ *Ibid*, p. 92.

³⁵⁰ Maria Elvira Mendez-Pinedo: *EC and EEA Law*, p. 44.

³⁵¹ Davíð Þór Björgvinsson: "Fundamental Rights in EEA law", p. 8.

³⁵² Davíð Þór Björgvinsson: "On the Interplay between EC Law, EEA Law and the ECHR", p. 98.

³⁵³ *ECHR, Ullens de Schooten and Rezabek v. Belgium, 20 September 2011 (3989/07 and 38353/07)*.

another court, particularly where there is limited discretion for such would have to be justified. National courts could thus not merely reject a request for a Preliminary ruling without reasoning.³⁵⁴ According to ECHR Article 6(1) there is thus an obligation for legal reasoning when national courts refuse to refer matters to another court whether national or international.

This raises important questions with respect to EEA law. If, despite the EEA Agreement's text, there is in fact an obligation to refer questions for an Advisory Opinion of the EFTA Court, national courts in the EEA would have to justify the refusals to refer such questions. Not reasoning such a refusal could be in violation of Article 6(1) of the European Convention of Human Rights. This raises serious questions concerning the case of *Kolbeinsson* where the Icelandic Supreme Court refused to refer the question of whether there had been judicial infringements of EEA law to the EFTA Court. The only reasoning given by the Supreme Court was that with such a question could not be referred to the EFTA Court. One could wonder whether this reasoning was compatible with ECHR Article 6(1) in light of the *Ullens de Schooten and Rexabek v. Belgium* judgment.

Although the principle of access to justice is not expressly noted in the EEA Agreement, the reference to the judicial defence of individual rights and human rights in the Agreement's preamble have been interpreted in such a way that individuals must enjoy access to justice in the EEA legal system.³⁵⁵ The principle has thus been consistently upheld by the EFTA Court, which has emphasized that:

[...] access to justice is an essential element of the EEA legal framework, as evidenced by the eighth recital in the Preamble to the EEA Agreement which stresses the value of the judicial defence of rights conferred by the Agreement on individuals and intended for their benefit [...]³⁵⁶

The EFTA Court has in its case law made clear that the EEA Agreement should be interpreted in light of fundamental rights and the European Convention of Human Rights.³⁵⁷ It is thus clear that EEA law must be interpreted in light of the principle of access to justice, which as previously noted, does not only entail access to a court but to an effective remedy.³⁵⁸

³⁵⁴ Davíð Þór Björgvinsson: "Fundamental Rights in EEA law", p. 14.

³⁵⁵ Skúli Magnússon: "On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court", p. 534.

³⁵⁶ *EFTA Court, Case E-5/10, EFTAGR 2009-2010, p.320 (Dr. Joachim Kottke v. Präsidial Anstalt and Sweetyle Stiftung)*, para. 26.

³⁵⁷ Carl Baudenbacher: *The EFTA Court in Action. Five Lectures*, p. 49.

³⁵⁸ European Union Agency for Fundamental Rights: *Access to justice in Europea: an overview of challenges and opportunities*, p. 55

If individuals are conferred rights but cannot obtain these rights, access to justice should entail that a remedy were available.

Access to justice plays an important role in relation to the principle of State liability. In the case of *Sigmarsson* the EFTA Court touched upon this subject when noting that:

[...] The EEA Agreement aims at securing equal treatment for individuals and economic operators and equal conditions of competition throughout the European Economic Area, as well as adequate means of enforcement, including at the judicial level (see the fourth and fifteenth recital in the Preamble to the EEA Agreement and Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraphs 57-58). In this regard, the Court has emphasised that access to justice is an essential element of the EEA legal framework. This is evidenced by the 7–eighth recital in the Preamble to the EEA Agreement which stresses the value of the judicial defence of rights conferred by the Agreement on individuals and intended for their benefit [...]³⁵⁹

In relation to the principle of State liability and access to justice it is important to note that both national courts and the EFTA Court have a mandate to interpret EEA law.³⁶⁰ When national courts do not refer questions to the EFTA Court, they have limited the access that individuals have to justice in EEA law. In any legal order composed of human judges mistakes can occur and in practice, no principle can prevent these mistakes entirely. However, the principle of access to justice should entail that these mistakes have consequences. If this leads to individuals suffering damage, one could deduce that in order for individuals to obtain justice, they should be compensated. There should be a form of extra-contractual responsibility of the State for miscarriages of justice.

Since the principle of access to justice is integral to the ECHR, it should be noted that when individuals bring cases before the European Court of Human Rights, according to Article 35 of the Convention they must meet certain criteria. One of the criteria is to have exhausted all domestic remedies and this may include having brought a case before a national court and appealing to a court of last instances.³⁶¹ When an individual brings a case before the ECHR and has exhausted domestic remedies he or she could thus be bringing a case for a judiciary breach of the ECHR. In such a case the State is held liable for a breach of the judiciary. As previously noted, all EFTA-EEA Member States are Member States of the ECHR and have thus accepted that in such a case the State can be held liable for a judiciary breach.

5.3 Interplay between homogeneity, effective judicial protection and State liability

The principle of homogeneity is considered to contain an obligation of result with respect to

³⁵⁹ EFTA Court, Case E-3/11, NYR, (*Pálmi Sigmarsson v. Seðlabanki Íslands*), para. 29.

³⁶⁰ EFTA Court, Case E-1/07, EFTACR 2007, p. 246 (*Criminal proceedings against A*), para. 39.

³⁶¹ Björg Thorarensen: “Skilyrði Kæru og Málsmeðferð”, p. 560.

the protection of rights of individuals. It is not considered enough to harmonize rights in EU and EEA law, but individuals should furthermore be able to expect similar results when they rely on these rights, whether they are situated in an EFTA-EEA Member State or EU Member State.³⁶² This was one of the guiding lights of the EFTA Court when establishing the principle of State liability for breaches of EEA law when the Court maintained that the principle was essential to guarantee the principle of homogeneity and rights of individuals in the EEA legal order.³⁶³

Establishing the principle of State liability for breaches of EEA law was essential to ensure that individuals could rely on homogeneous effect of EU and EEA law. To demonstrate the importance of this, one could imagine that the principle of State liability for breaches of EEA law had not been established. If this had been the case, individuals would obtain identical rights whether they were situated in a Member state to the EU or an EFTA-EEA Member State. However if, for some reason, they were not able to rely directly on these identical rights, only EU citizens would have the possibility of being compensated for damages thereof. EFTA-EEA citizens would on the other hand have been left with nothing. Had this been the case, individuals in EFTA-EEA Member States would have enjoyed a much weaker judicial protection of rights than EU citizens and the effectiveness of many EEA rights would have been rendered meaningless. Establishing the principle of State liability for breaches of EEA law thus served the purpose of ensuring that individuals would enjoy homogeneous protection of rights in EU and EEA law.³⁶⁴

With this in mind, it is important to take note of the reason given by the CJEU for extending the principle of State liability to judicial breaches of EU law, which was, amongst other, to ensure the effective judicial protection of individuals. This was reiterated in the case of *Traghetti* the CJEU noted:

Analogous considerations linked to the need to guarantee effective judicial protection to individuals of the rights conferred on them by Community law similarly preclude State liability not being incurred solely because an infringement of Community law attributable to a national court adjudicating at last instance arises from the interpretation of provisions of law made by that court.³⁶⁵

The CJEU maintained that if the principle only applied to legislative and executive breaches of EU law there would be no reparations when actors of the judiciary had carried out

³⁶² Carl Baudenbacher: “The EFTA Court Ten Years On”, p. 29.

³⁶³ Carl Baudenbacher: “The EFTA judicial system reaches the age of majority- Accomplishments and problems”, p. 4.

³⁶⁴ Carl Baudenbacher: “If Not EEA State Liability, Then What: Reflections Ten Years after the EFTA Court's Sveinbjornsdottir Ruling”, p. 357-358.

³⁶⁵ CJEU, Case C-173/03, ECR 2006, p. I-1209 (*Traghetti del Mediterraneo SpA v. Italy*), para. 33.

a breach of EU law. This would to a deficit in the judicial protection of individuals in EU law. Although several problems arose when establishing the principle in EU law, namely with respect to the principle of *res judicata*, the Court maintained that means would have to be found to circumvent these challenges, as described in chapter three. Otherwise, the effective judicial protection of individuals could not be guaranteed.

It has been established that the judicial protection of individuals was one of the guiding lights when the principle of State liability was established for breaches of EEA law and this certainly is a strong argument to extend the principle to apply to judiciary infringements in the EEA legal order.³⁶⁶ In the case of *Sveinbjörnsdóttir*, the EFTA Court noted that:

[...] the provisions of the EEA Agreement are, to a great extent, intended for the benefit of individuals and economic operators throughout the European Economic Area. Therefore, the proper functioning of the EEA Agreement is dependent on those individuals and economic operators being able to rely on the rights thus intended for their benefit.³⁶⁷

Member States of the EEA are according to Article 3 of the EEA Agreement under an obligation to “take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.” National courts, as previously noted, play a fundamentally important role in this regard, as it is their part to both apply EEA law and ensure its uniform interpretation.³⁶⁸ With this in mind, it is hard to see how the effective judicial protection of individuals could be ensured if the principle of State liability only applied to legislative and executive breaches of EEA law and not judiciary breaches as it does in EU law. This would mean that if, for fault of the judiciary, individuals could not rely directly on rights originating in EEA law, they would have the possibility to obtain compensation in EU law and not EEA law. This would not ensure a homogeneous effect of EU and EEA law.

During national proceedings, individuals only have indirect access to the EFTA Court and are rendered entirely dependent on national courts referring matters to the EFTA Court for an Advisory Opinions and interpreting EEA law in a correct manner.³⁶⁹ Furthermore, as previously noted, individuals cannot rely on direct effect and primacy of European law in the EEA legal order, to the same extent, as in EU law and to this effect the importance of national courts is further enhanced. It is clear that the effective judicial protection of individuals would

³⁶⁶ Ólafur Jóhannes Einarsson: “Hæstiréttur og EES-samningurinn. Samningsbrotamál og skaðabótaábyrgð”, p. 655.

³⁶⁷ *EFTA Court, Case E-7/97, EFTACR 1998, p. 95 (Erla María Sveinbjörnsdóttir v. Iceland)*, para. 58.

³⁶⁸ Skúli Magnússon: “On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court”, p. 539.

³⁶⁹ Skúli Magnússon: “Hversu ráðgefandi eru ráðgefandi álit EFTA dómstólsins”, p. 324-25.

be harmed if national courts would disregard the EFTA Court judgments concerning the interpretation of legislation originating in the EEA legal order and this would give further support to the principle of State liability applying to judiciary breaches of EEA law.³⁷⁰

The effective judicial protection of individuals in the EEA legal order could not be guaranteed to the same extent as in EU law if the principle of State liability would not apply to judicial infringements of EEA law. It is hard to see how the principle of homogeneity, particularly with respect to the homogeneity of result, could be guaranteed in such a system.

5.4 Ensuring the effectiveness of EEA law

The principle of State liability is not only important from the perspective of the judicial protection of individuals but also from the point of view of the effectiveness of EU and EEA law. In the case of *Francovich*, an important argument for establishing the principle of State liability for breaches of EU law was that the effectiveness of EU law could not be guaranteed without there being consequences for breaches of EU law.³⁷¹ When extending the principle to apply to judicial infringements of EU law, the CJEU applied similar reasoning when noting that:

In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.³⁷²

The CJEU thus maintained that the effectiveness of EU law could not be guaranteed if national courts could breach EU law without consequences for such. In order to ensure the effectiveness of EU rights, individuals had to be compensated whether the legislative, executive or the judiciary had carried out the breach.

In EEA law, the principle of effectiveness has been developing before the EFTA Court, which for long did not explicitly establish that the principle applied in the EEA legal order. In the case of *Karlsson* the EFTA Court, for example, refrained from establishing the principle of effectiveness in EEA law by relying on the general principle of effectiveness in public international law noting that:

³⁷⁰ Skúli Magnússon: “On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court”, p. 543.

³⁷¹ CJEU, *Joined Cases C-6/90 and 9/90*, ECR 1991, p. I-5357 (*Andrea Francovich and Danila Bonifaci and others v. Italian Republic*), para. 33.

³⁷² CJEU, *Case C-224/01*, ECR 1963, p. I-10239 (*Gerhard Köbler v. Republik Österreich*).

[...] it is inherent in the general objective of the EEA Agreement of establishing a dynamic and homogeneous market, in the ensuing emphasis on the judicial defence and enforcement of the rights of individuals, as well as in the public international law principle of effectiveness, that national courts will consider any relevant element of EEA law, whether implemented or not, when interpreting national law.³⁷³

In later case law the EFTA Court moved closer to establishing the principle in EEA law. In the case of *Kolbeinsson* the Court derived the principle from the loyalty principle as laid out in Article 3 of the Agreement, noting that Member States were “to take all measures necessary to guarantee the application and effectiveness of European law (...) even where a directive does not specifically provide any penalty for an infringement or refer for that purpose to national laws, regulations and administrative provisions.”³⁷⁴ The Court thus established that national courts were under a general obligation to ensure the effectiveness of EEA law.

In three recent judgments, the EFTA Court has explicitly established that the principle of effectiveness forms a part of EEA law. In the case of *Clauder* the Court noted:

In that regard, the Court also considers that, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness.³⁷⁵

The same position was taken in the case of *Norway Offshore*, when the Court noted that a Directive could not be interpreted in such a way as to permit EEA States to extend the terms and conditions of a particular provision since that “would amount to depriving the Directive of its effectiveness.”³⁷⁶ The Court went on to establish that:

In particular, EEA States may not make the provision of services in their territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the EEA Agreement whose object is, precisely, to guarantee the freedom to provide services. [...] ³⁷⁷

Finally, in the case of *Sigmarsson* the EFTA Court referred to the functioning of the EEA Agreement and that in certain cases States were allowed to take protective measures to ensure that the functioning of the Agreement was not jeopardized.³⁷⁸ The EFTA Court in these three consecutive cases seems to have erased all doubt of whether the principle of effectiveness is applicable in the EEA legal order. With the repeated reference to the effectiveness of EEA

³⁷³ EFTA Court, Case E-4/01, EFTACR 2002, p. 240 (*Karl K. Karlsson hf v. The Icelandic State*), para. 28.

³⁷⁴ EFTA Court, Case E-2/10, EFTACR 2009-2010, p. 234 (*Pór Kolbeinsson v. the Icelandic State*), para. 46.

³⁷⁵ EFTA Court, Case E-4/11, EFTACR 2011, p. 216 (*Arnulf Clauder*), para. 48.

³⁷⁶ EFTA Court, Case E-2/11, NYR (*STX Norway Offshore AS m.fl. v Staten v/ Tariffnemnda*), para. 40.

³⁷⁷ *Ibid*, para. 76.

³⁷⁸ EFTA Court, Case E-3/11, NYR, (*Pálmi Sigmarsson v. Seðlabanki Íslands*), para. 48.

law, perhaps the principle is playing an increasingly important in EEA law.³⁷⁹

As previously noted, the CJEU relied on the principle of effectiveness when establishing the principle of State liability for judicial infringements. Applying the same reasoning would support the principle of State liability for judicial infringements applying in the EEA legal order as well. Paraphrasing the CJEU case of *Köbler*, one could argue that the effectiveness of EEA law “would be called into question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement (...) attributable to a decision of a court of a Member State adjudicating at last instance.”³⁸⁰

5.5 Þór Kolbeinsson: Case study of access to justice and effective judicial protection

Returning to the saga of Þór Kolbeinsson, in light of the aforementioned, it is worth examining whether, and to what extent, his effective judicial protection was guaranteed.

As described in chapter four, the EFTA Court’s interpretation of Directives 89/291 and 92/57 was that workers’ safety and health at work obligations, could not affect the responsibility of the employer.³⁸¹ The Court noted that it was up to the national court to determine whether Mr. Kolbeinsson could be held responsible for the safety measures. However, the Court noted in paragraph 58 of the judgment, that only in exceptional cases could the responsibility lie fully with the worker and these exceptional cases would only be cases where an accident was for example purposely caused or caused with gross negligence of the worker. Even in such cases the complete denial of compensation would be disproportionate.

As previously described, the Icelandic Occupational Safety and Health Administration reported that the circumstances at the site of the accident has been such that “no measures of any type had been taken there, either above or below the joists, to prevent the workers from falling, as is obligatory” and that it appeared “that the cause of the accident can be solely attributed to the fact that neither were measures taken to prevent the workers from falling nor were safety belts in use on the site.”³⁸² Nonetheless the Icelandic Supreme Court had maintained that with respect to Article 26(1) of the Icelandic Act No 46/1980 on Working Conditions, Health, Hygiene and Safety in Work places and Mr. Kolbeinsson’s experience in

³⁷⁹ Carl Baudenbacher: “The EFTA judicial system reaches the age of majority- Accomplishments and problems”, p. 5.

³⁸⁰ CJEU, Case C-224/01, ECR 1963, p. I-10239 (*Gerhard Köbler v. Republik Österreich*).

³⁸¹ EFTA Court, Case E-2/10, EFTACR 2009-2010, p. 234 (*Þór Kolbeinsson v. the Icelandic State*), para. 55.

³⁸² *Ibid*, para. 4.

the field as a carpenter, the obligation lay on him, as a worker, to ensure safety in the work place and not the employer.³⁸³

Article 26 sets out the general obligation that workers should assist with ensuring safety in the work place.³⁸⁴ As noted above, the EFTA Court made clear that such general obligations relating to the responsibility of the worker could not affect the responsibility of the employer, who should always bear the main responsibility of safety in the work place. The aforementioned could give support to Mr. Kolbeinsson's claim that the decision, to render him entirely responsible for the accident, might have been disproportionate and that the application of Article 26 of the Icelandic Act No 46/1980 on Working Conditions, Health, Hygiene and Safety in Work places was not fully compatible with the aforementioned Directives as interpreted by the EFTA Court. If the principle of State liability for judicial infringements of EEA law is established, the Supreme Court's application could, if it meets the three criteria, give rise to State liability. However, in order to determine whether the Supreme Court breached EEA law, the matter would have to be evaluated by a court. The problem, in the case of *Kolbeinsson*, is that no court seems to be able to hear such a case and assess the matter.

Turning back to Mr. Kolbeinsson, he is an individual in an EFTA-EEA Member State trying to obtain rights according to Directives 89/291 and 92/57. Mr. Kolbeinsson first brought a claim for compensation against his employer before a national court but was not granted compensation. He then brought proceedings against the Icelandic State for the mal interpretation of Directives 89/291 and 92/57 maintaining, amongst other, that the Supreme Court had breached EEA law by misinterpreting EEA law in the first case. The same Supreme Court, however, did not allow for the question of judicial breaches to be referred to the EFTA Court maintaining that such a reference was simply not possible without any further reasoning. The EFTA Court indicated that the Directives should generally not be interpreted in the manner done by the Supreme Court, but limited with the question of legislative breaches of EEA law, only gave general guidelines concerning how to determine whether there have been legislative breaches of EEA law and did not touch upon the issue of judicial breaches.

The next step in the case is that Reykjavik District Court will consider whether there were

³⁸³ EFTA Court, *Case E-2/10, EFTACR 2009-2010, p. 234 (Pór Kolbeinsson v. the Icelandic State)*, para. 5.

³⁸⁴ In Icelandic Article 26(1) reads as follows: "Starfsmenn skulu stuðla að því, að starfsskilyrði innan verksviðs þeirra séu fullnægjandi að því er varðar aðbúnað, hollustuhætti og öryggi, og einnig að því, að þeim ráðstöfunum, sem gerðar eru til þess að auka öryggi og bæta aðbúnað og hollustuhætti, samkvæmt lögum þessum, sé framfylgt".

legislative or judicial breaches serious enough to give rise to State liability for EEA law. In light of the factual circumstances of the case, it is hard to see how the Icelandic legislator breached EEA law in a way to give rise to State liability. However, in light of Icelandic procedural law, described in chapter 4.2.4, the risk is that the District Court will not evaluate whether there were judicial breaches since it would entail evaluating a judgment from a higher court.³⁸⁵ If this is the case, no court can hear the case of Mr. Kolbeinsson and determine whether the Supreme Court breached EEA law in its judgment, Mr. Kolbeinsson has no means to obtain redress. Obtaining rights from EEA law seems to be an overwhelmingly difficult task for Mr. Kolbeinsson.

One could imagine how the case could have evolved had Mr. Kolbeinsson's accident occurred in a Member State of the EU. Theoretically, the initial case would have been referred for a Preliminary Ruling of the CJEU, which is likely to give a similar interpretation of the Directives as the EFTA Court. The case would then have been referred back to a national court and Mr. Kolbeinsson afforded reparations in one single case. However, even assuming that the national court would have dismissed referring the case for a Preliminary Ruling and Mr. Kolbeinsson had not been awarded compensation, he could bring a new case for judicial infringements of EU law. The second case would likely be referred for a Preliminary Ruling and if the first ruling is considered a breach and meets the three criteria for State liability, Mr. Kolbeinsson could be compensated for damage he suffered as a consequence of the judicial infringements of EU law.

It should be noted that effective judicial protection is not an absolute in any legal system and imagining how the case would have been dealt with in EU law is always based on hypothetical guesswork. However, the case of *Kolbeinsson* demonstrates that EEA law does not provide individuals with the same means as EU law to obtain redress when, for reasons of the judiciary, they cannot rely directly on EEA rights. The case of *Kolbeinsson* demonstrates that there is a risk, at least in Iceland, that individuals do not even have the possibility of a court hearing their case and determine whether there were judicial breaches of EEA law, let alone obtain redress if such breaches is found.

Author Hans-W. Micklitz has drawn up tables to demonstrate how individuals obtain rights and remedies in EU law an example of which is annexed to this study.³⁸⁶ One could imagine a similar table comparing how obtaining rights in EEA law can differ from EU law to

³⁸⁵ This was the case in a judgment from Reykjavik District Court dated 5. apríl 2011 in case No. E-10868/2009 which was rendered void (for other reasons) with a Supreme Court judgment on 9 February 2012 in case No. 405/2011 and therefore the matter will have to be brought back before the District Court.

³⁸⁶ See example in ANNEX I.

look as follows:

Table 1: Obtaining rights in EU and EEA law

	EU law	EEA law
<u>Direct effect</u>	Primary law: Yes Secondary law: Vertical: Yes Horizontal: No <i>(Except lately developments with some fundamental rights as demonstrated in the case of Mangold³⁸⁷ and Kucukdeveci³⁸⁸)</i>	Primary law: No Secondary law: Vertical: No Horizontal: No <i>(Quasi direct effect of EEA law once properly implemented in national law)</i>
<u>Primacy</u>	Yes	No <i>(Quasi primacy of EEA law once properly implemented in national law)</i>
<u>Indirect effect/duty of consistent interpretation</u>	Yes	Yes <i>(Limited: there can be no interpretation contra legem)</i>
<u>Preliminary reference obligation</u>	Yes	Formally: No <i>(In practice this obligation may exist when the effective protection of individual rights is at stake)</i>
<u>State liability for breaches of EU/EEA law</u>	Yes: <i>Legislative, Executive, Judiciary</i>	Yes: <i>Legislative, Executive</i> Maybe: <i>judiciary</i>
<u>Non-judicial remedies</u>	Yes: <i>Complain to Commission, Complain to EU Parliament, Committee of Petitions, Complain to EU Ombudsman</i>	Yes: Complain to ESA <i>(No other non-judicial remedies)</i>

³⁸⁷ CJEU, Case C-144/04, ECR 2005, p. 9981 (*Werner Mangold v. Rüdiger Helm*).

³⁸⁸ CJEU, Case C-555/07, ECR 2010, p. I-00365, (*Kucukdeveci v. Swedex GmbH & Co*).

It is clear from the table above that individuals have fewer means of obtaining rights in EEA law than they do in EU law since many of the most important principles of EU law are absent in the EEA legal order. It is, however, important to note that EU law does not necessarily provide for the highest standard of effective judicial protection of individuals in every case and has been criticized for a lack of remedies when individuals cannot rely directly on EU law. This is for example the case with secondary law, which generally does not have horizontal direct effect.³⁸⁹ Furthermore, since judges are human, there is always a risk of mistakes in judgments. The effective judicial protection is, however, found in the system that responds to such mistakes and it is in this respect that EEA law seems to provide individuals with fewer remedies. Although the principle of State liability in EEA law is, to some extent, meant to serve individuals when they cannot rely on direct effect and primacy, the case of *Kolbeinsson* demonstrates that there is a gap in the system with respect to judicial infringements of EEA law.

In light of the *Kolbeinsson* case, one can deduce that if the principle of State liability does not apply to judicial breaches of EEA law, individuals do not enjoy effective judicial protection of EEA law. This can pose significant problems with respect to the principle of homogeneity and obligation of result when it comes to the rights of individuals. If the principle of State liability is not established in EEA law, there is a loophole when national courts do not interpret EEA law correctly. Even though the legislation in such a case is homogeneous in EU and EEA law, EU citizens enjoy much greater protection of those rights than EFTA-EEA citizens since they have the chance of being compensated for damage suffered. This leaves individuals in EFTA-EEA Member States, such as Mr. Kolbeinsson, with limited access to justice and poor judicial protection in EEA law.

5.6 Trapped between procedural autonomy and effective judicial protection

The constant struggle between homogeneity and national sovereignty has been one of the central issues debated within the EEA legal system from the very beginning.³⁹⁰ In some respect it would seem as if homogeneity has had the upper hand in this struggle since EEA law has indisputably moved closer to the supranational character of the EU law with the development of time.³⁹¹ Member States to the EEA have, on many occasions, opposed to the legislative activities of the EFTA Court particularly when new and revolutionary principles

³⁸⁹ See e.g. Hans-W. Micklitz: "The ECJ Between the Individual Citizen and the Member States- a Plea for a Judge-Made European Law on Remedies".

³⁹⁰ See e.g. disputes in Iceland in: Davíð Þór Björgvinsson: "EES og framsal ríkisvalds," p. 79.

³⁹¹ Halvard Haukeland Fredriksen: "The EFTA Court 15 Years On", p. 729.

have been established, such as the principle of State liability. The EFTA Court has however rejected the objections of Member States when they have upheld that EEA law should have a narrower scope than EU law and the Court has taken important steps to ensure the homogeneity and effectiveness of EEA law.³⁹² One of the most important principles established by the EFTA Court to ensure the effectiveness of EEA law is the principle of State liability.³⁹³ By establishing the principle, the EFTA Court in a way created a back door entry to the principles of direct effect and primacy and at the very least established their *quasi* existence. The existence of the principle in EEA law means that the EFTA Court can ensure homogeneity of effect in cases, where EEA law lacks the tool to ensure the “EU solution” to problems arising from EEA law.³⁹⁴

The principle of State liability for breaches of EEA law is, by now, a well-established principle of EEA law. However, following the establishment of the principle of State liability for judicial breaches in EU law, the EEA legal order now faces the difficult question of whether to extend the principle to apply to judicial infringements of EEA law as well. From the perspective of homogeneity and the effective judicial protection of individuals, it would seem that the principle must inevitably apply in EEA law if individuals are to enjoy access to justice in the legal order. If the principle of State liability is not considered to apply to judiciary breaches of EEA law individuals would, as previously described, not enjoy the same level of protection of rights in EU and EEA law. The matter is however not as clear-cut as that.

The judiciary is a particularly sensitive matter when it comes to the question of sovereignty. Even within the EU legal order, where Member States have consciously transferred substantive sovereign powers to the institutions of the European Union, the Commission did not until the case of *Commission v. Italy*³⁹⁵ intervene for misapplications of EU law by national courts. The reason was not that the Commission regarded these breaches less serious than breaches of the legislative or executive branches of the State, but precisely because of this sensitivity of the judiciary.³⁹⁶

Judicial independence is a sensitive issue, but bearing in mind that the EFTA-EEA Member States have, at least formally, not transferred any sovereign powers whether

³⁹² Carl Baudenbacher: “The EFTA judicial system reaches the age of majority- Accomplishments and problems”, p. 3 and *EFTA Court, Case E-2/06, EFTACR 2007, p. 164 (EFTA Surveillance Authority v. The Kingdom of Norway)*, para. 59.

³⁹³ Skúli Magnússon: “Um Hið Sérstaka Eðli Samnings um Evrópska Efnahagssamninginn”, p. 477-478.

³⁹⁴ Halvard Haukeland Fredriksen: “The EFTA Court 15 Years On”, p. 738.

³⁹⁵ *CJEU, Case C-129/00, ECR 2003, p. I-14637 (Commission v. Italy)*.

³⁹⁶ Jan Komarek: “Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order”, p. 23.

legislative, executive or judiciary, it is difficult to see how establishing the principle for judicial infringements would affect the sovereignty of Member States to a greater extent than for legislative or executive breaches.³⁹⁷ The problem is thus not only the sovereignty of the State but also the independence of the judiciary from the State.

If the principle of State liability for judicial infringements is to be applied in EEA law, the formal lack of an obligation to refer questions to the EFTA Court and follow its jurisprudence poses significant problems. Some might argue that since this obligation is not present in EEA law, the principle of State liability cannot be extended to judicial breaches and since the two legal orders differ in this respect the principle of homogeneity does not come into question. However with the emerging view that in some cases there is both an obligation to refer questions to the EFTA Court and comply with the EFTA Court's jurisprudence, support is given to the principle applying to EEA law.³⁹⁸ In any case it is hard to see how the proper functioning of the EEA legal order is ensured if national courts never were to refer questions to the EFTA Court since the uniform interpretation of EEA law could not be ensured.³⁹⁹

The problem is however not only whether or not national courts are under an obligation to refer questions to the EFTA Court because even if such an obligation exists, national courts have the sole authority to formulate the questions referred to the EFTA Court. This is perhaps the most important problem concerning the principle of State liability applying to judiciary breaches of EEA law. The risk is that national courts will not refer the question of whether they themselves have breached EEA law, creating a vicious circle.

Since decisions of lower courts to refer questions to the EFTA Court can be appealed to higher courts the risk is enhanced since the very court accused of judicial infringements could stand before the choice of referring questions concerning its own breach of EEA law to the EFTA Court. This was the case of *Kolbeinsson* and as has been described, the EFTA Court maintained that it could not address the issue of judicial infringements for these reasons. Mr. Kolbeinsson is thus trapped between national procedural law and EEA law.

In the twenty years since the EEA Agreement was signed, the EU Treaties have undergone four large amendments. Yet the EEA Agreement has never been reviewed. This has led the EFTA Court to play limbo with the CJEU and the Court has had to interpret the EEA Agreement in a homogeneous manner in relation to EU law although the EU Treaties

³⁹⁷ Ólafur Jóhannes Einarsson: "Hæstiréttur og EES-samningurinn. Samningsbrotamál og skaðabótaábyrgð", p. 655.

³⁹⁸ *Ibid*, p. 657.

³⁹⁹ Skúli Magnússon: "On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court", p. 535.

have undergone vast changes.⁴⁰⁰ Under this framework, the EFTA Court has, through judicial dialogue with the CJEU and national courts, developed EEA law in order to ensure the judicial protection of individuals. The Court has implemented many of the most important principles from EU law into the EEA legal order and thus ensured a sense of homogeneity of effect rather than homogeneity on the road to effect. On many occasions, the Court has stretched EEA law to ensure that individuals in the EFTA-EEA Member States can, at the end of the day, obtain the same rights as EU citizens. EEA law is in this sense an “impressive example of judicial creativity” where the Court has ensured that in practice EEA law functions within its legislative framework.⁴⁰¹ The case of *Kolbeinnsson* however demonstrates that there is a crack in the system and individuals cannot always rely on the same result as EU citizens. The case of *Kolbeinnsson* demonstrates that obtaining rights in the EEA can prove to be a much more difficult task than in EU law.

Establishing the principle of State liability for judicial infringements of EEA law would to some extent fill the cracks. At the same time establishing the principle poses several problems because of the special nature of EEA law, which as previously stated is characterized by the compromise between homogeneity and independence. In a system where there is no formal obligation to refer questions to the EFTA Court, nor to follow its jurisprudence and where national courts formulate questions to the Court, it would seem that establishing the principle could prove to be a difficult task.

Author Hans-W. Micklitz has maintained that the cost of completing the internal market in EU law came at the price of strengthening policies beyond the market, for example relating to environmental, consumer, health and social protection.⁴⁰² Although the EEA-EFTA States wanted in the words of Skúli Magnússon “to have their cake and eat it” by participating in the internal market without being subject to the procedural requirements of EU law, this has not necessarily been the case.⁴⁰³ In practice the cake has to either be kept or eaten and one could argue that the cost of participating in the internal market for EFTA-EEA Member States has been an enhanced judicial protection of individuals beyond that of traditional international law through the doctrine of State liability.

⁴⁰⁰ Carl Baudenbacher: *The EFTA Court in Action. Five Lectures*, p. 63.

⁴⁰¹ Carl Baudenbacher: “Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area”, p. 175.

⁴⁰² Hans-W. Micklitz: “The ECJ Between the Individual Citizen and the Member States- a Plea for a Judge-Made European Law on Remedies”, p. 349.

⁴⁰³ Skúli Magnússon: “On the Authority of Advisory opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court”, p. 549.

In light of the case of *Kolbeinsson*, effective judicial protection of individuals in the EEA seems to be at crossroads. Without establishing the principle of State liability for judicial infringements of EEA law, the effective judicial protection of individuals cannot be ensured in EEA law to the same extent as in EU law. Yet the framework of the EEA Agreement does not necessarily provide for such a liability. The EFTA Court has tried to ensure the effective judicial protection of the rights of individuals and stretched the EEA legal order to meet changes that have occurred on the EU side. The case of *Kolbeinsson*, however, demonstrates that there are limits to how far EEA law can be stretched. National courts cannot interpret law *contra legem*. In a legal framework where the problem is always delayed but never mended, it is hard to ensure the highest standard of access to justice as set out by the ECHR and guaranteeing the effective judicial protection of individuals can prove to be a difficult task.

6 Conclusion

6.1 General findings: Need for reform

The focus of this thesis has been the relationship between the principle of State liability for judicial infringements and the effective judicial protection of individuals from the point of view of the principle of procedural homogeneity of EU and EEA law. Through the saga of Þór Kolbeinsson it has been demonstrated that national courts, at least in Iceland, may have reached an endpoint in stretching EEA law to ensure homogeneous protection of rights in EU and EEA law through the principle of State liability. Establishing the principle of State liability for judicial infringements of EEA law seems to be inevitable to ensure the homogenous protection of rights in EU and EEA law. However, at the same time establishing the principle could pose significant problems with respect to the text of the EEA Agreement. It is thus clear that if individuals are to enjoy effective judicial protection and the highest standard of access to justice in EEA law, reforms are inevitable within the EEA legal order, including at the national level in Iceland.

The need to establish the principle of State liability to judicial infringements is in many ways attributable to the important role played by national courts in European integration. The role of courts in EU and EEA law was discussed in chapter two. National courts have a mandate to interpret and apply EU and EEA law on the national level and therefore play an important role in ensuring the effective judicial protection of individuals in the two legal orders. Furthermore, through judicial dialogue between national courts, the EFTA Court and the CJEU many of the most important principles of EU and EEA law have been established. In EU law this dialogue has mostly been carried out through the obligatory Preliminary Rulings procedure of the CJEU, whereas in EEA law, this dialogue has mostly been carried out through the Advisory Opinion procedure of the EFTA Court, which formally speaking is neither obligatory nor binding. EEA law has in this sense been more dependent on the willingness of national courts incorporating EEA law into the national legal orders of EFTA-EEA Member States.

The principle of State liability for breaches of EU and EEA law was described in chapters three and four. The principle has played an important part in ensuring the effective judicial protection of individuals in cases where, for reasons attributable to the State, individuals cannot rely directly on European rights. In light of the important role played by judiciary in conferring rights to individuals, and the development of European law as a whole, it may have

come as no surprise that the principle of State liability was extended to apply to judiciary breaches of EU law in the landmark CJEU case of *Köbler*.

Because, as described in chapter two, the Advisory Opinion procedure is, formally, not obligatory there has been reluctance towards establishing the principle of State liability for judicial infringements of EEA law. Icelandic author Skúli Magnússon has, however, presented the view that in some cases national courts are under the obligation to both refer questions to the EFTA Court and to follow the Court's jurisprudence. If such an obligation exists, this would be support applying the principle of State liability for judicial infringements of EEA law.

As described in chapter five, even if there is no formal obligation for national courts to refer questions to the EFTA Court, there is evidence to support that the principle of State liability for judicial infringements should apply in EEA law. With respect to the principle of homogeneity, it is hard to justify that while individuals in the EU could obtain compensation when, for reasons attributable to the judiciary, they cannot rely directly on European rights, individuals in the EEA have no means to obtain redress in such an event. In such a case the effective judicial protection of individuals would be weaker in EEA law than in EU law. Furthermore in light of the principle of access to justice, which all EFTA-EEA and EU Member States are bound to ensure in EU and EEA law as well as by the ECHR, there would seem to be a need to ensure individuals reparations when they cannot rely directly on European rights. In EU law, one of the very reasons for extending the principle of State liability to apply to judicial infringements was to ensure the effectiveness of EU law. The EFTA Court has recently, in the cases of *Clauder*, *Norway Offshore* and *Sigmarsson*, explicitly established the principle of effectiveness in EEA law. It is hard to see how the effectiveness of EEA law could be guaranteed if there were no consequences to judicial infringements of EEA law.

From the point of view of the effective judicial protection of individuals, it is clear that there is a need to establish the principle within EEA law. The problem is however that national courts cannot interpret EEA and national law *contra legem* and establishing the principle in a legal framework where sovereign powers have not been transferred, where there is no formal obligation to refer questions to the EFTA Court, nor to follow its jurisprudence and where national courts formulate questions to the Court, it would seem that establishing the principle could prove to be a difficult task.

6.2 Problems that need to be addressed

Mr. Kolbeinsson exemplifies the problem of obtaining justice in EEA law. His case demonstrates the difficulties for individuals to obtain rights under the current EEA legal system. Mr. Kolbeinsson sought to rely on European rights before national courts but was not able to obtain these rights, for what he claims to have been the fault of the legislator or the judiciary. He thus brought a new case, this time against the State on the grounds, *inter alia*, that the national court did not apply EEA law correctly. The matter was referred to the EFTA Court, but the same court that Mr. Kolbeinsson claims to have breached EEA law only allows the question of legislative breaches to be sent to the EFTA Court and not the question of judicial breaches. The EFTA Court indicated that the interpretation of the Supreme Court had perhaps not been correct, but limited with the question of legislative breaches of EEA law, it only gave general guidelines concerning how to determine whether there have been legislative breaches of EEA law and did not touch upon the issue of judicial breaches. The next step in the case of *Kolbeinsson* will be that the District Court of Reykjavik has to determine whether there are grounds for State liability. The risk is that, in light of Icelandic procedural law, a lower national court will not be able to address the claim of judicial infringements carried out by the Supreme Court of Iceland. If this is the result of the case, Mr. Kolbeinsson is trapped in a loophole of EEA law. Mr. Kolbeinsson can of course, at this point, complain to ESA. If there are grounds for such, ESA could take action in the form of an infringement case against Iceland for judicial infringements. The effects of an infringement case are, however, only declaratory in nature and do not confer rights to individuals and Mr. Kolbeinsson would still have to rely on the principle of State liability in order to be compensated for damage.

It is important to bear in mind that in this legal maze stands an individual who has been battling windmills for a decade. Establishing the principle of State liability for judicial breaches of EEA law is essential to ensure this individual's effective judicial protection and the EEA Agreement's purpose of homogeneity. However, in a legal framework where sovereign powers have formally not been transferred, where national courts formulate matters referred to the EFTA Court and in a system where lower courts cannot evaluate the work of higher courts, establishing such a principle can be problematic.

The Treaties of the European Union have been developed and reconsidered on numerous occasions whereas the EEA Agreement has never been amended. With the development of time, EEA law has indisputably moved closer to EU law and the principle of homogeneity has been one of the driving forces in this integration. EEA law has in many ways been shaped to function with the active jurisprudence of the EFTA Court. The EFTA Court has in many way

moved EEA law away from the dualistic approach foreseen by some of the contracting parties and closer to the active judicial protection of individuals, who as a result have been able to rely on the Agreement to a much greater extent than initially foreseen by Member States. The principle of State liability for breaches of EEA law has played an important role in ensuring this judicial protection, but the case of *Kolbeinsson* demonstrates that courts cannot stretch EEA law infinitely.

Effective judicial protection is at crossroads in EEA law. There is a need to re-evaluate the system for what it really is and make the necessary amendments at the EEA and national level in light of twenty-first century conditions and the highest standard of access to justice as proscribed by the European Convention of Human Rights. Without changes to ensure real access to justice in the EEA, the effective judicial protection of individuals cannot be guaranteed and in that respect homogeneity of EU and EEA law is endangered. Without changes, there will be more cases of individuals standing in the footsteps of Mr. Kolbeinsson; being able to see their rights but not obtain them.

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ANNEX I

Hans-W. Micklitz: Obtaining rights in EU law⁴⁰⁴

	Individual vs. state Vertical	Individual vs. individual Horizontal
(1) Rights under <i>primary</i> Union law - negative integration - - but <i>Johnston</i> ¹²¹ and <i>Heylens</i> ¹²² - but <i>Kohll, Dekker, Watts</i>	<ul style="list-style-type: none"> • Market freedoms • Competition law (<i>Meng</i>) • Non-discrimination (<i>Johnston</i> and <i>Heylens</i>) • Transborder health care (<i>Kohll, Dekker, Watts, Commission vs. France</i>) 	<ul style="list-style-type: none"> • Market freedoms as far as collective regulations (<i>Bosman, Wouters, Angonese, Viking, Laval</i>) • Competition law (<i>Courage</i> and <i>Manfredi</i>) • Non-discrimination (<i>Defrenne II, Manfredi, Küçükdevici, Raccanelli</i>)
(1) Rights under <i>secondary</i> EU law - positive integration -	<ul style="list-style-type: none"> • Vertical direct effect of directives (<i>van Duyn</i>) 	<ul style="list-style-type: none"> • No horizontal direct effect (<i>Dori</i>) • EU conforming interpretation (<i>Marleasing, Pfeiffer, Adelenor</i>)
(2) Remedies under <i>primary</i> EU law - negative integration - - but <i>Carpenter</i> and citizenship cases	<ul style="list-style-type: none"> • Interim relief (<i>Factortame</i>) • State liability (<i>Brasserie</i>¹²³) 	<ul style="list-style-type: none"> • Compensation for antitrust injuries (<i>Courage</i> and <i>Manfredi</i>) • Compensation for violation of market freedoms (<i>Bosman, Laval via national courts</i>,¹²⁴ <i>Raccanelli</i>)
(2) Remedies under <i>secondary</i> EU law - positive integration -	<ul style="list-style-type: none"> • State liability (executive) (<i>Dillenkofer</i>,¹²⁵ <i>Rechberger</i>¹²⁶) • State liability (judiciary) (<i>Commission vs. Spain</i>¹²⁷) • Representative action in environmental law (<i>Janecek</i>) 	<ul style="list-style-type: none"> • Injunctions against discriminations (<i>Feryn</i>) • Injunctions in consumer law (no case law)
(3) Procedure under <i>primary</i> EU law	<ul style="list-style-type: none"> • virtually impossible or excessively difficult 	<ul style="list-style-type: none"> • 00 ?

⁴⁰⁴ Hans-W. Micklitz: “The ECJ Between the Individual Citizen and the Member States- a Plea for a Juge-Made European Law on Remedies”, p. 372.