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THE INTER-COURTS INTERACTION IN EUROPE: THE FRUITFUL DIALOGUE BETWEEN THE CJEU AND THE EFTA COURT

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Introduction

To start with, a study focused on the interaction among two European courts, that is, the CJEU and the EFTA Court, cannot set aside more general explanations around the phenomenon of "proliferation" of international courts, within which, this kind of judicial cooperation represents a very *sui generis* example. The present analysis therefore, aims at providing first and foremost background information on the phenomenon of "judicialization" of international law, as a result of an intensification of international adjudication, in order to understand the roots as well as consequences or worse, side effects of such a trend. In short, if internationally the multiplication of adjudicatory bodies could be perceived as a risk for the coherence of international law, due to the possibility of conflicting case-law amongst these manifold courts, it eventually intensifies their informal and 'spontaneous' judicial dialogue, outside any pre-established procedure, so as to tackle such a danger.

This *modus operandi* allows to better frame the CJEU and EFTA Court relation within the wider international process, to finally deepen their distinctive features, within both the international and regional context. The CJEU ad EFTA Court relation in fact, is a very interesting as well as emblematic case study in this regard. It reproduces in part common characteristics regulating courts' interconnections at the international level, as for instance recurrent cross-references to each other's jurisprudence, but on the other hand, the CJEU-EFTA Court judicial dialogue goes far beyond than that. As a matter of fact, the need to preserve a uniformity in the interpretation of substantially identical provisions with which these two courts operate, and a congruence in their respective case-law, is guaranteed through specific as well as written homogeneity rules. In other words, their interdependence is anything but accidental, since it develops within premeditated procedures, orienting *a priori* a "cross-fertilization" between these main European judicial bodies. Additionally, in the European Union, the institutions involved in such a judicial 'exchange' are jointly the General Court, the European Court of Justice and its Advocates General.

It goes without saying that such an analysis, whose object is the interaction between the two aforesaid courts, is logically comparative. This does not mean that the purpose of the study in question will be merely descriptive. Conversely, it aims at assessing the nature and content of their dialogue, trying to evaluate whether it is an equal, or rather unbalanced relation. For that reason, it will be necessary to examine the procedural framework, under which the EFTA Court and the CJEU interacts as well as what happens in practice, by looking at their respective uniform or conflicting case-law. As a consequence, a critical assessment will follow both when scrutinizing

statutory provisions governing their judicial cooperation and, in analysing their relevant jurisprudence.

Nevertheless, a study based on the interplay between the two courts cannot escape from investigating the role played by CJEU and the EFTA Court within their respective legal orders. In other terms, when dealing with the interaction of two courts, a comprehension of the functioning, the activity and authority of each judicial instance is in a certain sense needed. In this way some considerations can be drawn as regards their similarities or rather differences. An assessment of this kind is the prerequisite to understand the CJEU and EFTA Court approach *per se*, together with that adopted under the general framework of the Agreement on the European Economic Area (or "EEA"), the legal basis of their relation, but also the law they have in common and they are asked to interpret and apply. Under the EEA context, the process of the "mirror jurisdiction" given by courts' frequent cross-referencing is upheld by a very particular phenomenon of "mirror legislation", that is homogeneity of norms, which has a 'static' as well as 'dynamic' configuration. For this reason, it is right to analyse at the same time the system underlying the EEA Agreement and provisions thereof, which frame in their turn, the dialogue between the EFTA Court and CJEU.

The (painful) birth of the EFTA Court takes place in parallel to that of the EEA Agreement reproducing the core of European Union material law, related to the four fundamental freedoms and competition rules, so that the EU internal market is extended beyond its traditional boundaries (to the three EFTA States). Such an Agreement established a very particular "two-pillar" structure so as to preserve the independence of the EEA Agreement's parents organizations, that is, the European Union and the European Free Trade Association. There exist indeed, relevant dissimilarities with respect to the two legal systems deriving from EU and EEA law.

Interestingly, the study of the CJEU and the EFTA Court relation allows to further deepen other equally pertinent issues, such as the autonomy character of the EU legal system. The establishment of the EFTA Court, under the original form of an "EEA Court", has been vetoed in fact by the CJEU in order to preserve the autonomy of its jurisdiction and of EU law alike. Furthermore, being the EEA Agreement an example of "mixed" agreement, the present analysis cannot refrain from examining the practice of this kind of agreements under EU law, and to draw some considerations on the CJEU's jurisdiction in this regard.

Against this backdrop, a more in-depth analysis on the CJEU and EFTA Court case-law will follow, focusing on some specific subject-matters, where the Courts have engaged in a "dialectic" and/or "dialogical" relation, namely in

an affirmative, or rather conflictual interaction. However, what is certain is that both Courts have proved to be very responsive to each other's jurisprudence. This means that the EFTA Court rulings as well, have a bearing upon its EEA "big-sister" Court.

As earlier anticipated, the EFTA Court and CJEU constructive dialogue is a peculiar example within the wider international and regional sphere. Broadening the perspective beyond the EEA system, still remaining in the European continent, another court could intersect with the CJEU and EFTA Court's settled relation. That is to say, the European Court of Human Rights. Not surprisingly, the subject connecting these three European courts will shift from internal market rules' interpretation to turn to fundamental rights' protection, which have been 'incorporated' into EEA law only by means of the EFTA Court judicial 'activism'. No provision exists in the Agreement referring to it. However, the "cross-fertilization" in this field is particularly worthwhile to look at, since it entails a multi-level judicial dialogue amongst national, international and supranational courts. What is more, it will be interesting to note how the EFTA Court will manage fundamental rights' issues under EEA law, by drawing from the CJEU and/or European Court of Human rights case-law. Within this 'tripartite' judicial dialogue, the EFTA Court has to cope with the principle of homogeneity as a "thread" which binds it to the CJEU jurisprudence, but also with the common standard of human rights' protection provided for by the European Convention on Human Rights and last but not least, with the limited scope of the EEA Agreement.

Chapter 1

1.1 The phenomenon of "judicialization" of international law. The EEA Courts and the twofold process of "mirror jurisdiction" and "mirror legislation"

1.1.1 Preliminary remarks. From the "proliferation" of international courts to judicial dialogue

The relation between the Court of Justice of the European Union ("CJEU")[1] and the Court of Justice of the European Free Trade Association Agreement ("EFTA") can be classified as a *species* within the *genus* of the European judicial dialogue which, in its turn, can be ascribed to the broader trend of "judicialization" of international law – a corollary of the proliferation of international courts or tribunals. Thus, the interaction between the EFTA Court and the CJEU is a *regional* judicial cooperation – "layered" also nationally[2] – within the wider international trend[3].

As far as the European courts' interconnection is concerned, it is possible to detect a further categorization in "spatial" as well as procedural terms, respectively between a horizontal or, rather, vertical type of judicial dialogue and a formal or informal one.

As for the horizontal-vertical dichotomy, the first attribute alludes to the relationship between regional courts of human rights and/or of organizations of economic integration. A tangible example in this sense are the cross-references among the CJEU, the EFTA Court and the European Court of Human Rights ("ECtHR")[4].

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[1] It entails a sort of 'two-level jurisdiction' with the General Court and the European Court of Justice ("ECJ"). See Article 19 of the Treaty on European Union ("TEU"). However, their relation is not founded on a hierarchical principle *tout court*, but on the basis of a written allocation of competences. In this sense see, Article 256 of the Treaty on the functioning of the European Union ("TFEU").

[2] SUAMI (2014: 529). This occurs by means of preliminary rulings with respect to the European Union judicial system, or through the form of advisory opinion procedure in the European Economic Area judicial structure (discussed below).

[3] The 'internationality' could stem from the international character of the phenomenon as such, as regards the development and re-birth of international courts for instance of criminal nature, since the end of the Second World War; or to the international trend of "regionalization" beyond Europe, with the creation of the Court of Justice of the Andean Community of Nations in 1983 for example or still, of the Inter-American Court in 1979. In this regard see, BAUDENBACHER (2004: 392 ff.); LOCK (2015: 10 ff.).

[4] To better remark the horizontality of this type of interrelation, noteworthy is the expression "two-way process" in JACOBS (2003: 351) with respect to the interaction between the European Court of Justice and the ECtHR in the field of fundamental rights. See also, SPEITLER (2017: 26) where the author underlines the changing nature of the CJEU-EFTA Court relation from "one-way" to "horizontal judicial dialogue".

Furthermore, this horizontal inter-courts dialogue is usually associated with an informal type of 'networking' based on ordinary meetings[5], exchanges of information and viewpoints, visits, conferences and so on; but also, on a more structured and systematic cross-referencing[6] to take into account each other's jurisprudence.

At this point, it is right to grasp the overall picture of the formal-informal subcategory, by explaining in what a "formalised" judicial coordination consists, which is mainly vertical in nature. In fact, this institutionalized form of interdependence among courts – by means of references both compulsory and voluntary[7] – is given by preliminary ruling procedures which imply a (full) deference or loyalty by national judges to supranational or international judicial institutions[8]. Still in Europe, another expression of a formal judicial dialogue is provided by Article 1(1) of Additional Protocol No 16 to the European Convention on Human Rights ("ECHR"), which states as follows:

> "[h]ighest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto".

Beside this 'minor' example, a far more emblematic one is provided for by Article 267 TFEU, enshrining preliminary ruling procedure under EU law, that is, a formal dialogue between the Court of Justice and the EU Member States' national judges.

Just to anticipate, the EFTA Court and the CJEU experiment in their *sui generis* relation, and within their respective legal order, all the aforementioned variety of judicial dialogues developing through *inter* or *intra*-courts bonds. Logically speaking, the two prefixes[9] refer to the different dimensions concerned, that is, the European Union ("EU") on one hand, and/or the EFTA on the other, interacting either *between* them within the wider European Economic Area ("EEA") or in hierarchical ties among courts but *inside* their respective legal system – involving, as a result, supranational[10] as well as EU Member or EFTA States' judges.

Therefore, what is interesting in dealing with the EEA courts is their frequent involvement in all the four subtypes of judicial interrelationship and the very

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[5] JACOBS (2003: 552) who refers to the regular meetings taking place between the ECJ and the ECtHR as occasions to discuss general questions of common interest.
[6] GALLO (2007: 154 ff.); KOKOTT, DITTERT (2014: 44 ff.).
[7] An emblematic example of such variation is enshrined in Article 267 (2) and (3) TFEU, concerning the binding or otherwise character of the preliminary ruling procedure under European Union law, by differentiating between courts of last resort and lower courts.
[8] KOKOTT, DITTERT (2014: 48 ff.).
[9] That is to say, *intra* and *inter*-courts.
[10] Given that the EFTA Court has been modelled under the example of the ECJ, according to many scholars as well the EU Courts *evolving* jurisprudence, it is more than a merely international court, conversely it is estimated to have a "quasi-supranational" character. To further information see, SUAMI (2014: 534).

uncommon regime premeditated to ease their anything but accidental communication.

On a broad scale of forms of interaction, the two Courts pass from more or less spontaneous contacts to finally arrive at more imperative ties, suggested by an international (mixed) agreement[11].

Nevertheless, before deepening the specificity of this particular inter-courts' "conversation"[12], it is appropriate to assess the general process of multiplication of adjudicative mechanisms, diffusing at the international level. This latter is the precondition to understand the genesis of EEA law and the corresponding cooperative and equally critical connection between the two EEA independent courts. Not by chance, the EFTA Court is considered a meaningful example of "judicialization" in international law[13]. As already mentioned, this international phenomenon stems from the propagation of international courts or tribunals which is simultaneously cause and effect of other more or less problematic issues.

First of all, the multiplication of international adjudications evokes something negative or rather dangerous. In fact, the widespread concept, generally employed to label the process, is "proliferation" which, in international politics common language is associated to the use of nuclear weapons[14]. More precisely, the risk perceived is that of "fragmentation" of international law, or in other words, that to undermine its coherence due to the possible arising conflicts and discordances among jurisprudences, as a consequence of the inherently anarchic nature of their relations[15]. However, the mutual awareness among international tribunals of each other's judgements and of the need to build and keep more or less formal contacts, is a way to guarantee a minimum level of consistency in their strategy to cope with common problematics[16].

At this point, it is reasonable to clarify the *primum movens* of the progressive increase in international courts namely, globalization and the declining role of the State to face challenges of general interest. Globalization in fact, has

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[11] BRONCKERS (2007: 625 f.). In Bronckers' opinion in fact, the global conversation among judges occurs through different degree of intensity, starting with casual links to end up with binding ties provided for in international agreements.
[12] BAUDENBACHER (2003: 505).
[13] BAUDENBACHER (2004: 382); *ID.* (2005: 354).
[14] LOCK (2015: 11).
[15] GALLO (2007: 154); LOCK (2015: 13). In this respect, it is legitimate to anticipate the distinctiveness of the dialogue between the two EEA Courts, whose relationship is far from being anarchic, casual and undisciplined. On the other hand, there are also doubts about their truly peer rapport therefore, about the absence of any 'hierarchical' dimension.
[16] Focusing on the goal of uniformity in international law, it can be argued that, in the current international community a sort of 'universal' *stares decisis* principle exists, fostering an *erga omnes* effect of the decision issued by a court in a single case. In this regard see, DEL VECCHIO (2006: 4) where the author highlights the growing law-making power of international tribunals whose decisions may extend their validity within a certain geographic region or as far as the specific sphere of competence is concerned.

weakened the state-centric view of the international community, leading to another specular tendency that is, the intensification of international organizations – with the establishment of relative judicial mechanisms[17], internationally or regionally valid, in order to ensure the interpretation, application and enforcement of the law. Moreover, these new international courts appeared to be the most suitable institutions to deal with and judge particular cases, bearing in mind the collective interest and well-being[18]. In fact, in this globalized and intertwined world, States have gradually lost their ability to exercise an exclusive jurisdiction on some matters[19]. As a consequence, by acquiring consciousness of their – own – limited regulatory powers they have ceded some prerogatives to international or supranational institutions, in order to jointly achieve their objectives.

International organizations are, as a matter of facts, derivative legal orders, instituted through a voluntary act by Member States which decide to delegate some of their competences to pursue common goals that they are unable to satisfy *uti singuli*. The underlying principle, regulating this cession of powers, is that of conferral which acts as a dividing line in terms of fields of action, between the Member States and international organizations. A written example is enshrined in Article 5(2) TEU which states that

> "[u]nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

However, such a principle entails some exceptions[20] as well as a certain degree of flexibility, usually to the advantage of the international organization.

It follows therefore, that the phenomenon of "proliferation" of international courts has evidently been backed by an increasing availability from the States to submit themselves to international judicial mechanisms, as a way to settle disputes among them[21].

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[17] The EFTA Court and the CJEU are salient examples in this regard, with respect to the creation of international organization of economic integration (even though with a different degree of commitment).

[18] DEL VECCHIO (2006: 4) where the author investigates on the consequences of globalization leading to the rise of new international courts and tribunal, for the need to cope with a globalized international community.

[19] As for instance environmental, commercial and financial sectors or the protection of human rights which require a set of rules commonly accepted and shared. To further information see, DEL VECCHIO (2006: 2 ff.) where it is emphasized that the present "community is to be regulated not by national laws, but by an objective supranational and universal law that spontaneously arises from practice".

[20] An example in this sense is the "principle of subsidiarity". See Article 5(3) TEU or still, the general implied powers' doctrine.

[21] BUERGENTHAL (2001: 272); LOCK (2015: 11) where the author points out that there has been an escalation of cases brought before the International Court of Justice ("ICJ"), from one, two listed in its docket in the 1970s, to seventeen in 2014.

After considerations of rather general character, it is opportune to deepen, through a terminological approach, the meaning of "judicialization" just as that of court or tribunal.

A generic explanation of "judicialization" coincides with the progressive and growing transfer of powers from the legislative and/or executive branches to the judicial one. More precisely, in international law the concept refers first of all to the rise and institutionalization of (international) judicial bodies[22].

What is more, it has been noted that on the wake of globalization, permanent international courts have even more inherited the role of diplomatic bodies and *ad hoc* arbitration as disputes settlement mechanisms[23]. "Judicialization" can be – more or less implicitly – connected to a process of "de-politization" namely, the shift "of political authority to make policy decisions to the courts"[24]. Furthermore, the connection with the political sphere is also corroborated by the resemblance of the way of interaction among judges to that of politicians, by nourishing personal contacts, exchanges of view-points at the occasion of official meeting etc.[25], in order to develop and reach a common approach. This convergence seems to be even more likely in the case of judges, by virtue of their objective commitment to legality[26].

Before scrutinizing the EEA Courts' relations, it is right to provide the notion of international court. Firstly, an international tribunal is different from a national court with respect to the law – international or rather domestic – enforced before it to solve disputes[27]. Another distinguishing element is the legal basis founding them: international agreements on one hand, and national legislative or constitutional act on the other[28]. For the sake of completeness, two other requirements should be included to better frame the connotation of international court, that is, the independence and the binding nature of its jurisdiction[29]. To be precise, a definition which excludes the permanent feature of the judicial body and encompasses arbitral tribunals is however, more 'functional' than 'institutional'[30].

In this regard, it is worth noting that, both the ECJ and the EFTA Court have been confronted, very early, with the problem to clarify what a court or tribunal is[31], in order to assess if the *national* judicial body was entitled to refer

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[22] BAUDENBACHER (2004: 382).
[23] *Ibidem*.
[24] *Ibidem*.
[25] BAUDENBACHER (2003: 505).
[26] TIMMERMANS (2004: 399).
[27] LOCK (2015: 6).
[28] *Ibidem*.
[29] Ibid., p. 7. More controversial is the inclusion or otherwise, of 'permanence' as an unavoidable prerequisite for an international court, which would entail or conversely, exclude the possibility to consider also arbitral tribunals.
[30] BAUDENBACHER (2004: 387); LOCK (2015: 7).
[31] See Judgement of the Court of Justice of 17 September 1997, Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, para. 23; Judgement of the

the case pursuant to Article 267 TFEU and Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice or more concisely, Surveillance and Court Agreement ("SCA")[32].

Beyond any pragmatic or technical notion of "international court", what is important for the present discussion, is the consideration of those international adjudicatory bodies which end to interact – in a conflictual or constructive manner – with the CJEU for the interpretation of EU law, of substantially identical provisions or, those with a different wording but evoking the same content.

In this respect, among the possible alternatives, hereinafter the analysis will focus on a particular case within the so-called "judicial globalization"[33], namely the EEA inter-courts dialogue, reducing the research towards a particular regional area and dealing with both international and supranational institutions in the field of economic integration.

Being the EFTA Court the CJEU's reproduction under the EEA system – exercising jurisdiction towards three EFTA States – it is called upon to interpret very similar and homologous provisions with EU Treaties[34]; reason why an eventual interpretative disagreement could arise, undermining the legal certainty and the *homogeneity* of EEA-EU law.

The principle of legal certainty is a universal and general principle of European Union law, but it has also been incorporated in the EEA system thanks to the dynamic or 'creative' jurisprudence of the EFTA Court to provide *ex ante* knowability of rules to be respected, and to foster legitimate expectations to the benefits of the actors concerned by the Agreement on the European Economic Area ("EEA Agreement")[35].

Nevertheless, it is opportune to specify that the danger for the coherence of EEA law is well managed through aforethought procedures to cope – also *a priori* – with eventual cases of divergence in the interpretation between the EFTA Court and the EU Courts[36]. Examples of such written rules are established by Articles 105 and 111 of the EEA Agreement which enshrine a

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EFTA Court of 16 December 1884, Case E-1/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark,* para 24.

[32] These two articles enshrine respectively preliminary reference procedure in the EU and the request for an advisory opinion on the part of EFTA States to the EFTA Court, limited to interpretative doubts about the EEA Agreement, *not* also for evaluating the validity of acts of EEA institutions.

[33] BAUDENBACHER (2003: 505).

[34] Of course, the Treaties are both the TEU and the TFEU.

[35] LEBECK (2014: 259 ff.). To be precise, the overall EEA Agreement is made up of a "Main text of the Agreement", "Annexes" and "Protocols".

[36] GALLO (2010: 153) who in analysing the aspect of judicial homogeneity under the EEA Agreement points out that there exist *inter alia* written provisions regulating potential cases of interpretative disagreements.

compulsory solution[37] to handle with "difference[s] in the case-law of the two Courts"[38]. However, these procedures, provided for by the Agreement, have never been implemented[39]. The non-activation of the Articles cited above is a meaningful sign that the birth of the EFTA Court, within the framework of the multiplication of international adjudications and of "judicialization" of international law, instead of endangering, has rather promoted the development of (EEA) international law thanks to a process of "cross-fertilization" between the two jurisprudences[40]. This two-sided process tends to contradict the so-called "judicial egocentrism"[41] attributed to the CJEU and to exclude its exclusive monopoly in the interpretation of EEA law[42].

1.1.2 The (troubled) history of the EEA Agreement

The genesis of the EFTA Court goes hand in hand with to that of the EEA Agreement which erected the so-called "two-pillar system" based on EU as well as EEA/EFTA arrangement. If the EU Treaties and the related (derivative) legal order originated directly from a voluntary act of EU Member States, the EEA system stems from two already consolidated regional organizations, to foster their trade relations within a well-established framework and to by-pass the more occasional economic partnership inherent to the Free Trade bilateral Agreements ("FTAs").

Besides the European Union, the EEA structure lies on the EFTA inter-states Association established in 1960 through the Stockholm Convention, under the aegis of United Kingdom, together with Austria, Denmark, Norway, Sweden, Switzerland and Portugal, to offset the nascent European Communities' trading bloc. In the following years three other members joined the EFTA: Finland, Iceland and Liechtenstein, respectively in 1961, 1970 and 1991. Nevertheless, the EFTA intergovernmental cooperation has been challenged by the expanding European integration process and its appealing membership status also for the (old) EFTA States[43].

The roots of the European Economic Agreement date back to the discourse of the then President of the Commission Jacques Delors before the European Parliament, on 17 January 1989, the year which launched the negotiations process completed in 1992 at Oporto[44]. In his speech, he proposed a trade-off

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[37] SPEITLER (2017: 24).
[38] See Article 105 para. 3.
[39] SPEITLER (2017: 24).
[40] GALLO (2007: 155).
[41] BRONCKERS (2007: 625). Noteworthy is the distinction operated by the author between the "judicial egocentrism" of regional tribunals and the jurisprudential "narcissism" of the International Court of Justice that is, the tendency towards an "inward-looking" behaviour or put another way, the adoption of a more autoreferential approach.
[42] GALLO (2007: 155). In the author's opinion the process of "cross-fertilization" between the EEA Courts has avoided a monopoly by the CJEU in the interpretation of EEA law.
[43] The overall perception was that "the European Community wanted to remain the 'sole architect' in its house". In this regard see, VON LIECHTENSTEIN (2014: 476).
[44] *Ibidem*.

as regards the economic entente between the Community and the EFTA Member States. The first alternative was mainly related to the maintenance of the current *status quo*, namely the renewal of the already undertaken bilateral trade partnerships. The second and winning option instead, consisted in the creation of a joint decision-making and institutional set-up, in order to strengthen future commercial ties through pre-established rules[45]. A further incentive for the constitution of the EEA was the Single European Act, subscribed in Luxembourg in 1986 and in force, the following year. It fixed a long-term goal that is to say the complete achievement of the internal market by the 31st January 1992.

The European Economic Agreement signed in 1992 and in force in 1994, basically extends the European Single Market to the EFTA States, creating an "EEA Internal Market". In this respect, it is right to specify that it was the same European Community to claim the existence of a court for the EEA/EFTA pillar, so as to adjudicate proceedings brought before it by the EFTA States themselves[46]. Considering that the EEA Agreement reproduces EU norms related to the field of the four fundamental freedoms (of persons, goods, services and capitals) and to equal condition of competition[47], the EFTA Court is also called to ensure the rights of individual and economic operators within the whole European Economic Area. Hence, the development of two independent courts in this case has tried to curb the risk to undermine the coherence of EEA law. What is more, it has been observed that the EEA Agreement is the sole example of association agreement, on the basis of Article 217 TFEU, involving the European Union which compelled the associated members to rely on a distinct court[48].

Article 108 of the EEA Agreement represents the legal basis for the establishment of the EFTA Court as well as of the EFTA Surveillance Authority ("ESA"). By virtue of provisions contained therein, EEA/EFTA States have concluded on 2 May 1992 a separate Agreement namely, the Surveillance and Court Agreement, contemporarily to the EEA one.

1.1.3 The CJEU and the EFTA Court

At this point, it is reasonable to deepen the analysis from the perspective of EEA Courts, focusing then, on the twofold phenomenon of "mirror jurisdiction" and "legislation" which stems from and (equally) corroborates their interaction.

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[45] TATHAM (2014: 34).
[46] BAUDENBACHER (2004: 383 f.).
[47] See Recital 15 of the Preamble which states as follows: "in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition".
[48] BAUDENBACHER (2016a: 139).

Although it could be argued that a (permanent) court is not necessary for regional system of economic integration, as testified for instance by the North American Free Trade Agreement ("NAFTA") and Mercosur, the EFTA Court and the CJEU are two emblematic exceptions in this regard[49]. The presence of such authoritative judicial institutions reveals the far-reaching degree of economic integration of the two 'mothers' organizations, just as of the interrelated EU and EEA normative, even though, as it will be highlighted in the following investigation, it is not of the same level of intensity[50]. It has been remarked that the EEA structure, built on the convergence of the European Union from one side and the (intergovernmental) European Free Trade Association[51] on the other, involves the "most integrated associations of independent states in Europe"[52], if not in the world.

The ECJ, the then Court of Justice of the European Coal and Steel Community at the beginning had a rather limited role compared to that of the old High Authority – the ancestor of the European Commission – considered the supranational institution *par excellence*. In fact, its function was mainly directed to counterbalance High Authority's excess of power[53].

Notwithstanding, the ECJ has gradually widened its role relying on the preliminary ruling instrument[54], as a device to ensure *ex ante* the uniform interpretation as well as application of the EU law. Thus, such a tool is at the same time, a way to compensate the tardive application of the so-called 'infringement procedure' ratified in Article 258 and 259 TFEU which operates only *after* a Member State's violation of the Treaties' norms.

What is more, the increasing prestige and position of the ECJ derive also from its dynamic and creative alike interpretative method, through which it has incorporated in EU law a series of "constitutional" principles such as that of supremacy, State liability or still, that of the direct effect[55]. Besides them it can be listed other general and unwritten principles, raised to the rank of primary law, whereof a relevant example is that of the '*effet utile*' according to which it is possible to force the meaning and interpretation of a norm in order to guarantee the maximum efficiency of EU law[56]. In this regard, it is right to clarify that the ECJ more than an ordinary international court, is

[49] BAUDENBACHER (2004: 383).
[50] GALLO (2007: 160); *ID*. (2010: 169).
[51] With the exception of Switzerland which rejected EEA membership in a referendum hold in 1992. As a result, it continued to be associated to the European Union Internal Market thanks to bilateral agreements. See, TATHAM (2014: 37 ff.); KANNINEN (2014: 15 f.).
[52] KOKOTT, DITTERT (2014: 49).
[53] BAUDENBACHER (2004: 383).
[54] Under the then Article 177 of the European Economic Community ("EEC") Treaty. Now see, Article 267 TFEU.
[55] BAUDENBACHER (2004: 383) who refers to them as "constitutional triad". See also, KOKOTT, DITTERT (2014: 49) according to which by means of preliminary ruling procedure, the ECJ has developed the most peculiar traits of EU law.
[56] As regards the principle of the *effet utile* see VILLANI (2016: 266).

considered as a constitutional or supreme court because of its (innovative) way of interpretation[57].

The other body of the EU judicial 'apparatus' is the Court of First Instance ("CFI") established in 1989, after the Lisbon Treaty known as the General Court ("GC") whose jurisdiction is clarified in Article 256(1) TFEU. What is important to stress is that among the string of competences quoted in the Article in case, are excluded both that of the infringement procedure for violation of those duties stemming from the Treaties and that of preliminary ruling which remain exclusively under the authority of the Court of Justice (ECJ)[58]. To be precise, with the amendments brought about by the Treaty of Nice and confirmed by the following Lisbon Treaty, the General Court could potentially be entitled to hear and determine questions under preliminary reference procedure, pursuant to Article 256(3) that on the other hand, does not institute *per se* such a competence but it remits to the CJEU's Statute the possibility to specify it. Since the provision of the Treaty is merely an "enabling clause" and the Statute of the Court has not yet established the competence of the General Court in this regard[59], preliminary ruling remains a prerogative of the Court of Justice.

The General Court mainly deals with actions brought against EU institutions' decisions, related above all to the field of competition and trademarks[60] – salient economic areas which explain its involvement in the cross-referencing process with the EFTA Court. In addition, from the EU side, it was precisely the CFI to begin such a judicial reciprocity in 1997, in *Opel Austria*[61], even though overall, few are the examples of 'cross-conversation' with the EFTA Court[62] – compared to those with the ECJ. In the present case in fact, the CFI when reasoning on the uniformity intent, underlying EEA Agreement, made reference to the judgement of the EFTA Court in *Restamark*[63] and in *Scottish Salmon Grower Association Limited. v. EFTA Surveillance Authority*[64].The *Opel Austria* case concerns the conformity of a Council Regulation with the EEA Agreement, entailing an imposition duty on a specific model of car

[57] BAUDENBACHER (2004: 384 f.); BRONCKERS (2007: 621).
[58] To further information see also Article 51 of the Statute of Court of Justice of the European Union, where the subdivision of competences is made according to subjective elements, that is the 'nature' of the claimant before the Court of Justice (or the General Court accordingly).
[59] VILLANI (2016: 327).
[60] BAUDENBACHER (2004: 383); TIMMERMANS (2004: 403).
[61] Judgement of the Court of First Instance of 22 January 1997, Case T-115/97, *Opel Austria GmbH v. Council of the European Union*. See also, BAUDENBACHER (2008:120).
[62] As far as the (limited) dialogue between the EFTA Court and the CFI is concerned see, BAUDENBACHER (2008:120).
[63] Judgement of the EFTA Court, *Ravintoloitsijain Liiton Kustannus Oy Restamark*.
[64] Judgement of the EFTA Court of 21 March 1995, Case E-2/94, *Scottish Salmon Grower Association Limited. v. EFTA Surveillance Authority.* Interestingly, at para. 13 the EFTA Court also pointed out that "the Court of First Instance is not a separate institution under Community law but forms part of the EC Court of Justice in terms of Community institutions", just to have a more complete idea about their reciprocal acknowledgement. See also, BAUDENBACHER (2008: 91).

gearboxes, manufactured in Austria by the General Motors company. Notable is also the *obiter dictum* followed by the CFI in that occasion, that is to say that the "EEA Agreement involves a high degree of integration, with objectives which exceed those of a mere free-trade agreement"[65], positioning the EEA law more within the supranational than international one. Such consideration partly anticipated what the ECJ *impliedly* acknowledged in *Rechberger*[66], when the Court was asked – under preliminary ruling procedure – to assess if State liability principle applied to Austria, on the way of the country's (parallel) negotiation process to join the EU[67]. More specifically, the case dealt with an example of non-implementation of a Package Travel Council Directive on the part of the Austrian Government, hurting individual (travellers) rights[68]. First of all, the Court recognized a lack of jurisdiction to rule on a case whose facts preceded the country accession to the EU, therefore when Austria was an EEA/EFTA State[69]. Bearing in mind these premises, another problematic issue concerning EEA Courts' dialogue arises, under the trend of proliferation of international tribunals, namely that of the so-called *forum shopping*[70]. Secondly, returning to the argumentation made by the GC in *Opel Austria* case cited above, it is correct to point out that – even if not officially – in *Rechberger* the ECJ as well, seemed to endorse the distinctive nature of EEA Agreement, overcoming the restrictive vision according to which EEA Agreement simply allocates rights and duties among the Contracting Parties[71]. In fact, in that occasion the Court asserted that State liability principle was deep-rooted in EEA law, and it quoted or better validated the prior EFTA Court jurisprudence in this regard[72]. The recognition and the attribution of such a principle to the EEA system, with the purpose of improving claimant's rights, is demonstrative of the impact it has towards domestic legal orders, addressing not only States but their nationals as well.

Before focusing on the intertwining relation between the two (EEA) judicial institutions, a parenthesis on the EEA/EFTA structure should be opened. The EFTA Court is the (little) "sister" counterpart of EU Court(s) within the EEA system. It is evidently smaller in terms of composition, considering that it is

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[65] Judgement of the Court of First Instance, *Opel Austria GmbH v. Council of the European Union*, para. 107.
[66] Judgement of the Court of 15 June 1999, Case C-140/97, *Walter Rechberger and Renate Greindl Hermann Hofmeister and Others v. Republic of Austria*.
[67] BAUDENBACHER (2005: 383 f.); *ID*. (2008: 101). This transitional process culminated on January 1, 1995 when finally, Austria, together with Sweden and Finland acquired the EU membership.
[68] BAUDENBACHER (2005: 383 f.).
[69] *Ibidem*. See also, *ID*. (2013: 193). Currently, when speaking about "EEA/EFTA States", reference is to those EFTA States which joined the EEA. So, Norway, Iceland and Liechtenstein with the exception of Switzerland.
[70] With regard to the forum shopping in relation to the EEA Courts see, BAUDENBACHER (2008: 91). For background information see, LOCK (2015: 13).
[71] BAUDENBACHER (2013: 193); SUAMI (2014: 533). See also, Article 217 TFEU on the agreements "establishing an association involving reciprocal rights and obligations".
[72] Judgement of the Court of Justice, *Rechberger*, para.39. See also, SKOURIS (2005: 125).

formed by three independent judges, appointed from EFTA States members of EEA, that is to say Norway, Liechtenstein and Iceland – even though the nationality prerequisite does not apply[73]. Furthermore, the three permanent judges, in charge for a six-year term, are entitled to designated other six *ad hoc* judges[74].

The birth of the EFTA Court is explicable first and foremost for the asymmetric configuration which stems from the 1972-1972 Free Trade bilateral Agreements between the then Communities and EFTA Member States, that left the EFTA side without a common or rather, supranational court[75]. If the CJEU had jurisdiction to interpret FTAs provisions or those similarly worded in Community law, the same competence was imputable instead, to Nation-states' judges who only through a 'casuistic' approach decided whether to follow or conversely, to disregard parallel CJEU interpretations, downsizing therefore the role of its authoritative decisions[76]. This circumstance evokes the major degree of manoeuvrability enjoyed from the outset by the EFTA States, compared with EU countries, due to the more imperative character of EU law, where norms can be *automatically*[77] capable to have legal effects within each national system[78].

1.1.4 "Mirror jurisdiction" and "mirror legislation" in the context of EEA: judicial and legislative homogeneity

The general background described above allows to shift the attention towards the specific processes of "mirror jurisdiction" and "legislation", trying to grasp how and why they take place in the relationship between the CJEU and the EFTA Court. First of all, it should be clarified the content of these two specular expressions. The "mirror jurisdiction" pertains jointly to the mutual influence, to the process of "cross-fertilization" and to that of cross-referencing between courts. The "mirror legislation" instead, consists in the similar or better, identical wording of norms among different international

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[73] BAUDENBACHER (2016a: 140 ff.). See also, Article 30 SCA which states as follows: "[t]he Judges shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence. They shall be appointed by common accord of the Governments of the EFTA States for a term of six years".

[74] BAUDENBACHER (2004: 383).

[75] *Ibidem*. See also, *ID*. (2005: 356) where Baudenbacher observes that the framework established by the FTAs was "characterized by an imbalance with regard to the role of courts".

[76] TATHAM (2014: 46) who deepens the practice of the EFTA States' FTAs with the then European Economic Community, highlighting the problem intrinsic to their interpretation, since the EFTA States were not bound by the Court of Justice relevant case-law.

[77] Both by means of the *direct applicability* of secondary legislation and the complementary principle of the *direct effect* which applies to (all) the other sufficiently clear, precise and unconditional norms that are therefore, self-sufficient (or of *non facere*) that is, able to create rights to individuals that are immediately enforceable before national judges. In this regard, see the landmark judgement of the Court of Justice of 5 February 1963, Case C-26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherland Inland Revenue Administration*.

[78] SUAMI (2014: 537).

organizations[79], both in the form of primary and secondary law. What is important to underline, is that these two phenomena develop within the framework of an "institutionalized"[80] interaction and tend approximately to position the two EEA Courts on an equal footing.

In the EEA system, "mirror jurisdiction" derives from the overriding goal of "judicial homogeneity" informing EEA law, whereas "mirror legislation" derives and contemporarily fortifies itself, thanks to the other unavoidable objective of the "legislative homogeneity". As a consequence, these two branches of homogeneity[81] justify *ex ante* the existence of the two "mirror" processes cited above, and they foster *ex post* the continuation of such complementary tendencies in legislative and judicial terms, through an ever-ending cause-effect relation. Meaningful in this regard, is Recital 4 of the Preamble to the EEA Agreement which refers to a "*dynamic* and *homogenous* European Economic Area"[82]. The intertwined principles of dynamicity and homogeneity are at the origin of the uniform interpretation and application of norms in the EEA.

As described above, the CJEU has adopted over the years a dynamic interpretative approach by acquiring an even more prominent position and increasing the interference of EU law within national legal orders. Therefore, if EU law is dynamic and EEA law is basically the reproduction of EU normative but outside its traditional borders, the EEA law should develop accordingly, keeping the pace of this continuous evolution. So as to respect and fulfil such a proactive approach within EEA system, judicial homogeneity – through the collaboration of the EFTA Court – is required, together with a "homogeneity of legislation"[83] which occurs via the action of the EEA Joint Committee, an example of a common EEA body.

As far as "mirror legislation" is concerned, the EEA (written) law essentially reiterates the core of EU material law, related for instance, to fundamental freedoms, State aid, competition but it excludes some other common policies as for instance the agricultural and fishery ones[84].

By looking at Article 3 TFEU, concerning the exclusive competences of the EU, an immediate comparison with EEA Agreement comes out. This latter

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[79] GALLO (2007: 155) who starting from general definitions of the "mirror legislation" and "mirror jurisdiction" ends up to analyse them as regards the relation between the EFTA Court and CJEU.

[80] Ibid., p. 158. The formalization regards their affirmative as well as conflictual 'correspondence'.

[81] Homogeneity is the major principle and guideline regulating the EEA Courts' dialogue, just like the EU and EEA/EFTA pillars' interconnection which finds a source in written provisions and in practice alike. However, a more in-depth analysis of the principle in question, will be presented in the following pages.

[82] Emphasis added.

[83] NORDBY (2014: 146) who clearly emphasises the correlation between EU law's *dynamicity* and EEA law's *homogeneity* (to the former).

[84] BAUDENBACHER (2013a: 184).

entails a far more limited scope by excluding a customs union, a common monetary as well as commercial policy – mentioned in Article 3 TFEU. In fact, as it has been specified, the EEA Single Market is a particular or imperfect type of internal market[85].

When speaking about legislative homogeneity, beyond the given substantial reproduction of norms from the EU to EEA law[86], it is indispensable to deal with new (EU) secondary internal market legislation adopted by EEA Joint Committee's decisions ("JCDs") and the more delicate issue of primary and secondary law, with respect the EEA Agreement.

Since 1994, when the Agreement entered into force, around 8000 legal acts have been made part of EEA law through JCDs[87], just to have an idea of the dynamic essence of EEA law that evolves so as to allow more or less simultaneous application of secondary EU law.

When the EU decides to adopt new EEA relevant legislation, this has to be incorporated into the EEA Agreement and consequently subject to the implementation by the EEA/ EFTA States[88], in order to update the (old) *acquis communautaire* connected to the internal market. The incorporation follows a decision of the EEA Joint Committee which resembles to a "simplified form of an international agreement between the Community and its Member States on the one hand, and the EFTA States party to the EEA Agreement on the other"[89]. The comparable nature of JCDs to a sort of international agreement is corroborated by Article 103(1) EEA which states that they "can be binding on a Contracting Party only after the fulfilment of constitutional requirements", this means that the entry into force of EEA (new) legal acts – resulting in a revision of the (pre)existent EEA law– is not as immediate as in EU. Here, the expression "constitutional requirements" alludes essentially to procedural aspects demanded for the adoption of a Joint Committee's decision – as for instance the call for a referendum or parliamentary approval[90] – and it is symptomatic of the need to preserve EFTA States' sovereignty when

[85] GALLO (2007: 161 f.); *ID*. (2010: 151 f).
[86] Both at the level of the Agreement and its (twenty-two) Annexes and (fifty-one) Protocols. To further information see, FREDRIKSEN (2016: 97).
[87] HOLTER (2017: 13).
[88] Ibid., p. 8. It follows that not the whole EU secondary legislation is salient for EEA law, it depends from the area concerned (see for instance, Article 102 (2) EEA). Moreover, the integration of EU relevant legislation into the EEA Agreement could entail some special adaptations to render incorporation of EU legal acts as suitable as possible for all the EEA Members.
[89] In this regard see Judgement of the EFTA Court of 9 October 2002, Case E-6/01, *CIBA Speciality Chemicals Water Treatment Ltd and Others and The Norwegian State*, para. 33. Here the Court mainly restates what is enshrined in Article 93(2) EEA that is to say that the "EEA Joint Committee shall take decisions by Agreement between the Community […] and the EFTA State […]". See also, FREDRIKSEN (2016: 106). The rationale is that decisions of the EEA Joint Committee allow to amend EEA Agreement through a "simplified procedure".
[90] BAUR (2016: 63 f.) who investigates on the constitutional requirements and entry into force of Joint Committee's decisions, pursuant to Article 103 EEA.

adopting novel EEA legislation. Furthermore, in comparative terms, such written provision recalled Article 48(4) TEU disposing EU Treaties' revision procedure, pursuant to which "[t]he amendment shall enter into force after being ratified by all the Member States in accordance with their constitutional requirements". Drawing such a parallel is not so spontaneous but rather reasonable given that Joint Committee's decisions have the effect to modify EEA law, where the classification between primary and secondary law is not as straightforward as in EU. What is more, according to Article 93(2) of the present Agreement, EEA/EFTA Contracting Parties shall speak with "one voice" hence, unanimity rule applies. Once again, it emerges the strong intergovernmental character of their cooperation. The same Article specifies that the Committee is formed by representatives of the all Contracting Parties, so, of all the EEA Member States together with exponents of the European Commission on behalf of the EU[91].

The EEA Joint Committee is the sole authority to which the Agreement attributes a wide range of competences, among them the most significative for the study in question are those linked to the amendment of Annexes and Protocols[92] and to the related assessment and incorporation of new EU secondary legislation[93], or still to the management of interpretative (jurisprudential) disagreements[94].

Even without examining in detail the procedural steps of the decision-making process within the EEA Joint Committee, a further clarification is needed. The "decision-taking" form of the unanimous vote on the part of the EFTA States could halt the achievement of an agreement between the two EEA sides, pursuant to Article 93 (2). The ultimate risk of such a disagreement is the suspension of a part of the Agreement that, despite a certain "backlog" of not yet incorporated EU legislative acts, has never occurred[95].

By way of conclusion, as far as legislative homogeneity is concerned, an ultimate point has to be addressed namely the limitations of the Joint Committee's entitlement to amend EEA law – when new legislation is enacted in the EU pillar. According to Article 98 EEA in fact, the Committee may amend the 22 Annexes but only some specific Protocols[96]. Furthermore, as the 'Main part of the Agreement' has not been included in the Article in question, it is possible to infer that the central corpus of EEA Agreement is thus unchangeable through JCDs. By broadening the perspective, Article 119 EEA states that Protocols and Annexes "form an integral part of this Agreement",

[91] Since the EEA Agreement is concluded under the form of a "mixed agreement", the EU pillar comprises the EU and its Member States alike. See, BAUDENBACHER (2013: 185 f.).
[92] See in particular Articles 98 and 102 EEA.
[93] See Articles 97 ff. on the "decision-making procedure". On this point see VON LIECHTENSTEIN (2014: 477 f.).
[94] See Articles 105, 111 EEA.
[95] See Article 102 (5) EEA on the suspension of the affected part of the Agreement. See also, BAUDENBACHER (2013: 186); HOLTER (2017: 7 f.).
[96] FREDRIKSEN (2016: 100).

meaning that no hierarchy, in terms of sources of law, exists between them and the Main Agreement. If one read these two just cited Articles in conjunction, some problems arise with respect to the distinction between primary and secondary EEA law and the positioning of Joint Committee's decision in this framework. Such a differentiation however, should not be misleading by immediately recalling the parallel contraposition within the European Union's legal order, which is much clearer. Helpful in this sense has been the evolutionary jurisprudence of the EFTA Court which sheds a light on the – formally inexistent – dichotomy between 'primary' and 'secondary' EEA law. A first clarification on the issue has been made in *CIBA*[97], where the EFTA Court was asked to judge if the EEA Joint Committee exceeded or otherwise, its powers. Beyond the facts of the case in point, what is relevant to highlight is the conclusion advanced by the Court on the 'subordination' of Committee's decisions to Agreement's rules and boundaries, alluding implicitly to a sort of hierarchical relation between EEA norms as such and those deriving from JCDs[98].

Later on, in *STX*[99], the EFTA Court distinguished between secondary EU legislation and secondary EEA law, affirming that the first (in that case a directive) should be interpreted consistently with EEA Agreement and its general principles[100]. By putting together these two judgements, it seems that primary (EEA) law is given by the Main Agreement and the related general principles of law, whereas within secondary norms, one should put those enacted by the Joint Committee.

Nevertheless, in the EEA this differentiation is blurred and probably it should apply only in case of a rather unrealistic contrast between the core of the EEA Agreement and those rules issued from amendments by the EEA Committee[101].

Therefore, if the Main Agreement is not changeable by means of EEA Joint Committee's common decisions, the EEA judicial institutions are the sole subjects potentially able to do it, thanks to their dynamic method of interpretation[102]. As a matter of fact, this means that with its case-law, the EFTA Court can 'incorporate' new EU law into the core part of EEA Agreement, circumventing those amendment procedures to be accomplished by the Committee and by levering on the duty of (judicial) homogeneity.

In this respect, a little parenthesis should be opened with respect to the failure to revise the Main Agreement that, according to traditional international law

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[97] Judgement of the EFTA Court, *CIBA*.
[98] With regard to the EFTA Court relevant case-law as to the hierarchy, if any, among EEA sources of law see FREDRIKSEN (2016: 102 f.).
[99] Judgement of the EFTA Court of 23 January 2012, Case-E-2/11, *STX Norway Offshore AS and Others v. The Norwegian State*. See in particular para 31.
[100] FREDRIKSEN (2016: 103).
[101] Ibid., p. 106.
[102] BAUDENBACHER (2013a: 186).

rules, requires the ratification of all EEA Contracting Parties, not merely of the EFTA States. At least in 2001, this stalemate derived from a workload on the part of the European Union which was dealing with other priorities, as for instance the negotiation process related to the Constitution Treaty[103]. Such an impasse can easily be grasped by looking at the EEA Agreement's wording which still makes reference to the "European Communities" rather than to the "European Union".

Last, to complete the picture on the interdependent processes of the "mirror jurisdiction" and "mirror legislation", it is right to examine judicial homogeneity, an imperative taken seriously by both the EFTA Court and CJEU.

The micro-experience of jurisprudential uniformity in Europe between the EEA Courts is a fruitful example of judicial cooperation, operating on the basis of shared principles, explicit norms and daily practice, by virtue of a mutual understanding. So as to elucidate this prolific exchange it is possible to rely directly on some provisions, of both the EEA Agreement and the SCA, more precisely to paragraph 15 and Article 6 EEA as well as Article 3(2) SCA. A meaningful premise in this regard, is provided by Recital 15 which asserts that "in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement […]". Reference to 'independence' is important to attribute, as a matter of principle, an equal role to the EEA (homologous) Courts and to ground a mutual respect and consideration within their structured interaction. Even though, concerns may arise on their effective balanced role in the concrete experience, where the overriding principle of homogeneity could function as a derogation to the general rule of parity and encourage a full deference of one Court to the other one's jurisprudence. A situation which could led ultimately to the overruling of a court's judgement to comply with that of the judicial counterpart.

Article 6 EEA and Article 3(2), even if with a difference degree of obligation, formally create a unilateral burden upon the EFTA Court to follow the CJEU case-law, leaving the latter court free from such an institutional duty. Of course, the EFTA Court's commitment to respect CJEU precedents refers both to those concerning the interpretation of EEA Agreement as such, and to those EU norms substantially identical to EEA law.

However, in order to respect the maintenance of a "dynamic and homogenous European Economic Area", pursuant to paragraph 4 of the Preamble to the EEA Agreement and its uniform interpretation and application within the whole EEA free-trade area, a commitment to judicial or better *legal* homogeneity could not be one-sided.

[103] FREDRIKSEN (2012: 870).

As a consequence, and as testified by practice, the same CJEU refers to the EFTA Court case-law, both as a main or ancillary argument for its judgements. This tendency is even more consolidated in the so-called "going first cases", that is, when the EFTA Court expresses itself on subject-matters linked to the internal market where there are no CJEU precedents from which it is feasible to draw upon. In this respect some examples are connected to the sector of State alcohol monopolies, food safety law, trademark rights, television without frontiers and so on[104]. Thus, the empirical evidence would seem to contradict the existence of an interpretative hegemony on the part of one – logically the "eldest" and larger – court. On the contrary, EEA system seems to host a constructive, as well as bidirectional, judicial "osmosis"[105].

For the sake of completeness, it is right to scrutinize, as recently mentioned, the slight difference in the phrasing between Article 6 EEA and 3(2) SCA. According to Article 6 EEA, the EFTA Court is obliged to conform its interpretation with the CJEU rulings "given prior to the date of the signature of the Agreement" (2 May 1992). Conversely, Article 3(2) SCA refers to a less mandatory duty to "pay due account" to CJEU's case-law delivered after the signing of the Agreement in question. Evidently, such a discrimination had a significance for the drafters of the two agreements cited above. In fact, the binding nature of the Court of Justice jurisprudence differs according to its belonging to the *acquis communautaire* already accepted or not, by the EFTA Court at that date[106].

Nevertheless, the day-to-day practice of the EFTA Court has always adopted the same approach with respects to the CJEU, mainly ECJ, judgements. This is quite reasonable considering the dynamicity of EU (case) law which – in the view of homogeneity – should be also followed by its EEA counterpart.

1.2 The EEA two-pillar structure and the principle of autonomy

1.2.1 The EU pillar and the EFTA pillar of EEA: looking through the differences and their distinct structure

As anticipated above, the EEA Agreement and the correlated SCA have erected a "two-pillar" architecture in order to preserve from one hand, the autonomy of the EU legal order, so indirectly also that of the CJEU's

[104] On the so-called "going first" cases see BAUDENBACHER (2016b: 187).
[105] TIMMERMANS (2004: 401) who uses the term "legal osmosis" when describing the judicial dialogue between EU Court from one part, and national and other international courts on the other (such as the European Court of Human Rights and the EFTA Court).
[106] According to GALLO (2007: 163), the CJEU jurisprudence, following the date of signature of the Agreement, falls outside the *acquis communautaire* acknowledged by the EFTA Court, thus, this explains its lower binding effect towards the EFTA Court case-law.

jurisdiction, and from the other the national sovereignty of the EFTA States[107], reluctant to be submitted to supranational institutions. The guarantee of two separate structures – that is, that of the EU and the EFTA – converging into an international or "quasi-supranational" EEA system, was an exigence nourished from both sides. Put it differently, the EEA two-pillar approach is a sophisticated device designed to preserve the autonomy of its two underpinning organizations, operating within two separate legal orders, namely those stemming from EU and EEA law.

EEA decision-making process is conferred to common bodies, as for instance that of the EEA Joint Committee. However, it has been reproached that EFTA States exercise merely a formal power within the EEA system, as legislative acts they deal with, flow (directly) from EU legal order. As a result, it would seem that EFTA States only participate in the "decision-shaping" process (pursuant to Articles 99 and 100 EEA) by means of consultations and exchanges of information both at the EEA and EU level, respectively within the EEA Joint Committee and the European Commission[108]. Alongside these joint bodies, among other the EEA Council, the EEA Parliamentary Committee etc., there are EFTA institutions as the EFTA Court and the so-called EFTA Surveillance Authority.

To better grasp the idea of such double structure it is worth citing what expressed, in this respect, the CFI in *Opel Austria*[109]. At paragraph 108 of the present judgement, the Court asserts as follows:

> "[t]hus, by establishing an EFTA Surveillance Authority and an EFTA Court with powers and jurisdiction similar to those oh the Commission and the Court of Justice, a two-pillar system has been created in which the EFTA Surveillance Authority and the EFTA Court monitor the application of the Agreement on the part of the EFTA States, while the Court of Justice and the Court of first Instance do so on the part of the Community".

A first noteworthy distinction between these two separate legal orders concerns their scope and the type of economic integration, beyond the evident differentiation *ratione materiae*, as regards their respective range of competences, much more limited in the case of the EEA system[110].

In relation to the objectives of the EU Treaties from one part, and of the EEA Agreement on the other, as well as the background under which they have been pursued, emblematic is the reasoning put forward by the Court of Justice

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[107] It is quite obvious that even if the wording 'EEA/EFTA States' appears to be the most precise, when dealing with the EEA Agreement and the EFTA Court, the expression 'EFTA States' logically refers to the three EFTA States (Norway, Iceland and Liechtenstein) ratifying the Agreement, with the exception of Switzerland which opted out from EEA legal system.

[108] HOLTER (2017: 8 ff.) who distinguishes the phases of "decision making" and "decision-shaping" in the EEA.

[109] Judgement of the Court of First Instance, *Opel Austria GmbH.*

[110] GALLO (2007: 160). In fact, in Daniele Gallo's view although the EEA Agreement reproduces substantially EU norms, there exists considerable differences underlying the EU Treaties from one part and the EEA Agreement on the other.

in Opinion 1/91[111] pursuant to Article 228 EEC, now Article 218 TFEU, on the compatibility of the EEA Agreement with the old Community law. Here, the Court states that if the aim of the Agreement is that to extend EEC internal market rules to the EFTA States, that of the Community legal order goes far beyond. What is more, it adds that the EEA Agreement is an international agreement which simply conferred rights and obligations to the Contracting Parties, the EEC Treaty instead, resembles to a "constitutional charter" which erodes its Members' sovereign rights and addresses not only to States but to their citizens alike[112].

As far as the different reach of economic integration, illustrative is the Advisory Opinion of the EFTA Court in *Maglite*[113] which had to do with the possible application of the international exhaustion principle of trade mark rights within the EEA law and the related issue of parallel imports from United States thus, outside the EEA free-trade area. Of interest for the present analysis, are the contents of paragraph 25 of the judgement, where the EFTA Court underlines that differently from the European Community Treaty ("EC" Treaty), the EEA Agreement has not created a customs union but simply a free trade area, therefore it lacks an outwards dimension. Moreover, in the following paragraph 27, the Court emphasises the absence of a common commercial policy with respect to foreign countries, implying again an internal not also external cohesive strategy. Last but not least, it remarks how EEA Contracting Parties have avoided to transfer any power to supranational institutions, alluding to the more intergovernmental method of their association, for economic aims.

Unlike what happens in the EU in fact, EEA States have not conferred any legislative competence to the EEA level, neither to EEA joint bodies nor to the EFTA institutions. In this regard, it is pertinent to compare the diverging powers between the ESA and the European Commission. The first in fact, pursuant to Articles 108-110 disciplining the "surveillance procedure", does not exercise the power of legislative initiative or proposal, attributed conversely, to the Commission by virtue of Article 289 TFEU or still, Article 294 TFEU[114]. EEA Contracting Parties, in fact, have clearly enshrined their negative will as to the attribution of legislative authority to EEA/EFTA institutions, in Protocol 35 to the EEA Agreement. This means that, after that new internal market legislation is incorporated in EEA, its implementation is (always) achieved through national procedures. So, this has significant implications on the side of the EFTA States, as for directly applicable EU law

[111] Opinion 1/91 of the Court of 14 December 1991, *relating to the creation of the European Economic Area*.
[112] *Ibidem*. See, paras 15-21.
[113] Advisory Opinion of the EFTA Court of 3 December 1997, Case E-2/97, *Mag Instrument Inc. v California Trading Company Norway, Ulsteen*.
[114] With respect to the similarities or rather differences between EU and EEA/EFTA institutions see, BJÖRGVINSSON (2014: 265).

or provisions endowed of the so-called direct effect – which circumvent any State intermediation within the EU system.

Noteworthy in the EFTA pillar, is also the monist-dualist dichotomy with respect to the relation between national and international law. Two of the three EEA/EFTA States, that is Iceland and Norway, have a dualist tradition. Therefore, these latter consider domestic and international law as separate, and whatsoever EU/EEA directive or regulation, before producing legal effects, has to be transposed within the national legislation. On the contrary, Liechtenstein is a monist country so, once EEA relevant law has been adopted, this becomes immediately part of domestic law, although as regards directives, a further legislative act is needed both in the EU and EEA[115].

The two pillars' distinct configurations from an institutional as well as operational point of view, logically derive from the different *ratio* inspiring the 'parents' of the EEA Agreement, that is the EU Member States and the EFTA ones and also from the diverging aspiration of these regional economic organizations. In the EU case, economic integration was an *en passant* mean – inspired by the so-called functionalist method – for a broader 'political' cohesion. The same cannot be said for the EFTA which has always worked on an intergovernmental basis, excluding any kind of political bonds and whose first – and ultimate – objective was that to create a liberalized trade area, enhancing economic interdependence[116]. Put another way, the EFTA States embraced an "affordable nationalism"[117], whereas the EU Members committed themselves to a burdensome supranationalism. Thus, with the EEA the then five EFTA States, now only three, intended to inherit the economic advantages from the EU, rejecting any supranational interference and the costs in terms of sovereign rights' erosion related to it.

Considering that the EEA law descends from a combination of supranational and international law, it has been labelled as a "hybrid" and its 'midway' nature has ranked its association as a "quasi-supranational" form of integration[118].

In this sense, has also proceeded the EFTA Court case-law. Since the origins, in *Erla María Sveinbjörnsdóttir*[119], the Court recognized that the EEA

[115] Note by the Secretariat of 26 October 2018, 17-1402*, Procedure in the EEA EFTA States, the EFTA Secretariat and the EU for the incorporation of legislation into the EEA Agreement*. As regards the monist/dualist tradition of Nordic EFTA countries see also BAUDENBACHER (2005: 355).

[116] TATHAM (2014: 32 f.) who points out that the EU and the EFTA while sharing free-trade goal, reflect different (economic) aspirations.

[117] *Ibidem*.

[118] SUAMI (2014: 534) who provides a detailed analysis on the distinctive feature of EU law towards international law, to turn then the attention to the intermediate character of EEA law as a "hybrid" of international and EU law.

[119] Advisory Opinion of the EFTA Court of 10 December 1998, Case E-9/97, *Erla María Sveinbjörnsdóttir and The Government of Iceland*.

Agreement is a *sui generis* international treaty entailing a "distinct legal order of its own" and that it "goes beyond what is usual for an agreement under international public law"[120]. These considerations resemble those advanced by the Court of Justice in *van Gend & Loos*, in 1963 where it recognized the *unique* character of the then Community legal order and the direct effect of EU law[121].

Returning to the topic of national implementation for the EEA/EFTA States, as a necessary step to incorporate legislation into domestic system, a problem arises with respect to those EEA rights immediately enjoyable by individuals before national courts. This because direct effect or primacy principle in EEA law should apply only with respect to implemented EEA acts, as the EFTA Court prudently pointed out in *Karlsson*[122].

Notwithstanding, the EFTA Court has tried to develop – via its dynamic jurisprudence – an *escamotage* to cope with this evident gap (in terms of citizens' rights) between EEA and EU law, levering on State liability and consistent interpretation (to EU law) principle[123]. This latter can be considered a sort of "indirect-effect" principle[124], a surrogate of the direct effect acting at the EU level, to broaden individual rights.

Ultimately, the two-pillar structure evokes two separate legal orders whose similarities and differences have been partly described above. However, a further elucidation is needed with respect to the total independent status enjoyed by the EEA. Some, for instance, seem to contradict such a vision because of the overarching homogeneity aim underlying the EEA, which makes it deeply dependent or worse subordinate to EU law[125]. This circumstance, from the perspective of EEA Courts, could result in an unbalance relation, hegemonized by the CJEU.

1.2.2 The autonomy of the EU law and the difficult birth of the EFTA Court from Opinion 1/91 to Opinion 1/92

Beyond the independence of the two legal orders as such, it is interesting to further deepen the concept of autonomy from the EU perspective and, in relation to the CJEU's jurisdiction. However, before moving on it is right to

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[120] *Ibidem* para. 59.
[121] See, *supra* note 77.
[122] EFTA Court judgement of 30 March 2010, Case E-4/01*, Karl K. Karlsson hf. and The Icelandic State*. At para. 28, the Court asserts that "EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts". See also, SUAMI (2014: 532 ff.).
[123] Ibid., p. 535.
[124] In this regard see, TATHAM (2014: 40) where the author makes such a comparison with respect to EU law *vis-à-vis* national legislation. That is, he defines the principle of interpretation of domestic law in conformity to EU law as a 'principle of indirect-effect' of EU law.
[125] According to FREDRIKSEN (2012: 881) in fact, the aim of homogeneity implies that there is "no basis for characterizing the EEA as an *independent* legal order".

specify that the concept of autonomy has a twofold nature, in the sense that it applies both with respect to a national and/or international dimension. The first refers to the interaction between EU and domestic law, the second to the dichotomy EU *versus* international law[126].

The exclusive jurisdiction of the CJEU, together with the autonomy of the EU legal order *vis-à-vis* international law have been cited in the Court Opinion 1/91 on the compatibility of the Agreement on the European Economic Area with the then the Community legal order[127]. That Opinion however, acquires an additional significance for the present analysis, as it allows to retrace the birth of the EFTA Court which has been rejected in its original version under the form of an EEA Court.

By adopting a "generational" metaphor, one could say that the CJEU, from a "step-sister" gradually becomes and play the role of "big-sister" in relation to the EFTA Court. This symbolic language simply implies the progressive openness on the part of the CJEU to its counterpart under the EEA Agreement, which passed through a preliminary aversion or rather, inadmissibility.

As the guardian of the EU law in general, and of internal market rules and rights in particular, the Court of Justice had to express on the acceptability of a new court, with which a jurisdictional conflict as well as interpretative contrast might have arisen. That risk appeared intensified given that, the EEA Agreement duplicated the fundamental material body law of EU Treaties, essentially to widen its geographical reach.

The draft EEA Agreement – as it was originally drawn up – has been judged by the Court incompatible with Community law. Therefore, after such a negative judgement, the Contracting Parties had to renegotiate some provisions to make them more suitable in the opinion of the Court. To be more precise, even if Article 218(11) TFEU refers to a Court's *advice*, it has a binding effect and provides for an '*aut aut*' solution that is, either to amend the agreement in case, or the Treaties accordingly. The same is also true for the prior version of that Article, namely Article 228 EEC Treaty – later on, Article 300 TEC –, as it has been remarked by the Court at paragraph 61 of its Opinion 1/91 stating that "[…] in the very specific case of Article 228, the Opinion given by the Court of Justice has the binding effect stipulated in that article".

By virtue of the importance of the above-mentioned Opinion 1/91 for the definition of the autonomy of the EU legal system and the exclusive jurisdiction of the Court of Justice, a more in-depth analysis is opportune, if not needed.

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[126] As far as the dimensions of EU legal order's autonomy are concerned see LOCK (2015: 78 ff.)
[127] *Ibidem*.

First and foremost, the provisions the Court was called upon to evaluate, pertained to the particular category of the so-called "mixed" agreement, concluded between the EFTA States, the European Community together with its Member States – all three acting as contracting parties.

The initial draft agreement presented to the Court, entailed the constitution of an EEA Court and a (EEA) Court of First Instance. As enshrined in Article 95 of that Agreement, the EEA Court would have been composed of eight judges among which five belonging to the Court of Justice, whereas the remaining were to be chosen for instance, by EFTA countries. Hence, the EEA Agreement founded a system of courts in order to preserve a homogenous interpretation and application of EEA law. Although the Court asserted that in principle, the establishment of an adjudicatory system under an international agreement is compatible with Community law, it reached the conclusion that the same could not be affirmed with respect to the EEA Agreement[128].

The scrutiny of Opinion 1/91 can be articulated in two major points, coinciding with the main argumentations put forwards by the Court to "dismantle" the architecture conceived by the Agreement, in particular its judicial system. The first reason dealt with the threat to the autonomy of the Community and to the related exclusive jurisdiction of the Court of Justice, whereas the second, with the risk of a conflict of interpretation between the EEA Courts.

It is rather obvious that the establishment of an EEA Court, entitled to solve disputes among EFTA as well as Community Members, created problems of conflicts of jurisdiction with the other Community judicial machinery (competent to rule on the same cases by applying essentially the same law). The additional danger had to do with the meaning of the notion "Contracting Parties" by the EEA Court – when asked to solve a dispute on the interpretation or application of the agreement's provisions. Relying on a case-by-case approach and *ad hoc* interpretation of the expression in question, the EEA Court "for the purpose of the provision at issue" might freely decide each time if 'Contracting Party' meant the "Community, the Community and the Member States or simply the Member States"[129]. In this way it could have undermined the autonomy of the Community legal order, orienting from the outside, the *internal* allocation of competences determined in the Treaties, a prerogative of the Court of Justice[130].

At this point, it is pertinent to highlight the ability of the Court to derive the exclusive character of its jurisdiction from the autonomy of what is now the

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[128] In this regard see, Opinion 1/91, *relating to the creation of the European Economic Area*, paras 40 and 53. With respect to the challenging establishment of the EFTA Court see also, BRONCKERS (2007: 606).

[129] Opinion 1/91, *relating to the creation of the European Economic Area,* para. 34. See also, BRONCKERS (2007: 606); LOCK (2015: 78). See also Article 2(c) EEA on the meaning of Contracting Parties.

[130] *Ibidem*.

EU legal system. In this respect, emblematic is paragraph 35 of Opinion 1/91 which recites:

> "[…] the agreement is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the *autonomy* of the Community legal order, *respect for which must be assured by the Court of Justice* pursuant to Article 164 of the EEC Treaty. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that treaty to any method of settlement other than those provided for in the Treaty"[131].

As a result, through reading together Article 164 EEC, now Article 19 TEU, and Article 219 EEC, the current Article 344 TFEU, the Court grounded the exclusivity of its jurisdiction. The logic followed by the Court is simple: its exclusive jurisdiction is upheld, *a posteriori,* by a written disposition, but it is inherently attached to the EU autonomy as a legal order of its own. This excerpt of Opinion 1/91 merits particular attention as it denoted the autonomy principle of EU law *vis-à-vis* international law which is not explicitly enshrined in the Treaties but elaborated through the CJEU case-law. The same applies for the autonomous feature of EU system with respect to domestic law which finds its legal foundation in the Court's decision in *Costa v. ENEL*[132]. In that occasion in fact, under a request for a preliminary ruling, the Court ideated the so-called primacy principle of EU (directly applicable) law over incompatible national norms[133].

From a comparative viewpoint, it is useful to recall the centrality of Article 19 TEU for the European Union's judicial system which does not find an identical wording in EEA law, as far as the EFTA Court is concerned.

If Article 19 TFEU attributed to the CJEU the task to supervise that in the interpretation and application of EU Treaties the *law* – in general terms – is observed, a similar provision lacks for the EFTA Court. Such a gap in the EEA formal provisions could be symptomatic of the CJEU's distinctiveness as guarantor of EU Treaties and, according to a well-consolidated literature that Article offers a legal basis for the Court's "constitutional" interpretative method[134].

Now, it is suitable to turn the attention to the second main explanation issued by the Court, to justify the rejection of the Agreement under scrutiny – as initially drafted. According to Article 104(1) of that Agreement the Court of Justice had to "pay due account" to judgements delivered by the EEA Court.

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[131] Emphasis added. On the relation between the autonomy and the CJEU's jurisdiction see also, LOCK (2015: 80 f.).

[132] Judgement of the Court of Justice of 15 July 1964, Case 6/64, *Costa v ENEL*. See also, LOCK (2014: 77 f.).

[133] VILLANI (2016: 416 f.).

[134] FREDRIKSEN (2012: 881). Thus, the generic referral to 'law' (rather than explicit and particular reference to that prescribed by the Treaties) has implicitly founded the Court's creative action in the development of EU law.

The problem evidently stemmed from the inviolable and two-sided goal of homogeneity, requiring a uniform interpretation and application of EEA rules. In particular, there could have been a conflict of interpretation when the EEA Court would have been called upon to interpret EEA provisions identical in substance to corresponding Community rules but which could have, at the opinion of the Court of Justice, a different meaning. Therefore, the need to preserve homogeneity or coherence of EEA law, would have obliged the CJEU to take into account EEA Court's reading of those norms, endangering once again, the autonomy tenet of the then, Community legal order[135].

The critical stance of the Court, led the Contracting Parties to revise the affected provisions and a redrafted version of EEA Agreement has been finally accepted by the Court in Opinion 1/92[136]. The last version of the Agreement replaced the EEA Court with an EFTA Court, exercising jurisdiction *only* towards EEA/EFTA States not also Community countries; a new and the only European Court formally accepted by the ECJ[137].

What is more, the (edited) EEA Agreement empowers the EEA Joint Committee to settle whatever disputes among the Contracting Parties concerning the interpretation or application of EEA rules as well as those related to divergence in case-law between the two Courts, whose development is under its constant review according to Article 105(2) EEA. However, as the Court explicitly remarked in Opinion 1/92, decisions of the Committee "may not affect the case-law of the Court of Justice of the European Communities"[138], thus, the autonomy principle is preserved. The power of the Joint Committee is however restricted, as it cannot overrule any EEA Courts' decisions, even though they could lead to a heterogeneous interpretation of the present Agreement[139]. A situation like that is rather improbable because of EEA Courts' reciprocal commitment to homogeneity and, despite such a prospect might arise, it does not mean that "inhomogeneity" will prevail. This because homogeneity is an open and "fluid" concept therefore, it is suitable to frame diverging case-law in a wider and long-term perspective, where future developments and changes in both Courts' jurisprudences are also envisaged[140]. Consequently, incompatibility could naturally be redressed.

Considering what was just mentioned it is worth to underline that the independence of the EEA Courts has been formally recognized twice in the EEA Agreement that is, in Recital 15 and Article 106 EEA, but also reaffirmed in the Preamble of the SCA, with the phrasing – already mentioned in the

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[135] On the problem of conflict of interpretation see BRONCKERS (2007: 607); LOCK (2015: 79).
[136] Advisory Opinion 1/92 of the Court of Justice of 10 April 1992, *Draft agreement relating to the creation of the European Economic Area*.
[137] According to BAUDENBACHER (2013: 184) the EFTA Court is in fact, the only European Court which has been (officially) approved by the ECJ.
[138] See, Advisory Opinion 1/92 of the Court of Justice, *Draft agreement relating to the creation of the European Economic Area,* paras 21-25. See also, Protocol 48 to EEA Agreement.
[139] SPEITLER (2017: 24).
[140] BAUDENBACHER (2016b: 191).

foregoing analysis – "in the full deference to the independence of the courts" as a precondition to arrive at and to maintain a uniform interpretation and application of the EEA Agreement. This means that such a condition is not one-sided, but it should hold true also for the EFTA pillar.

Thanks to this background, it will be feasible in the subsequent analysis to assess to which extent such independence exists and (consequently) has permitted a sound and well-balanced judicial dialogue. So as to try to better understand the nature of their interaction it will be useful both to look at EEA Agreement's relevant provisions and EEA Courts' jurisprudence.

For the sake of clarity, and shifting the attention from a legal to a practical reasoning, it should be noted that after the CJEU's "baptism", the establishment of EFTA Court was difficult because of *endogenous* circumstances. In 1992 the negative result of the Swiss referendum, left Switzerland out from EEA, although the country remained the EFTA Court's headquarter until 1996, when it finally moved to Luxembourg – from here the epithet 'Luxembourg Court' as the CJEU. Moreover, in 1993, five were the EFTA States ratifying the Surveillance and Court Agreement, that is Austria, Finland, Sweden, Norway and Iceland, not yet the principality of Liechtenstein. Accordingly, five were the original EFTA Judges taking seat in Geneva. However, by 1995 the EFTA Court's size shrunk to three judges, with Austria, Finland and Sweden joining the EU and Liechtenstein ratifying the SCA only in 1995. As a result, the European integration process represented a serious warning for the survival of the EFTA Court, which despite its small size still continue to be operative[141].

1.3 The principle-goal of homogeneity. CJEU and EFTA Court: a (formalised) peer relationship?

As the title suggests, the homogeneity concept in the EEA law assumes more than one meaning, acting both as a general principle and aim, underpinning and guiding the overall EEA system. Not by chance, it finds a solid legal basis in a series of provisions both from the EEA Agreement and SCA. The objective of the following discussion is to better frame 'homogeneity' by grasping as far as possible, its nuances and different articulations which pursue all the same direction. Briefly, the main purpose in the EEA is to ensure a uniform interpretation and application of the Agreement and of those EU corresponding provisions.

As already mentioned in the foregoing analysis, since EEA law derives from EU law, it has incorporated a core part of its material law, aiming at "the fullest

[141] KANNINEN (2014: 17 ff.) who speaks about the "painful" birth and establishment of the EFTA Court.

possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States"[142]. With this view, it seems that homogeneity recalls no more than uniformity of norms, so as to ensure the consistency of EEA law.

The centrality of homogeneity reveals EEA law's unique character as far as its relation with EU law is concerned. Thus, it implicitly structures and orients the EFTA Court and CJEU's crosstalk, reducing as a matter of principle, eventual conflicting case-law. In other words, if in the general context of proliferation of courts, internationally, the related risk is that to alter the coherence of international law, within the European area, the CJEU and EFTA Court's interdependence, by virtue of the homogeneity objective, curbs the "fragmentation" of EEA law. On the contrary, it has been highlighted the positive effect of the EEA Courts' judicial dialogue, namely, the overall development and constant "fertilization" of EEA law[143].

Before articulating and attempting to draw up any kind of – more or less arbitral – classification of the principle-goal of homogeneity, a general premise is suitable. A uniform or homogenous application and interpretation of EEA rules is explicable first and foremost because of substantive and formal homogeneity of rules between the two EEA's pillars, as well as for the logic underpinning this "extended" Internal Market. This latter briefly consists in the "equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition" as enshrined in the Preamble to the EEA Agreement[144]. As a result, such a homogeneity, in term of contents and written provisions, is the precondition to understand the other "branches" of homogeneity.

1.3.1 The multifaceted concept of homogeneity

From the most general perspective of a "legal homogeneity" between the two pillars of the EEA, two articulations have been already mentioned, that is "legislative" and "judicial homogeneity". From the wider concept to its particular expressions, homogeneity answers the need to realize as well as to preserve, a uniform system of rules, to be applied and interpreted without common judicial and executive institutions[145]. As a matter of fact, the project for an EEA Court has been vetoed by the CJEU, and finally, EEA/EFTA States agreed to ratify a separate and corollary agreement that is the SCA, to have their own EFTA Court and Surveillance Authority.

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[142]See, judgement of the Court of Justice of 23 September 2003, Case C-452/01, *Margarethe Ospelt v. Schlössle Weissenberg Familienstiftung* para. 29.
[143] BAUDENBACHER (2008: 120).
[144] See, Recital 15 of the Preamble to EEA Agreement.
[145] According to LEBECK (2014: 257), homogeneity has the "aim of creating a system of uniform rules […]in the absence of a common institutional structure".

The notion of homogeneity can also be conceived as a general principle of EEA law holding however, a privileged position in hierarchical terms. As it is customary to do with the concept of rights, one could say that homogeneity is a "first generation" principle, on the basis of which other principles of "second generation" develop and flourish. It has been defined as an "overarching constitutional principle", a source of law through which the EFTA Court has extrapolated other general principles such as fundamental rights' protection or State liability etc., in order to preserve homogeneity with EU law[146]. This signifies that – *a priori* – homogeneity principle engenders some other general principles which in their turn, strengthen and foster homogeneity between the EU-EEA legal orders.

Therefore, the EFTA Court's method of interpretation with respect to EEA rules, cannot differ from that of its EU "big-sister" Court, so as to guarantee a uniform circulation of norms – as demanded by the principle-goal of homogeneity.

It is evident that homogeneity functions like a dynamic tool in the hands of the EFTA Court, to incorporate evolutions of EU law into EEA law. The dynamicity of this concept could also be grasped from a terminological point of view, by comparing it with "equivalence". This latter term in fact, appears far more static, and this slight divergence is even more recognisable when speaking about "equivalence of legislation" rather than "legal" or "legislative homogeneity".

As a fundamental principle and value however, homogeneity is not merely used *ex ante* as a source of law, but also *ex post* when assessing the meaning of norms prospering under its aegis or simply of other substantive identical rules to EU law [147]. Moreover, within the spectrum of general (and unwritten) principles of law, homogeneity also represents an exception, given that it finds an explicit, rather than inferable, basis in the EEA Agreement through a wide range of written provisions quoting it[148].

For the sake of completeness, it is worth to recall that homogeneity is not novel in the history of relations between the then Members of the Community, now EU and the EFTA States. The precedent has been represented by the 1968 Brussel Regime[149], and the specular Lugano Convention of 1988[150]. The first Convention was signed by the old six Members of the European Communities, whereas the second one, among Community countries and the three EFTA States Norway, Iceland and Switzerland, with the aim to extend Brussel

[146] Ibid., pp. 256 f.
[147] *Ibidem*.
[148] Ibid., p. 257.
[149] Brussel Convention of 27 September 1968, *on jurisdiction and the enforcement of judgement in civil and commercial matters*.
[150]Lugano Convention of 16 September 1968, *on jurisdiction and the enforcement of judgement in civil and commercial matters.*

Regime's rules to (these) third states[151]. In the absence of a common court and/or of the possibility for Community's judicial structure to exercise jurisdiction on the interpretation of the Lugano Convention, procedures and dispositions pursing homogeneity, between the two international systems of norms, were needed. In this regard, Article 2 of Protocol 2 on the uniform interpretation of the Lugano Convention, established an information exchange system to ease the circulation of relevant judgements, issued by virtue of the two Conventions in question and centralized in an *ad hoc* body that is, the Registrar of the Court of Justice. Furthermore, the representatives of the governments of the EFTA States on one part, and those of the European Communities on the other, agreed to draw up two further – even if not binding – declarations to ensure homogeneity, that is to say, uniformity in the interpretation of Lugano-Brussel rules[152]. Such declarations simply invited EFTA judges to "take into account" the rulings of European Community's national courts as well as those of the ECJ. This latter in its turn, was asked to pay attention to the overall case-law concerning the Lugano Convention[153].

This little digression is indicative to understand that in the absence of a joint institutional structure, the express goal or better, imperative of homogeneity remains the most satisfactory solution and effective mean to achieve uniformity of norms among different systems.

At this point, the following analysis will focus on three more dimensions of (judicial) homogeneity under EEA, detected and followed by the EFTA Court when interpreting EEA law, even though there is no mention of them in the Agreement.

The first is the so-called "substantive homogeneity" which refers to the uniform interpretation of those written EEA rules identical in substance to the main corpus of EU material law[154] (fundamental freedom and competition). This approach stays at odds with what the Court of Justice asserted in Opinion 1/91, namely that divergences of the "context" and "aim" between EEA Agreement and the then Community law prevents a homogenous interpretation and application of norms within the European Economic Area[155]. This position has been – even more – explicitly overruled by the ECJ's evolving case-law, as testified by what it reasoned in *Ospelt*[156] and

[151] SPEITLER (2017: 20) where the author describes the precedent for EEA's homogeneity, in the Lugano Convention.
[152] See Declaration by the Representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities; Declaration by Representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Free Trade Association. See also, BAUDENBACHER (2016b: 180 f.); SPEITLER (2017: 21).
[153] SPEITLER (2017: 20 f.).
[154] BAUDENBACHER (2013: 188 ff.).
[155] *Ibidem*. See also, Opinion 1/91, *relating to the creation of the European Economic Area*, para. 29.
[156] Judgement of the Court of Justice, *Margarethe Ospelt.*

subsequently in *Bellio Fratelli*[157]. The first dealt with the free movement of capitals among citizens of States party to EEA Agreement and the inherent prohibition of possible restrictions on the basis of Article 40 EEA, reproducing substantially Article 63 TFEU. In *Bellio* instead, the ECJ was called upon to assess the justifiability of two European Community Decisions concerning restrictive measures on the grounds of human health protection pursuant to Article 13 EEA. Beyond the facts and the circumstances of the above-mentioned cases, it is appropriate to emphasise what the Court of Justice concluded on the interpretation of EEA Agreement's provisions. In this regard, emblematic is what the Court affirmed in *Bellio*, that is to say "[…] both the Court and the EFTA Court have recognized the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly"[158], referring finally also to (and echoing) its previous *Ospelt* judgment. It is evident how the ECJ fulfilled a "U-turn" with respect to the original assumptions advanced in Opinion 1/91.

What the substantive homogeneity prescribes – as it has just been explained – can be achieved both through written rules, such as Article 6 EEA and Article 3 SCA which explicitly recommend the EFTA Court to follow or to pay due account to CJEU's relevant rulings or, through a similar interpretative approach, implemented in practice.

As far as the method of interpretation is concerned a further clarification is opportune. It is well known that the CJEU has detached itself from traditional international rules relating to the interpretation of international treaties that is, Article 31 and Article 32 of the Vienna Convention of the Law of Treaties[159]. The reason is quite obvious and stems from the special *status* attributed to EU Treaties, not comparable to classical (public) international law. As anticipated, the principle of homogeneity (with EU law) creates a "burden" to the EFTA Court which has to act so as to back EEA Agreement's purpose to "extend to the EEA future Community Law in the fields covered by the Agreement as it is created, *develops* or *changes* […][160]". Thus, if EU law evolves by means of CJEU jurisprudence, the same should occur for EEA law. For this reason, it is fair to affirm that the EFTA Court opts for the same method of interpretation and the connection to the Court of Justice case-law goes far beyond homogeneity rules addressed to it by the Agreement. In other words, EEA Courts' relation is more than simple "cross-referencing", as it has fostered a truly homologous operational strategy. What is more, one could legitimately expect that EFTA Court, also when dealing with novel internal market issues, so, where there are no CJEU precedents to follow, tries to imitate Court of justice's interpretative approach. Such a consideration is

[157] Judgement of the Court of Justice of 1 April 2003, Case C-286/02*, Bellio F.lli Srl v. Prefettura di Treviso*.
[158] *Ibidem*. See in particular para. 34.
[159] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969. On the Court of Justice's method of interpretation see also, BAUDENBACHER (2013: 197).
[160] Judgement of the Court of First Instance, *Opel Austria*, para 107.

supported by the general tendency of the CJEU to align with EFTA Court's finding and understanding[161].

The second declination of judicial homogeneity is the so-called "effect-related homogeneity" that points to an "*obligation de résultat*"[162], considering EU law as yardstick. Once again, the allusion here is to the evolving EFTA Court jurisprudence through which it had to guarantee the extension to EEA law, of those EU constitutional principles such as primacy, State liability and direct effect (and not only), which have been made part of EEA system in order to fill the gap with EU law. In this respect, the EFTA Court has created analogous – not identical – principles adapting them in the less" integrationist" EEA context[163]. The explanation for an EEA version of EU principles derives from the necessity to comply with the (peremptory) homogeneity goal, but without damaging EFTA States' sovereign rights. In fact, as for EEA/EFTA pillar, it would be fairer to speak about "quasi-primacy", "quasi-direct effect" and "full State liability"[164].

EFTA States' governments in fact, from the start have appeared recalcitrant to subject themselves to the "foreign" judicial activism of the CJEU, as they opted out EU membership status. However, EFTA national judges have progressively adopted a more EEA and EU "friendly" approach than one could have imagined[165]. On balance, National Supreme Courts have showed a cooperative stance towards EFTA Court extensive interpretation of EEA law, provided for under Article 34 SCA, despite the advisory legal nature of its opinions. However, as it happens also for the European Union domestic courts, not all the EFTA national courts have developed the same attitude with respect for instance, to requests for advisory opinions to the EFTA Court. It seems that Norwegians courts represent the negative exception within EFTA judicial institutions, because of their reluctancy to submit to "foreign" interference[166]. Moreover, it has been emphasised how the Norwegian Supreme Court has repeatedly relied on CJEU case-law – sometimes overstretching the Court of Justice's interpretation – merely to divert from the EFTA Court's authority[167]. Ultimately, one could argue the Supreme Court's quest for independence *vis-à-vis* both the EFTA Court and the CJEU.

Last but not least, the "procedural homogeneity" which is a quite recent elaboration and particularization, since it has entered in the EFTA Court's common language only from 2011[168]. In short, it pertains to an exigence to observe CJEU's relevant argumentations when interpreting EEA rules and

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[161] FREDRIKSEN (2015).
[162] BARNARD (2014: 154); BAUDENBACHER (2016: 183).
[163] BARNARD (2014: 154).
[164] These are expressions used by the former EFTA Court's President Baudenbacher. See, BAUDENBACHER (2005: 361).
[165] FREDRIKSEN (2015).
[166] As regards EFTA courts' willingness to refer see BARNARD (2014: 158).
[167] FREDRIKSEN (2015).
[168] BAUDENBACHER (2013: 194).

provisions related to procedural aspects and access to justice in the broader sense[169].This kind of homogeneity should prove as a valid support when the EFTA Court is called to express on a series of critical procedural issues, that do not find explicit answer in written provisions, nor in the EEA Agreement (Article 108 EEA) nor in the SCA. The CJEU's already known and well-established position on those delicate subject-matters can fill the void existent both in EEA law and EFTA Court jurisprudence – or simply orient its interpretation. Several are the examples of those "hot topics", varying from the necessity to find for instance, a specific interpretation for what a court or tribunal is, even if taken for granted, or still a meaning for Article 34 SCA in comparable way or not to Article 267 TFEU on the duty to refer under advisory opinion procedure, until the assessment and/or recognition of *locus standi* in nullity action[170]. In this respect, it should be denoted that the EFTA Court has gradually distanced from its original and more "benevolent" approach in granting recognition to such a claim, to embrace even more firmly the ECJ's position adopted in 1963, famous as the "*Plaumann* test"[171].

Beyond any formal homogeneity rule and Agreements' provisions it is possible to pursue and strengthen EEA law consistency between the two pillars also thanks to procedures provided for by the EEA Courts' Statue, dealing with third parties right to participate in the respective proceedings. The relative provisions are contained in Article 36 as far as the EFTA Court is concerned and Article 40 with respect to the CJEU. Moreover, the comparison between these articles allows at the same time to display some incongruences in terms of "procedural homogeneity".

According to Article 36 of the Statue "[a]ny EFTA State, the EFTA Surveillance Authority, the Union and the European Commission may intervene in cases before the Court" and parallelly Article 40 asserts that " […] States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority […] may intervene in cases before the Court where one of the fields of application of that Agreement is concerned".

Nevertheless, despite the mutual and reciprocal opportunity to take part and to submit observations[172], it has been remarked that if the Commission is a

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[169] *Ibidem*.

[170] Ibid., p. 195.

[171] *Ibidem*; *ID*. (2008: 118). See also Judgement of the Court of 15 July 1963, Case 25/62, *Plaumann & Co. v. Commission of the European Communities* where the Court provided a restrictive interpretation of Article 263(4) with respect to the wording "which is of […] individual concern to them".

[172] In this regard see, Article 20 of the EFTA Court's Statute and Article 23 as regards that of the CJEU. However, with respect to CJEU's pending proceedings a distinction arises between direct actions or preliminary ruling cases, the former entails "intervention rights", whereas the latter that to "submit statements or written observations". This differentiation is not provided under the EFTA Court's Statute where observations and statements can be submitted in any case pending before the Court. See, BAUDENBACHER (2004: 388 f.).

constant and active participant before EFTA Court's proceedings, the ESA intervenes with a more limited intensity[173]. What is more, it is well known that the European Commission, when acting before the EFTA Court, exercises the role of the preferential interpreter of EU as well as EEA law, performing its task on behalf of the EU as a whole[174].

It has been observed that the European Commission has nearly always submitted written observations in cases before the EFTA Court, influencing EFTA judges' standpoint[175] – in the ongoing working progress. Furthermore, if considering the objective of homogeneity and consistent development of EEA Courts' case-law, it should be emphasized that very few are the occasions in which the EFTA Court distanced itself from the Commission's position[176]. But here, it seems that the goal of congruence between the two pillars' case-law is actually one-sided. That is to say that the homogeneity "input" flows from the EU towards the EEA/EFTA side, where such an "output" is achieved.

Returning to the concept of "procedural homogeneity" cited above, a further clarification is needed. In the recent development of the EFTA Court and ECJ case-law an unbalanced situation has arisen as for the right for leave to intervene. By means of ECJ President's orders, the intervention rights for the EFTA State's governments or institutions before the Court have in several occasions been dismissed or limited[177]. Conversely, the EFTA Court has assumed a more EU's friendly approach in this regard as testified by the President's order in the recent *Iceland v EFTA Surveillance Authority*[178]. Here, even though Iceland and ESA argued against, the EFTA Court finally granted the Commission the right to intervene, by reasoning that

> "In the case at hand, consideration must be given to the fact that the capability for any EEA State, ESA, the European Union and its institutions, including the Commission, to intervene in cases before the Court is of paramount significance for the good functioning of the EEA Agreement. Not only from a textual, but also from a teleological and functional perspective, the first paragraph of Article 36 of the Statute must be construed accordingly"[179].

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[173] FORRESTER (2014: 25).
[174] GALLO (2007:176).
[175] Ibid., p. 159.
[176] *Ibidem*.
[177] BAUDENBACHER (2013: 196).
[178] See, Order of the EFTA Court President of 23 April 2012, Case E-16/11, *Iceland v EFTA Surveillance Authority.*
[179] *Ibidem*. See in particular para. 33. To further information about the case in relation to "procedural homogeneity" see BAUDENBACHER (2013: 196).

1.3.2 Some final remarks

After having described the multifaced concept of homogeneity it is right to draw some conclusions on the more or less equal burden that it demands to the two EEA pillars and to their respective judicial structure.

The subsequent observations are not yet elaborated on the basis of the empirical experience, given by a comparative analysis of the EEA Courts' jurisprudence, deepened further in the following pages, but on the grounds of the general configuration and mechanisms surrounding homogeneity's rules.

First of all, textually speaking, the already examined Articles 6 EEA and Article 3 SCA alike, entail a unilateral duty towards the EFTA Court in order to preserve a uniform evolution of the EEA Courts' case-law. Notwithstanding, the principle of homogeneity in practice has encouraged EU Courts to rely on their EFTA counterpart, even in the absence of written provisions, fostering a very fruitful dialogue. Noteworthy in this sense are the considerations of the then ECJ's President Vassilios Skouris according to whom disregarding EFTA Court rulings is simply at odds with the imperative of homogeneity which sustains the overall EEA system[180]. Additionally, he observed that the interaction between EFTA Court and the CJEU (mainly the ECJ) can be a model for judicial cooperation at international level[181], especially among courts operating under distinct but intertwined legal orders.

Another remark stems again, from a scrutiny of some EEA statutory provisions, whose meaning has been reinforced and made clear by the Court of Justice in its two opinions relating to the draft Agreement on the establishment of a European Economic Area. The provisions in question are related to interpretative contrasts between the two EEA pillars and their respective case-law, as they prefigured an excess of authority in favour of the CJEU. Pursuant to Article 111(3) if a dispute concerning the Agreement's provisions evoking similar EU norms has not been solved within three months by the EEA Joint Committee, EEA Contracting Parties may demand to the Court of Justice "to *give a ruling* on the interpretation of the relevant rules"[182]. In the above-mentioned Opinion 1/92 the Court specified that the nature of its decision is binding, as it is possible to deduce from the phrasing in itself of the Article 'give a ruling', which sounds as a mandatory judgement and not merely an expression of the Court's standpoint.

Such a configuration strengthens in last resort the CJEU's stance, even if for the aim to restore interpretative inconsistencies. What is more, it appears like a paradox that requests for opinions to EFTA Court are instead, simply advisory and that on the other hand, solutions provided under the form of

[180] According to SKOURIS (2005: 125) "ignoring EFTA Court precedents would simply be incompatible with the overriding objective of the EEA Agreement which is homogeneity".
[181] *Ibidem*.
[182] Article 111(3) EEA, emphasis added.

decisions of the Joint Committee pursuant to Article 105 and 111 EEA, originating as a result within the EEA, "may not affect the case-law of the Court of justice" as enshrined in Protocol 48 to the EEA Agreement.

By way of conclusion, it is good to add a last comment on the central role played by homogeneity in the EEA law. As a *general* principle of law, it should be unterminated and indefinite, so as to leave a margin of appreciation upon judges when interpreting or referring to it[183]. However, one can sustain that as far as the EFTA Court is concerned, homogeneity is both cause and effect of its dependence towards the CJEU, rather than being synonym of greater discretion, at least *vis-à-vis* EU legal order. This signifies that substantial and textual homogeneity of rules, between the two pillars, requires *ex ante* to the EFTA Court, to follow its European counterpart and *ex post*, to do the same to preserve uniformity in front of the continuous evolutions in EU/EEA law. But such a scenario, does not exclude the possibility for the CJEU to take advantage of the EFTA Court jurisprudence when interpreting similar (and also not yet investigated) provisions.

Homogeneity is a principle in the sense that it constitutes the fundamental value supporting the entire EEA system, and contemporarily the ultimate aim guiding EEA law, ensuring its constant updating and compatibility with EU law.

That said, the centrality and 'supremacy' of homogeneity, mainly in its judicial declination, result from the necessity to create as well as to safeguard over time, the coexistence or better the overlapping of two internal markets, converging in a unique EEA Single Market of which two different legal systems benefit from.

1.4 Principles, competences and functions of the EEA Courts: similarities and divergences

As inferable, more or less explicitly, from the foregoing sections, the originality of the EEA Courts' relation is connected to the way of their interaction. The EFTA Court in particular does not rely on the CJEU only through the basic form of (cross)references but by inheriting its way of interpreting and applying EU law (or EEA specular provisions). In fact, the EFTA Court has consistently acknowledged the EU fundamental principles which have furthered the European integration process and consequently the development of EEA internal market as a whole. In such a way, EU and EEA legal orders progressively improved the status of their (economic) integration,

[183] With respect to the general principles of (EEA) law see LEBECK (2014: 255 ff.).

the second in the wake of the first, by reaching however, different but jointly ambitious outcomes. The reason is simple, that is, although being separate, EU and EEA systems essentially shared the same law[184].

Before a more in-depth analysis over the principles, functions and competences assimilating, or rather distinguishing the two EEA judicial institutions, it is suitable to draw some premises of general character.

The EFTA Court and the CJEU, even though in the following analysis reference is above all made to the ECJ, operate with similar spheres of competences, under quite extensive statutory provisions and are both headquartered in Luxembourg[185]. Such a framework justifies the distinctiveness of their cooperation within the international scenario that, by fostering a steady (and bidirectional) judicial "osmosis", has offset the institutional divergences between the two legal systems and promoted their convergence.

What is more, it is quite evident and understandable that the EFTA Court has a limited caseload *per se* and in comparison with the Court of Justice, not only for the small number and size of the EEA/EFTA States but also for the tendency of their national courts to refrain from referring a case to the EFTA Court if they can find an answer in the existent ECJ case law[186]. Nevertheless, the procedural challenges and the object of the proceedings with which they confront are very similar, by virtue of the overlapping system of norms they deal with in their respective legal orders.

The *modus operandi* adopted for this section is strictly speaking comparative, for the purpose of detecting the main distinguishing or analogous features between the two EEA Courts, in terms of principles, competences and functions which have in their turn, an impact on the entire EEA and EU systems – broadening their fundamental traits.

As far as the principles are concerned those of homogeneity and of autonomy discussed above, merit here, a further consideration as they apply to both side and are deeply rooted in the EEA Courts' jurisprudences.

With respect to the principle of autonomy (from international law) what is interesting to note is that both the ECJ and the EFTA Court have recognized the *sui generis* nature of the Treaties and Agreement under which they operate, not classifiable therefore under the label of traditional international law. This occurred in the *Van Gen den Loos* and *Costa v ENEL* judgements, restated also in Opinion 1/91, as regards the Court of Justice and in *Sveinbjörnsdóttir* with respect to the EFTA Court[187]. It is also curious that these rulings have

[184] SKOURIS (2014: 5).
[185] SKOURIS (2005: 128).
[186] BAUDENBACHER (2008: 90).
[187] SUAMI (2014: 530 ff.) who provides an analysis of the peculiar nature of both EU and EEA law.

been issued respectively, by means of preliminary reference and advisory opinion procedure, "*la voie royale*"[188] through which these Courts, with the collaboration of national judges, have expanded the reach of the EU and/or EEA law, ensuring their uniform respect as well as their development.

Secondly, as anticipated the principle of homogeneity's peculiarity is that it is not simply a principle as such, but it grounds the formulation of other general principles of EEA law, whereof the most notorious are those defined with the expression of "constitutional triad"[189] that is, primacy, direct effect and State liability.

The complementary principle of homogeneity is that of 'reciprocity' which on the other hand, has a much more limited legal basis in the EEA Agreement, reason why it has been further improved by the EEA Courts' case-law. Emblematic in this regard, is the fourth recital of the Preamble to the EEA Agreement which states that the homogeneous European Economic Area is "achieved on the *basis* of equality and reciprocity"[190] among the Contracting Parties. This means that this principle, together with homogeneity, underpins the EEA architecture. More precisely, reciprocity principle demands that the EEA rights should be equal for EEA/EFTA nationals in EU and for EU nationals in the EFTA pilaster[191]. This mutuality between the two pillars in terms of rights acquire both a substantive and a procedural facet. The former looks at the content of rights enjoyable by EEA individuals whereas the latter refers to the possibility to benefit from access to justice in a comparable way[192].

A further common principle between the two EEA pillars is that of 'sincere cooperation', even though in EU law it has a broader spectrum of application. From Article 4(3) and Article 13(2) TEU the ECJ has inferred a general principle of loyal cooperation to confer positive and negative duties both to the Member States (with respect to EU) therefore to their national authorities, mainly judicial ones, and EU institutions[193]. Similar provisions to Article 4 TEU are those of Article 3 EEA which states that

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[188] To use a term employed by TIZZANO (2013: 230) to describe the driving force of preliminary ruling procedure under the EU legal order, through which the ECJ has strengthened the effectiveness of EU norms within domestic systems but also extended its function and the impact of EU law.
[189] BAUDENBACHER (2004: 383).
[190] Emphasis added. See BARNARD (2014: 152 ff.).
[191] *Ibidem*.
[192] *Ibidem*.
[193] VILLANI (2016: 97). With respect to the application of the principle in question to the relations amongst EU institutions see, judgement of the Court of Justice of 20 March 1995, Case C-65/93, *European Parliament v. Council of the European Union*, para. 23 where the Court affirms that "inter-institutional dialogue, on which the consultation procedure in particular is based, is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions".

> "[t]he Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement".

However, the same principle to loyally cooperate acquires a different nuance in the two pillars. In the EEA as well, the EFTA Court has 'exploited' such a principle to improve its collaboration with national courts, in particular in relation to the duty to refer by national courts according to requests for advisory opinions enshrined in Article 34 SCA (discussed below). However, if the objective of the EEA Agreement is to pursue homogeneity, the principle of loyal cooperation cannot be interpreted separately from it. It follows that Contracting Parties shall collaborate so as to put the homogeneity principle/goal into effect. On the contrary, in the EU, the Court of Justice has not attributed to the sincere cooperation principle a linear – even if of ample spectrum – interpretation, in fact such a principle has been declined in so many versions that it is difficult to gather them into a single and coherent definition[194].

Also other are the principles that the EEA law has deduced and inherited from the EU thanks to the EFTA Court jurisprudence on the wake of its synergy with the ECJ. Beyond the three constitutional principles mentioned above, reference is for instance to the principle of proportionality, of protection of fundamental rights and last but not least that of effectiveness or *effet utile*.

With respect to fundamental rights it is reasonable to precise that they do not fall within the scope of the EEA Agreement, reason why their protection rests on generic principles of law[195] so, consolidated and implemented through the EFTA Court jurisprudence by looking at the Court of Justice from one hand, and to the European Court of Human Rights on the other.

The principle of proportionality is a general principle of both EU and EEA law. Within the European Union it enjoys a legal foundation pursuant to Article 5(4) TEU, affirming that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties", in the EEA Agreement instead, there are no similar provisions so it stems mainly from EFTA Court's action. In general terms, proportionality principle is employed to protect individual rights as well as fundamental freedoms from national or European authorities' interference in the exercise of their respective powers[196]. To put it differently, it is a legal – and flexible – standard used to assess the action of governments and EEA institutions so as to avoid this can be to the detriment of individuals. What is more, the EFTA Court has repeatedly used the so-called 'proportionality test' when evaluating the admissibility of restrictive measures hurting fundamental freedoms or other of

[194] TEMPLE LANG (2017: 85).
[195] LEBECK (2014: 259).
[196] Ibid., p. 260 f.

distortive nature affecting competition. Tangible examples are to be found in "*Husbanken*"[197] on the legitimacy of an ESA's decision granting State aid or in "*Kellogg*" [198] where the EFTA Court however, went far beyond than that. In this latter case in fact, the Court ideated and applied for the first time the so-called 'precautionary principle' in food law, as a stricter parameter to allow restrictions on the free movement of goods.

The principle of effectiveness in the EU has been a product of the Court of Justice case-law and elaborated as an instrument of teleological as well as flexible interpretation of EU norms, to allow them to achieve as efficiently as possible their objective[199]. However, such a principle has become central also for EEA law, as attested by the recent developments of the EFTA Court as for instance in *Celina Nguyen*, where the same Court asserted that the EEA law "cannot be deprived of its effectiveness"[200] – once transposed and applied in domestic systems. Both in EU and EFTA pillars of EEA, the Courts have broadly relied on this principle and combined it to other ones, for example to back the primacy or direct effect principles or still, that of State liability so as to deduce new legal effects, from the existent positive law or already consolidated EEA norms and principles[201] .

Nevertheless, if in the EU law the use of the *effet utile* principle as a support for the primacy and the related direct effect principle has been less problematic, considering their untouchable value within EU, intrinsically connected to the supranational nature of the organization, the same cannot be said for EEA law, because of the underlying intergovernmental method of the EFTA organization. That is why, in this latter context the EFTA Court has been more inclined to secure the effectiveness of EEA law by levering on State liability, due for example to the incorrect implementation of a directive, to confer subjective rights to the parties involved[202].

That said, it is right to turn the attention to the main constitutional principles of EU law, that according to an "*obligation de résultat*" have been gradually acknowledged as well as reinterpreted by the EFTA Court through its creative jurisprudential activity and by means of a vertical dialogue with national courts.

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[197] Judgement of the EFTA Court of 3 March 1999, Case E-4/97, *Norwegian Bankers' Association v. EFTA Surveillance Authority*, para. 69 ff.
[198] Judgement of the EFTA Court of 5 April 2001, Case E-3/00, *EFTA Surveillance Authority v. Norway.*
[199] See, Judgement of the Court of Justice of 13 February 1969, Case 14/68, *Walt Wilhelm and others v. Bundeskartellamt,* para. 6 where the Court affirms that "[i]t would be contrary to the nature of such a system to allow Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty".
[200] Judgement of the EFTA Court of 20 June 2008, Case E-8/07, *Celina Nguyen v. The Norwegian State,* para. 24.
[201] LEBECK (2014: 258).
[202] *Ibidem*.

In 1994, in its very first case, *Restamark*[203] the EFTA Court was confronted with the issue of direct effect of (some) EEA provisions. The question posed by the referring Finnish Court was whether Article 16 EEA on State monopoly of commercial nature, equivalent to Article 37 TFEU, was "so unconditional and sufficiently precise so as to have direct legal effect"[204]. The Court however, avoided to provide a clear answer by affirming that individuals and economic operators can claim, before national courts, their rights deriving from EEA law as long as it has been made part of domestic system and provisions are unconditional or sufficiently precise[205]. Therefore, the direct effect of EEA norms is different from that conceived in 1963 by the Court of Justice in the historical *Van Gend & Loos* judgement. In fact, in the EU system direct effect of norms is not forcedly subordinated to the implementation of a further legislative act, but it applies *tout court* in so far as the content of the dispositions in question is sufficiently clear, precise and unconditional.

Later on, in 1997, following a chronological order, the EFTA Court upon request form the District Court of Reykjavík, pursuant to Article 34 SCA, recognized in *Sveinbjörnsdóttir* the full State liability principle as part of EEA law. Here the Court, relying on similar argumentations put forwards by the ECJ in *Francovich*[206], ascertained the responsibility of the national government of Iceland for damages provoked to individuals (or economic operators) by violating its obligations under EEA Agreement, in that specific case for the wrong implementation of Council Directive 80/987/EEC[207]. What is more, the EFTA Court also traced a thread between State responsibility and effectiveness principle under EEA law when stating that "in the event of the incorrect implementation of directive in national law contrary to Article 7 EEA, the *effectiveness* of that rule requires that there should be a right to reparation […]"[208].

Last, in 2002 the EFTA Court in *Einarsson*[209] recognized the quasi-primacy of EEA law, reasoning in a comparable manner as it did in *Restamark* for the direct effect. That is to say, where national law results incompatible with EEA law that has been implemented into the domestic legal order according to Protocol 35 to the EEA Agreement, the "implemented EEA rule shall prevail" insofar as it is unconditional and sufficiently precise[210]. Thus, once again State

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[203] Judgement of the EFTA Court, *Ravintoloitsijain Liiton Kustannus Oy Restamark*.
[204] *Ibidem*, para. 75.
[205] *Ibidem*.
[206] Judgement of the Court of Justice of 19 November 1992, Joined Cases C-6/90 and C-9/90, *Andrea Francovich and others v. Italian Republic*.
[207] Council Directive 80/987/EEC of 20 October 1980, *on the approximation of the laws of the Member States relating to protection of employees in the event of the insolvency of their employe*r.
[208] Advisory Opinion of the EFTA Court, *Sveinbjörnsdóttir*, para. 65.
[209] Judgement of the EFTA Court of 22 February 2002, Case E-1/01, *Hörður Einarsson and The Icelandic State.*
[210] *Ibidem*, see in particular paras 54-55. See also Protocol 35(3), pursuant to "For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA

intermediation is the prerequisite for the applicability of the principle hereinabove, unlike what happens in EU, where it produces its effect directly from EU to national system, without any State act of execution or adaptation. Nevertheless, an eventual conflict between national and EEA law, as in EU, is *ex ante* avoided by means of harmonic interpretation of the former with EEA law, under the general duty of loyal cooperation that EEA national judges are inclined to respect.

From the foregoing, it derives the far more careful approach embraced by the EFTA Court than the ECJ, that is explicable in terms of a distinction between implemented and non-implemented EEA rules, as a precondition to produce or otherwise, legal effects into EEA/EFTA domestic systems. A differentiation which does not hold on the other hand, in the logic of the Court of Justice when dealing with the constitutional principles cited above. Consequently, one may question the homogeneity between EEA and EU law, at least with respect of individuals and private actors' rights immediately claimable before a national judge[211].

As explained above, such a discrimination is reasonably justified because of the different degree of the (regional) economic integration pursue by the two systems of norms, corroborated in the EFTA pillar of EEA law through explicit provisions such as Article 7 EEA[212] and Protocol 35 to the EEA Agreement, on the implementation of EEA rules. In this regard, a further explanation is required due to the diverging stance between the CJEU from one part and the EEA/EFTA Contracting Parties on the other, as far as the interpretation of Article 7 EEA is concerned, enshrining the procedure to adopt new EEA acts related to parallel EU directives or regulations – of relevance for EEA law. According to Article 7(a) "an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties" but if direct applicability is a distinctive feature of EU law, the same cannot be argued for EEA law.

Recently the Court of Justice has ruled on the interpretation of the wording 'as such' disposed in Article 7 EEA, affirming that it implies "without any implementing measures"[213]. The EFTA States instead, refrain from endorsing this vision, so for the two dualist countries of Norway and Iceland the affected

States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases". These provisions found the (quasi)primacy of EEA implanted law over conflicting national law.

[211] SUAMI (2014: 532 f.).

[212] "Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows : (a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties; (b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation" (Article 7 EEA).

[213] Judgement of the Court of Justice of 26 September 2013, Case C-432/11, *United Kingdom v. Ireland*, para 54.

provision has to be intended as a duty to implement any EU regulation by including all its parts[214]. As a matter of fact, the integrationist position advanced by the Court of Justice is at odds with Protocol 35 to the EEA Agreement under which no legislative power is transferred to EEA institutions.

Bearing in mind what has just been examined, it seems that the EEA Courts, although attaining more or less distant results, have proceeded along the same direction, namely that to foster the so-called "constitutionalisation" of EEA market, that is, of what were originally economic orders. The line followed – even if far more extensively by EU law –, was that aimed at strengthening the rights' protection of individuals as well as economic actors involved by the scope of the positive law, in force in EU and EEA/EFTA pillar[215]. In other words, the judicial activity under EEA law, of both the EFTA Court and the CJEU, by virtue of the peculiar status of their respective legal order, has empowered these Courts to interpret and further extend the meaning of the EEA Agreement from one hand, and of EU Treaties on the other, going beyond the original intentions of the States party and affecting even more individuals within their national systems[216]. Additionally, the use of general principles of law, of which that of homogeneity represents a singular category within the general sphere under which it flourishes, has also proved instrumental to promote the cohesion of different but overlapping national, international or supranational systems of law – above all where explicit rules lack[217].

Finally, it is important to have an overview on the competences attributed to the EEA Courts at the regulatory level of the EEA Agreement and SCA as to the EFTA Court, and the EU Treaties with respect to the CJEU.

The EFTA Court has jurisdiction to rule on actions related to the surveillance procedure towards EFTA States for violation of the Agreement, undertaken by the EFTA Surveillance Authority pursuant to Article 31 SCA and those against EFTA States carried out by another State, as enshrined in Article 32 SCA. Such competences mirror that of the infringement procedure towards EU Member States under Article 258 TFEU when started by the European Commission and Article 259 TFEU, if activated by another Member State. Thus, in both pillars the Courts are competent to hear cases concerning actions against States, for a breach of the Agreement or the Treaties.

EFTA Court can also hear appeals against EFTA Surveillance's decisions on the grounds of Article 36 SCA, brought by any EEA/EFTA States or "any natural or legal person" that conversely to the former category of plaintiffs, has to demonstrate an interest in taking action, namely that, the contested act

[214] BJÖRGVINSSON (2014: 264 f).
[215] LEBECK (2014: 262 f.).
[216] FREDRIKSEN (2012: 880); SUAMI (2014: 536).
[217] LEBECK (2014: 261).

is of "direct or individual concern". This Article echoes Article 263 TFEU on the CJEU's jurisdiction over the legality of European Union's acts that is, the actions for annulment of EU legal acts.

Article 37 SCA confers to the EFTA Court jurisdiction over actions for failure to act by the EFTA Surveillance Authority, reproducing, even if in a much more limited way, provisions of Article 265 TFEU as far the CJEU's competence is concerned.

Last but not least, Article 34 SCA establishes the EFTA Court's competence to give 'advisory opinions' on the interpretation of the Agreement, upon request by national courts, evoking what in EU law is well known as the preliminary ruling procedure pursuant to Article 267 TFEU. Nevertheless, considering the key role of the vertical dialogue among judges both in EU and EEA law to ensure the coherence – and the development – of norms, it is advisable to provide additional explanations on this point. Firstly, in a comparative outlook it is right to emphasise some formal differences between the wording of the two articles in question and thus, of the related procedures involving the EEA Courts. Article 34 SCA recites as follows:

> The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.
> Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.
> An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.

First of all, the present Article merely refers to 'advisory opinions', therefore to acts of a consultative nature and not legally binding for the requesting court, unlike the compulsory judgements of the ECJ under Article 267 TFEU. However, despite such a statutory difference, it has been denoted that in practice EEA/EFTA national courts tendentially comply with the (authoritative) opinions provided by the EFTA Court, so as to avoid violations of the Agreement. In this regard, symptomatic is the Court's reference to them – interchangeably – also as full-fledged judgements[218]. A second main distinction as regards the procedure under Article 34 SCA and Article 267 TFEU, is that in the former case, the opinion concerns only the interpretation of the Agreement and no mention is made on the validity of acts. What is more, as inferable by paragraph 2 of Article 34, national judges even if of last resort, are not under any obligation to refer, as it happens on the contrary in the EU context[219].Significative in this respect, is the reasoning adopted recently by the EFTA Court, in *Irish Bank*[220] where it recognized that, whilst

[218] BAUDENBACHER (2005: 359-360).
[219] NORDBY (2014: 146).
[220] Judgement of the EFTA Court of 28 September 2012, Case E-18/11, *Irish Bank v. Kauphing Bank*. See in particular para. 58.

national supreme courts of EEA/EFTA Stats are not compelled to make a reference according to Article 34 SCA, such an obligation can derive from their duty to loyally cooperate under Article 3 EEA[221].

For the sake of completeness, it should be added that provisions like those of paragraph 3 of Article 34 SCA are not conceived for the homologous preliminary rulings' procedure that is, the possibility for an EFTA State party to the Agreement to introduce in their domestic system an "appeal system", through which decisions by lower courts to refer to the EFTA Court can be appealed to the highest ones. As a consequence, Iceland has introduced such a mechanism leaving essentially to the Icelandic Supreme Court, the determinant power to decide on advisory opinions' requests[222].

By way of conclusion, it is worth specifying some aspects on the approach adopted by the EFTA Court and the ECJ on the issue of admissibility as well as the assessment of competence with respect to advisory opinions and preliminary rulings. Although the content of the argumentations and the procedural matters are substantially identical, the attitude of the Court of Justice is reasonably more selective in order to avoid an excessive backlog, considering the huge number of cases presented to it (in general), and therefore, also in comparison to those before the EFTA Court.

With respect to the question of competence, as a matter of principle ECJ and the EFTA Court can be called upon to interpret – or to pronounce on the validity of act in the case of the Court of Justice – only EU and EEA law, but not national one[223]. Nevertheless, it has been highlighted that the Court of Justice is not precluded, in absolute terms, to hear a request from a national judge to rule on the interpretation of EU norms that shall not as such be applied in the national proceedings, or that are not directly the source of law of the affected national law, but indirectly linked to it or of relevance for the concrete case[224]. Although only the domestic court can express itself on the interpretation of the national legal act, the Court has circumvented such an 'obstacle' through an alternative use of the interpretative preliminary ruling, by reversing the perspective and by assessing hypothetically if the EU law conflict or otherwise with national law[225]. In this way, the Court does not limit itself to provide the correct interpretation but, by affirming the existence or not of a potential contrast, it provides instructions on how to solve that particular case.

Finally, the evaluation of admissibility – in both pillars – aims first and foremost to assess if the request is necessary and relevant to settle the dispute

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[221] SUAMI (2014: 538) where reference is made to the judgement in question, to underline that although EFTA courts are not bound to follow EFTA Court opinions, they are obliged to fulfil their duty of loyalty pursuant to Article 3 EEA.
[222] On this point see SIGURBJÖRNSSON (2014: 101).
[223] ROSAS (2014: 86).
[224] *Ibidem*.
[225] VILLANI (2016: 395).

before the national judge, moreover that the controversy is not fictious, or still, whether the questions which arise in the pending case are not hypothetical[226].

Chapter 2

2.1 The EEA (mixed) Agreement and the extension of EU's internal market as a weaker commitment to "common" integration

2.1.1 Introduction: the general framework and methodological premises

The aim of this chapter is, from one hand, to deepen the nature of EEA "mixed" Agreement and, on the other to clarify the reach of EEA integration, in comparison with the parallel and more intensified process developing at the EU level. However, before a more in depth-analysis on the topics at issue which will articulate the following section in two main parts – each of them containing sub-arguments to cope with – some general premises are suitable, as well as methodological indications in order to better orient the subsequent reading.

First of all, it is worth to advance some observations, so as to better highlight in practical terms the significance of EEA market, hence, not to frame it only from a legal point of view. In this regard in fact, it should be noted that the EEA Agreement was intended to establish the greater trading bloc in the world, in terms of consumers and gross domestic product[1]. As a consequence, the aforementioned Agreement has been esteemed as one of the most inclusive tools to expand EU internal market to (EFTA) third countries, offering EEA/EFTA States' citizens (notably workers) and undertakings reciprocal advantages and rights[2]. Concretely, these benefits regard the possibility for EEA/EFTA consumers and producers to buy from or sell to EU, products without the burden of an extra tariff or still, to EEA/EFTA students for

[226] Ibid., p. 87 ff.

[1] TATHAM (2014: 36), in describing the 'stop and go' process of the EEA Agreement, the writer underlines that even if, EEA market is smaller than the geographical area covered by the North American Free Trade Agreement, it counts more consumers and a major gross domestic product.

[2] REDING (2014: 193). In this regard, it should be recalled the existence of the so-called principles of 'reciprocity' and 'homogeneity' aiming at fostering mutual benefits among the actors concerned by the Agreement.

instance, to benefit from the Erasmus+ programme, whose relative EU regulation has been made part of EEA law on May 2014[3].

Notwithstanding a justifiable negligence towards EEA and the related legal system, in the light of its incipient history as troubled as uncertain – due to those legal and actual challenges mentioned in the foregoing chapter[4] – EEA Agreement has resisted over more than twenty years. Speaking about mere endurance however, does not suffice to gather the true and current essence of EEA law. That is to say, the Agreement has not simply survived, but it has also displayed a great evolutionary trend, so as to follow the dynamic and 'expansive' path of EU law. What is more, it is relevant to emphasise that the harder work in this regard has been executed by the EFTA Court which committed itself very seriously to the duty of homogeneity, ending up by affecting its own judicial and total independence, just as EFTA countries' sovereignty. The EFTA Court, in fact, has basically privileged an "EU friendly" interpretation of the Agreement at the expense of a more "EEA-specific" or "State friendly" reading of substantially equivalent provisions to EU Treaties[5].

As for methodological guidelines, it is right to specify that with respect to the degree of EEA range, there is no one single and unequivocal interpretation since, some aspects lead towards a more sovereigntist lecture, whereas others envisage a more integrationist or 'EEA-friendly' vision. Not surprisingly, there has been assessed the existence of two main logics founding the EEA Agreement namely, 'sovereignty' and 'homogeneity' which coexist and are linked, at the same time, by an inversely proportional ratio[6]. Put another way, these two aspects proceed independently and parallelly to gain ground under the EEA system, whilst being in principle dichotomous.

Therefore, according to the perspective adopted, one could argue a more or less extensive impact of EEA law in national legal system of the EFTA States, bearing in mind overall, its minor ambition and the greater intergovernmental character of its economic cooperation than those pursued by EU law and Treaties.

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[3] *Ibidem*.

[4] Reference is made to the European integration process, just as the negative Swiss referendum which finally lessened the EEA/EFTA membership to only three states. Or still, to the negative stance adopted by the Court of Justice in Opinion 1/91, with respect to the original formulation of EEA Agreement and its system of courts.

[5] See, FREDRIKSEN, FRANKLIN (2015: 633) where the two writers provide a detailed study on the backwardness as well strong resilience of the EEA Agreement over the years, thanks primarily, to the work of EEA judicial institutions.

[6] On this point see, HARBO (2009: 201) who denotes the existence of a principle of sovereignty beside that of homogeneity.

2.1.2 Constitutionalising EU trade policy[7]

First of all, it should be introduced and scrutinized the topic of EU trade policy as well as the negotiation of trade agreements, to better understand their main features and the underlying critical issues, within the context of EU law. Such a digression is pertinent since EEA Agreement is a tangible example of an international mixed agreement, concluded under the framework of EU trade relations with third states. That said, it is right to pay attention to the process of "constitutionalisation" of EU trade law together with the influence of such a trend in EU external economic cooperation with EFTA countries, by virtue of the EEA Association Agreement. Since the origins, it is undeniable the progressive and crescent constitutionalising tendency of EU Internal Market as a result of its simultaneous "judicialization"[8] that is, the predominant role played by the Court of Justice in furthering the scope of EU Treaties, far beyond the original intentions of their masters, namely, the EU Member States. As already mentioned, thanks to the elaboration of the principles of supremacy and direct effect, the CJEU has extended the string of economic rights directly enforceable before domestic courts by individuals or private actors but to the detriment of national fundamental rights[9]. Conversely, besides its generous approach in deriving EU-based rights, the same Court has adopted a restraining attitude as for the level of tolerability of restrictions to free trade's freedoms[10]. In order to balance between both trade and national constitutional rights, the Court of Justice has time by time elaborated general and unwritten principles of EU law levering and drawing on legal traditions of Member States, as enshrined by Article 6(3) TEU[11]. Nevertheless, the vagueness of such principles of law always remits a great margin of discretion towards the courts when concretely applying them, thus, also to the Court of Justice so as to broaden the reach of the European integration. For the sake of completeness, it should be underlined that an additional guarantee to Member States' constitutional traditions is provided for by Article 4(2) TEU which appeals to (their) "national identities, inherent in their fundamental structures, political and constitutional […]"[12]. From the perspective of (formal) rights' protection at the EU plane, Article 6 TEU mentions also the European Convention on Human Rights and the Charter of Fundamental Rights which become legally binding only after the Lisbon Treaty. It follows that the commitment towards a common and stronger integration, based on economic ties and including even more also a social and political dimension, has been offset by further reassurances for EU domestic legal systems at the EU level,

[7] The expression is borrowed from TATHAM (2014: 40 ff) who investigates on the impact of European regional law into (EEA) domestic legal systems, operated mainly by the CJEU, to extend afterwards the analysis to the constitutionalisation of EEA Agreement, so to the role of EFTA Court *vis-à-vis* EFTA States.
[8] TATHAM (2014: 56).
[9] Ibid., p. 41.
[10] *Ibidem.*
[11] Ibid., p. 42.
[12] Ibid., p. 43.

just as through the firm reaction of national – above all constitutional – judges. In this regard, it is worth to cite the so-called "counter-limits" doctrine, stemming from the jurisprudence of the Italian Constitutional Courts, which acts as an exception to the primacy of EU law over national norms, when the former contrasts with fundamental principles or inalienable rights of the Italian constitutional order[13]. This means that the judicial activism of the CJEU is not unconditional, due to the necessity to preserve the coexistence of "multilevel constitutional systems" therefore, a balanced interaction among national, regional and international courts and their respective set of norms. As already anticipated a minimum level of coherence between independent but intertwined systems, its build upon the cross-cutting nature of general principles of law, whereof that of homogeneity represents an emblematic example under EEA law, whose consistency is also eased by more or less systematic inter-courts dialogue[14].

After having summarily depicted the state of affairs of EU trade policy, it is possible to turn the attention to the EEA counterpart, in order to assess to which extent, the EEA Agreement has bolstered the existence of a specular (to the EU) economic constitution. In other words, it is suitable to evaluate whether the EFTA Court as well, has so operated in order to foster the "constitutionalisation" of EEA law. First of all, it is important to note that although – in principle – EEA/EFTA States have not ceded sovereign rights to EEA institutions, the EFTA Court's deference to CJEU jurisprudence has pave the way to such a "constitutionalising" process also within the EEA system, even if in a far more limited manner[15]. In fact, it has been already examined the spread of analogous principles of primacy and direct effect, which ended to elevate the status of EEA Agreement to "quasi-supranational" law. Nevertheless, it is correct to clarify that as they are out from EU, EEA/EFTA States and their courts, enjoy a greater latitude of action when balancing between national constitutional rights and free trade benefits rooted in EEA law[16]. Or better, such a discourse holds true in theory but it is not always validated by practice. The reason is twofold, that is, the EFTA Court general firmness in emulating the CJEU, and as a result, the relative acceptance by EEA/EFTA national authorities of EU Courts' interpretations over EU internal market provisions, as the most authentic one[17].

Homogeneity goal has attributed a responsibility to the EFTA Court which in its turn, has so instructed its national interlocutors, to avoid the emergence of possible discrepancies between EU and EEA law. These latter, share essentially the same core of rules, reason why the EFTA Court shall act in order to approach these two distinct sets of norms, while considering their

[13] VILLANI (2016: 429).
[14] LEBECK (2014: 261).
[15] TATHAM (2014: 51).
[16] Ibid., 45 ff.).
[17] FREDRIKSEN, FRANKLIN (2015: 673).

structural as well as purposive differences. To sum up, on the EEA/EFTA side, the acquiescence to the CJEU undisputed jurisdiction, makes unnecessary the rooting of identical EU principles at the benefits of individual rights.

Even though further details with respect to the EEA degree of economic integration will be provided in the following discussion, it should be pointed out the so-called phenomenon of the "cherry picking" or "pick and choose" strategy, implemented by EEA/EFTA countries *vis-à-vis* EU policies/legislations and EU Courts' jurisprudence. Such a selective process is explicable by virtue of the major flexibility allowed to them, compared to EU Member States and equally to evaluation of convenience. Furthermore, it is curious how this convenient behaviour is linked to the specular process of judicial and legislative homogeneity, namely, to the more or less arbitral choice to incorporate new EEA relevant legislation and to follow or otherwise, CJEU and EFTA Court case-law[18].

2.1.3 The practice of international (mixed) agreements under EU law

After the aforementioned observations and caveats, it is now the moment for deepening the theme of the 'mixed agreement' in EU practice, starting from the main content of EEA Agreement that is, the internal market. This latter is enumerated in Article 4 TFEU as a "shared competence" between the Union and its Member States and represents the fundamental scope of the Agreement, aiming at opening the EU single market to EEA/EFTA States, while precluding them from EU whole membership status. The collocation and nature of the subject-matter linked to the Agreement is essential for the exercise of the EU external competence to sign international agreements, because mixed agreements are used when a given field falls outside the Union's exclusive jurisdiction. As a matter of fact, the kind of EU competence is crucial for the type of trade agreement the European Union (hereinafter also "Union") can opt for. By means of a broader application of the so-called principle of "parallelism of competences" – elaborated by the CJEU jurisprudence relying on the implied power's doctrine[19] – it is feasible to infer a correspondence between an internal allocation of competences amongst the Union and/or its Member States and an external (implicit) one. Therefore, the statutory subdivision in "exclusive" and "shared" EU competences[20] , made explicit by the Lisbon Treaty, applies not merely for discipling the Union inner legislative power but also when assessing its outer authority to conclude

[18] With regard to national supreme courts of EFTA States it should be specified that referral to the two EEA Luxembourg Courts does not occur symmetrically, that is to say that, sometimes reference to the CJEU is instrumental to distance from EFTA Court's stance.

[19] Judgement of the Court of Justice of 31 March 1971, Case 22-70, *Commission of the European Communities v Council of the European Communities*, *European Agreement on Road Transport*, see in particular para. 22.

[20] See respectively, Articles 3 and 4 TFEU. Moreover, a third category of competences exists under EU Treaties enshrined in Articles 2(5) TFEU and clarified in Article 6 TFEU. This latter variant is intended to "support, coordinate or supplement" Member States' action without anyway, "superseding their competences".

international agreements. The *ratio* is rooted in pragmatic considerations, that is, to prevent potential incongruences between EU legislation and provisions of international agreements with third parties[21]. To be precise, speaking about the existence or otherwise, of the Union external authority to conclude international agreements entails *a priori* a capacity to do it, namely the attribution to EU of an autonomous international legal personality. In this sense operates explicitly Article 47 TEU.

The Union's prerogative to conclude agreements is disciplined in Articles 216 and 218 TFEU, the first clarifies such a competence in general terms, the second instead, provides the procedures to follow, regardless of the kind of agreement concerned. Beyond generic dispositions, EU Treaties also offer specific provisions evoking particular examples of international agreements such as Article 49(2) TEU on the accession of new members to the European Union or still, Article 217 TFEU on the association agreements[22].

If Article 216 TFEU provides the guidelines to deduce overall, the Union's power to conclude agreements when there is no explicit mention of it in primary law, Article 3(2) TFEU does the same as far as EU exclusive competences are concerned[23]. Article 216 TFEU illustrates that EU's authority in this regard, can stem directly from EU Treaties, but even when the agreement is necessary to the pursuit of the objectives under EU law or if it is so provided by an act of the Union and last but not least, when its conclusion is "likely to affect common rules or alter their scope". This latter possibility refers to a case in which the internal competence of the EU is not simply potential but it has already been exercised through the adoption of relevant rules[24]. In such a way the preliminary and early action of the Union pre-empts that of the Member State(s) – internally and externally alike.

Article 218 TFEU empowers the Council of the European Union (hereinafter the "Council") to open negotiations and conclude international (trade) agreements[25] acting basically by qualified majority with the exceptions mentioned in its paragraph 8, subparagraph 2. Derogations to the general qualified majority's voting rule, once again answer the need to ensure an assonance between the internal legislative process and the Union's external

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[21] LOCK (2015: 93 ff.).

[22] MOHAY (2017: 152) where the writer describes the status of international agreements within EU law, by looking at EU Treaties' provisions as well as at the relevant Court of Justice jurisprudence in this regard, more or less able to compensate the unclarity existent at the level of primary law.

[23] LOCK (2015: 95) who draws a parallel between EU internal competences (exclusive, shared and parallel) and the external ones, in order to evaluate EU authority to sign and conclude agreements.

[24] Ibid., p. 94 f.

[25] According to Article 17 TEU The European Commission represents the Union's external action, excluding that in the common foreign and security policy and all other cases differently disciplined by the Treaties. Thus, if the Council concludes international agreements the Commission is entitled to carry on the relative negotiations.

decisions-making[26]. In fact, unanimity rule prevails in relation to negotiations and conclusions of international agreements covering sectors for which the adoption of an EU act requires a unanimous vote. Alongside such cases, other examples are those linked to 'association agreements' or the agreement for the accession to the European Convention on Human Rights and Fundamental Freedom.

Furthermore, the same Article distinguishes between two different scenarios connected to the required consent of the European Parliament in relation to a list of *ad hoc* agreements, or its mere consultation in the other situations[27]. The Article in question is also important to better frame international agreements' provisions within the hierarchical context of European Union's sources of law. Article 218(11) in fact, assigns the Court of Justice the particular task – upon request – to ascertain the draft agreement's compatibility with the Treaties, so as to restore if any, eventual contrasts. By reading jointly Article 218(11) and Article 216(2) which claims that Union's agreements are binding on its institutions and Member States, one can easily deduce their positioning below EU primary law just as, their pre-eminence over secondary law[28]. This condition implies that international agreements can be employed as a standard for review when assessing the validity of EU secondary legislation. Notwithstanding, according to the settled Court of Justice case law, the Union's act conflicting with international agreements' provisions is annulled when these latter have 'direct effect'[29].

Against this background, it is possible now to investigate the peculiar form of mixed agreements. First of all, it should be highlighted that currently, this kind of agreements is not expressly envisaged by the Treaties even though they are foreseen by Article 102 of the Treaty establishing the European Atomic Energy Community ("EURATOM")[30]. However, they are well consolidated in practice when dealing with subjects that fall outside the exclusive competence of the European Union. Mixed agreements are considered in fact, useful devices in order to overcome the delicate issue of partition of competences between the Union and Member States and, their shared

[26] PUCCIO (2016: 8 f.) who provides in her article a short and exhaustive briefing on EU procedures for conclusion of international agreements, combing a theoretical explanation with actual examples.
[27] In this regard, see Article 218 (6) (a) and (b) TFEU.
[28] MOHAY (2017: 153).
[29] Ibid., p. 158.
[30] The Article recites as follows: "[a]greements or contracts concluded with a third State, an international organisation or a national of a third State to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws". See also, LOCK (2015: 98).

responsibility for the attainment of the duties originating from the agreement in question, represents a further guarantee for third parties[31].

An agreement can pertain to different fields, much of them exclude the authority of the Union to conclude it alone as they are related to concurrent competences with Member States. What is more, it could also happen that some matters are attached to the Union, while others to the Member States' external action. Thus, a pragmatic response to such a variety of configurations is to bring the EU and its Members together when signing and ratifying international agreements with third partners.

The particularity of a mixed agreement is that to enter into force it requires both a decision (of the Council) at the EU level and a ratification on the part of some Member States or of all, as in the case of association agreements. In other terms, mixed agreements are officially binding only after that ratification procedures have been completed by third parties, the Union and its Member States[32]. Therefore, whilst such a type of agreement has undoubtedly several advantages, it entails also some drawbacks, as for instance those related to eventual delays in its adoption owing to the required fulfilment of Member States' ratification, in compliance with their constitutional requirements. An *escamotage* to tackle this eventuality and to unlock a standstill is provided by Article 218(5) TFEU concerning 'provisional application' of an international agreement before the exhaustion of ratification procedures[33].

In conclusion, as for mixed agreements, a last argument related to the CJEU jurisdiction has to be further developed. First and foremost, as anticipated the "mixity" formula for international agreement is a practical solution to circumvent an unclear definition of competences between the EU and the Member States. Such a finding, in fact, is not so immediate in practice and it may implicate a more or less long proceedings before the Court of Justice, awaiting its verdict on the issue[34]. A recent example revealing the intricacy underlying mixed agreements is provided by the EU-Singapore Free Trade Agreement ("EUSFTA"), submitted to the attention of the Court after the European Commission asked, in 2015, its opinion to ascertain the exclusive or otherwise Union's competence to conclude it. The Court delivered its Opinion on May 2017[35], affirming that some fields covered by the agreement

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[31] LOCK (2015: 101 f.). To be precise, it should be remarked that in the past, mixed agreements had been employed to cope with third States' unwillingness (as the Soviet Union or satellite countries) to recognize the legal personality of the European Union, then the Community, as well as with their claim to have Member States as contracting parties. In this regard see, VILLANI (2016: 240).

[32] PUCCIO (2016: 7).

[33] *Ibidem*, where it is added that provisional application pursuant to Article 218(5) can be secured only with respect to those provisions implying an EU competence or extended to other part if so, have agreed Member States.

[34] LOCK (2015: 99).

[35] Opinion of the Court of 16 May 2017, 2/15*, on the Free Trade Agreement between the European Union and the Republic of Singapor*e.

in question, belong to the category of "shared competences"– as for instance non-direct investments –, reason why EU Members shall be included as contracting parties beside the EU. Briefly, while evaluating the divisions of competences in trade policy, the Court convened that the draft agreement presented to it, could not be concluded by the Union alone, thereby a mixed agreement would have been preferred.

In general, despite mixed agreements demand a joint collaboration of the Union and its Members so as to fulfil their commitments under the conventional provisions, as a matter of principle, the CJEU is entitled to clarify the exact allocation of responsibilities between the contracting parties involved, according to the exercise – of not – of their outside competence[36]. Another problem belonging to this type of international agreements is connected to the CJEU's jurisdiction. With respect to the abovementioned "parallelism of competences" the Court should have essentially the authority to interpret those provisions covering subjects in which the EU is entitled to conduct an external action, not also those which fall under the activities for which competent are the States[37]. Nevertheless, the Court's stance has not been overall so linear and obvious. As a consequence, the line circumscribing or better, defining its power in this regard is flexible and it is quite understandable that such an elasticity can be easily exploited to the advantage of the same Court.

It has been specified from the outset, that the EEA Agreement has been concluded as a 'mixed agreement' and that the Court of Justice has objected the creation of an EEA Court, in order to avoid potential conflicts of jurisdiction and interpretation. At this point, it is right to observe that CJEU's interpretation over EEA Agreement's provisions can indirectly descend from those corresponding to EU law. Additionally, it seems that under the *sui generis* context of EEA law, the CJEU's dilemma on the interpretation over (EEA) mixed agreement has been solved *a priori* in its landmark Opinion 1/91, in which the Court negatively expressed on the system of courts architected by the first draft agreement. What is more, the CJEU's indisputable authority over EEA/EU norms is corroborated simultaneously by the peculiar nature of EEA Agreement, substantially reproducing the 'heart' of EU material law, by the general principle of homogeneity as well as homogeneity rules addressed to the EFTA Court. This latter in fact, has adopted a deferential behaviour by following its EEA judicial counterpart' s case-law and above all, by imitating its purposive interpretative strategy. In such a way the CJEU's standpoint is formally preserved. Such a scenario is

[36] LOCK (2015: 99 f.); MOHAY (2017: 154).

[37] For further information on CJEU's jurisdiction over EU agreements see, LOCK (2015: 102 ff.) in which an in-depth analysis on the Court's competence over mixed agreements is illustrated through the relevant EU case-law. As far as mixed agreements are concerned in fact, it is not so easy to derive a general rule, far more inferable instead, is the exercise of CJEU's jurisdiction over the whole set of provisions concerning "pure agreements", concluded by the Union only.

ultimately upheld by the practice and entente among EEA Courts, though, the general rule of uniformity and mutual correspondence are far from being absolutely perfect.

2.1.4 The scope of the EEA Agreement (*vis-à-vis* EU Treaties)

The second major theme of this chapter, related to the intensity of the EEA economic integration, is less 'contextual' and notably focused on the EEA Agreement. This topic acquires particular value not only as such to understand the flaws, the specificities or simply the characteristics of EEA system, but also and chiefly because of a comparative outlook with the EU, whose association is spontaneous by virtue of the two-pillar structure and rationale. The principal objective of the following analysis is to grasp the performance of the EEA Agreement by detecting its ambitious or rather humble results. The present study intends so, to provide greater clarity on the status of the EEA association, basically looking at the reach of EEA written rules, the dynamicity or backwardness of EEA legislation and degree of commitment by EEA/EFTA national authorities.

The starting point of any kind of assessment about EEA level of integration is the recognition of two different, even if comparable, legal regimes that is to say, the EU and the EEA. Not surprisingly, the EEA Agreement has been concluded to permit to the three EEA/EFTA States to accede EU Single Market even without acquiring the whole EU membership. Just focusing on the mere economic integration established by the Agreement, the EFTA Court in one of its first rulings, *Maglite*[38], affirmed that the purpose of the EEA Agreement was that "to create […] an improved free trade area but no customs union with a uniform foreign trade policy"[39].

A first and evident shortcoming derives from textual differences between the EEA Main Agreement and EU Treaties. In fact, the continuous amendments brought about by the Maastricht Treaty until the Treaty of Lisbon have not been matched by parallel updating of the main part of the EEA Agreement[40]. The problems arising from non-renewal of the central part of the Agreement are worsened if considering the impossibility of EEA Joint Committee's decisions to modify these key provisions, which demand consequently, the ordinary process of treaty revision and the participation of all EEA Contracting Parties. It has been noted however, that the revision of EU primary law has not touched fundamental rules connected to the internal

[38] Advisory Opinion of the EFTA Court, Case E-2/97, *Mag Instrument Inc. v California Trading Company Norway, Ulsteen*.
[39] Ibid., para. 27.
[40] FREDRIKSEN, FRANKLIN (2015: 635 ff.) who carry out an analysis of the EEA Agreement's reach and material contents by contrasts or rather symmetry with EU Treaties.

market so finally, there were no significant impacts on the unchanged EEA law[41].

On the other hand, complications for EEA Main Agreement's standstill may arise when the updating of EU Treaties could affect – indirectly – the meaning of internal market *acquis*. For instance, the enlistment of values stipulated in Article 2 TEU, on the basis of which the Union pursues its objectives enumerated in Article 3 TEU, are not equally reproduced in the EEA Agreement but they cannot be disregarded also when interpreting internal market provisions[42]. Such a situation can potentially affect homogeneity in the interpretation of essentially corresponding EEA/EU provisions and puts a weight on the EFTA Court. This Court in fact, bearing in mind the scope of the EEA Agreement, is called to decide whether interpret EEA rules in the view of novel EU law provisions or conversely reject such hypothesis when it implicates a broadening of the range of EEA Agreement[43]. A further clarification linked to textual discrepancies between the Treaties and the EEA Agreement has to do with Articles 4(2) and 6(3) TEU, thus, with the respect of national identities of EU Member States, on which the CJEU draws on to define the content of general principles of EU law. From the inner perspective of EU pillar, it follows that the Court should discriminate between legal traditions of EU Members and 'outsiders' – as for instances EEA/EFTA third states. As a result, in case of a contrast between the two EEA pillars' constitutional traditions the CJEU will of course let prevail those of EU countries[44]. From the EEA side, this possibility could undermine homogeneity if the EFTA Court will distance from its EEA judicial counterpart so as to valorise and preserve the specificities of Nordic EFTA States legal systems, when interpreting EEA law differently from EU law. Conversely the EFTA Court, in line with the imperative of homogeneity, may also disregard EEA/EFTA states legal cultures as a source of law, to follow CJEU's position[45]. Or still, the EFTA Court may *lato sensu* refer to common traditions of the whole EEA States when they result consistent *a priori*. Nevertheless, it has been observed that the EFTA Court case-law is not inclined to appeal expressly to EFTA States' legal traditions, above all when they seem to conflict with EU law[46]. Finally, a critical approach could advance the idea that to an EU constitutional pluralism does not correspond an EEA legal pluralism.

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[41] Ibid., p. 636. In this regard the author also remarks that despite the Treaty of Maastricht has amended provisions related to the freedom of capitals, the negotiation of the EEA Agreement was subsequent to liberalization of capital in EU. In fact, Article 40 EEA directly states that there shall be no restrictions on the movement of capitals rather than alluding to a 'gradual removal' of those limitations.

[42] Ibid., p. 336 ff.

[43] *Ibidem*.

[44] FREDRIKSEN (2010: 491 ff). Here the author wonders if the EEA Agreement may be considered as a full-fledged example of legal pluralism with respect to the EFTA States' legal traditions, if considering the imperative of homogeneity and EFTA Court deferential attitude towards the CJEU.

[45] Ibid., p. 492.

[46] *Ibidem*.

By drawing some considerations in this respect, one could argue that the weaker commitment to integration in the EFTA pillar (of EEA) may engender unintentionally some drawbacks against EFTA States' governments themselves, despite their claim for a major intergovernmental essence of EEA association. That is to say that, in some occasions, the lack of corresponding EU provisions in EEA law could limit the margin of appreciation upon national authorities when it comes to the possibility to claim derogative measures to the general rules regulating the functioning of the internal market.

Still at the level of primary law, an additional remark should be made as regards the general and unwritten principles of primacy and direct effect which have not been made 'as such' part of EEA law. The reason is essentially that to preserve the dualist tradition of some EEA/EFTA States, given that by virtue of the abovementioned principles in EU law, the dichotomy monism-dualism in international law becomes irrelevant. This gap on the EEA side is justifiable in the light of the required balance between sovereignty and homogeneity principles. But if the rejection of the direct effect is intended to preserve EFTA States' sovereign rights, the accepted principles of consistent interpretation and State liability fulfil instead, the need of homogeneity with EU law. Therefore, it is legitimate to wonder if concessions to the EEA/EFTA States have both a formal and concrete recognition[47]. That is to say, whether in the struggle between sovereignty and homogeneity, the victory of first may truly be taken for granted.

Beyond the behaviour of the EFTA Court, when assessing the weaker constraints defining the EEA system, it is right to observe at the same time the position of EEA/EFTA States national courts. First of all, it is true that unlike what happens for EU courts, national (supreme) courts of EEA/EFTA countries are neither obliged to refer nor to peremptorily follow EFTA Court's opinions. In fact, on the whole the Luxembourg Court deals annually with very few cases upon requests by the highest and lower courts of the EFTA States[48]. More striking is that the absence of direct effect of EEA norms, just as the less binding nature of preliminary reference procedure under EEA law, have proved not crucial for the performance of the EEA Agreement over more than twenty years of its existence. Homogeneity has continued overall to be preserved. That said, it should also be clarified that national courts of the EFTA pillar are scarcely inclined to refer to the EFTA Court mainly to avoid delays – which can indirectly alter the efficiency and speed of delivery of justice – and further costs. What is more, they get around this additional and vertical procedure by relying, when possible, directly on the CJEU jurisprudence which allows national judges to decline the exercise of their right to bring the question before the EFTA Court[49]. For this reason, before

[47] FREDRIKSEN (2010: 491).
[48] FREDRIKSEN, FRANKLIN (2015: 671 ff). To give some numbers, the EFTA Court receives per year, less than five requests of opinion from national courts of the three EEA/ EFTA States.
[49] Ibid., 673 ff.

starting any referral procedure, national courts of the EFTA States question themselves whether the benefits they can draw from the EFTA Court's intervention, outbalance the disadvantages in terms of times and additional work[50].

It is true that in principle the EFTA Court's "EU-friendly" interpretation seemed to contrast with EEA/EFTA States' demands for a more "EEA-specific" meaning of substantially similar EEA/EU provisions. However, over the entire span of EEA Agreement's life, pretentions on the side of both national political and judicial authorities for a more "State-friendly" interpretation of the Agreement have also decreased, due to the general acceptance of the CJEU case-law as the most authentic model for the understanding of internal market rules[51]. As a consequence, national courts of the EEA/EFTA States have argued to be able to examine CJEU jurisprudence on an equal footing with the EFTA Court, with which they shared similar commitment and consciousness in this regard. Therefore, if the EFTA Court adheres faithfully to the CJEU settled case-law, and national judges too esteem this latter as their own primary source of inspiration, it follows indirectly their deference to the EFTA Court's authority. In such a way, no problem seems to arise from this 'tri-polar' linear relation ensuring in any case homogeneous interpretation and application of EEA rules as well as uniform protection of EEA-based rights. But as anticipated, EFTA domestic courts can take advantage of their freedom by deciding, through a case-by-case approach, whether it is more convenient to rely on EFTA Court jurisprudence or divert from it claiming a different result if privileging - what they consider - CJEU's view of EEA law[52]. This practice finally creates a greater burden on national judges than upon the EFTA Court, when the first are requested and solicited by the parties involved in the proceeding, to look 'elsewhere' in searching for major political discretion than that suggested by the EFTA Court jurisprudence[53]. This discriminatory activity has consolidated the so-called praxis of 'forum shopping' at the level of EEA/EFTA Member States which on the side of EU can raise doubts on the sincere observance by national courts to the CJEU case-law. Such a concern is rather legitimate considering the low number of English's translation of EEA/EFTA national courts' judgements[54].

A substantial divergence between EEA Agreement and EU Treaties regards the inexistence of an equivalent concept to that of EU Citizenship, together with the lack of EEA rules reproducing those of the EU Charter of fundamental rights. Of course, such a gap is explicable by virtue of the limited scope of EEA law but it produces a disparity between the two pillars' set of

[50] *Ibidem*.
[51] *Ibidem*.
[52] Ibid., p. 674 ff. Such a strategy has been detected above all with respect to Norwegian Supreme Court.
[53] *Ibidem*. Interestingly, the author points out how in several occasions the EFTA Court has revealed itself a far more fervent defendant of the internal market than the same ECJ.
[54] Ibid., p. 675.

norms which, if not cautiously managed, risks to undermine their homogeneity.

EU citizenship has been introduced after the Maastricht Treaty and welcomed as a really turning point for the free movement of persons, conferring rights not just to economically active citizens but to inactive persons as well. This change encouraged the same EU courts to revise and 'upgrade' their approach so as to cope with the evolutions at the level of EU primary law[55]. Despite the absence of provisions like those regulating Union's citizenship (Article 20 and 21 TFEU) the EEA Joint Committee has eventually agreed the EEA relevance of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[56]. It should be noted that the decision of the Joint Committee incorporating the EU directive[57] has been complemented by a Joint Declaration specifying that derived rights for third country nationals are circumscribed to situations in which their EEA national family member is concretely exercising a right to freely move under EEA law[58]. Even if the incorporation of the abovementioned Directive partly bridges the gap between EEA and EU law – at least from a textual point of view – the hard work rests on the EFTA Court, owing to the contextual differences in which the norms in question apply. The EFTA Court in fact, has to keep dynamically homogeneity in the interpretation and application of EEA law, to outweigh the far more static, albeit remedial, configuration provided by any JCD once entered into the EFTA pillar. If the CJEU is eased in the extrapolation of derived rights to third country nationals in the light of Treaties provisions like those of Article 21 TFEU, the same cannot be said for the EFTA Court. This latter court in fact has to achieve similar outcomes with different means, so by overstretching the interpretation of the provisions of Directive 2004/38/EC. Overall, the EFTA Court has shown a coherent case-law based on the so-called "fundamental rights approach" and broad interpretations of relevant provisions, to the benefits of EEA nationals and their family members' rights[59]. Tangible examples upholding the Court's linear jurisprudence are provided by *Gunnarsson* case [60] and later on by the judgement in *Yankuba Jabbi*[61] where *inter alia* reference to the first judgement has been made. In both cases the Court asserts that a home EEA State cannot deter its nationals from exercising their EEA-based

[55] Ibid., 639 ff.
[56] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004*, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State*s. In this regard see also, FREDRIKSEN, FRANKLIN (2015: 640 ff); FREDRIKSEN (2016: 98).
[57] Decision of the EEA Joint Committee No 158/2007 of 7 December 2007.
[58] Joint Declaration by the Contracting Parties to Decision no 158/2007 incorporating Directive 2004/38/EC into the EEA Agreement. See also, FREDRIKSEN, FRANKLIN (2015: 639 ff.).
[59] SPANO (2017: 484 ff.).
[60] Judgement of the EFTA Court of 27 June 2014, Case E-26/13, *The Icelandic State v. Atli Gunnarsson*.
[61] Judgement of the EFTA Court 26 July 2016, Case E-28/15, *Yankuba Jabbi v. The Norwegian Government.*

right of free movement, that could indirectly be affected if the country in question does not protect adequately also their family members (rights)[62].

As far as the EU Charter of fundamental right is concerned, the lack of corresponding provisions in EEA law has been essentially circumvented by the judicial activism of the EFTA Court which has repeatedly recognized fundamental rights as general principles of EEA law. With respect to fundamental rights in EEA law it is possible to detect (essentially three) different scenarios. To start with, no problem should exist in dealing with EU Charter provisions mirroring those of the ECHR, given that all the EEA States are parties to it. On the contrary, more complex are those situations in which the European Convention on Human Rights does not provide any support to the EFTA Court or still, when the CJEU and the Strasbourg Court may develop diverging interpretations for substantially identical provisions[63].

From the rank of EU primary law, it is interesting to turn the attention to EU legislative acts, so as to ascertain the – more or less extensive – scope of EEA law also by means of secondary law. The issue of 'EEA relevance', in relation to new EU legislation, defines each time the reach of the EEA law, in a positive or negative fashion according to the outcomes reached (diplomatically) within the Joint Committee. Although the EEA Agreement has conceived a very dynamic mechanism to cope with new EU secondary law, it has not revealed always so efficient in practice. Flaws emerge both at the level of incorporation of EU relevant legislation and implementation of new EEA provisions on the part of EEA/EFTA States – once let in the EEA law. As far as the question of relevance it should be observed that not always the view of EU pillar matches with that of the EFTA one or vice-versa. Even without rejecting explicitly the incorporation of a new EEA relevant act, EFTA States tend to prolong discussions and negotiation within the Committee, even for years from the moment in which the act in question has been adopted by the EU[64]. For this reason, even though in principle the dynamicity of EEA law seems to be preserved, the lengthy of the decision by EEA/EFTA States could actually impede the expected results. Furthermore, the increasing and far-reaching competences of the EU can lead to the adoption of new internal market legislation covering also other subjects, marginal for the EEA law. For this reason, EEA/EFTA States preferred and push for a provisions-by-provision selection, when evaluating the EEA relevance of new EU legal acts[65].

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[62] SPANO (2017: 487 ff.).
[63] FREDRIKSEN, FRANKLIN (2015: 646 ff.).
[64] Ibid., p. 654. This situation occurred with respect to Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 *on the protection of the environment through criminal law*.
[65] Ibid., p. 655. It is curious to remark the author's expression in this regard of another case of EEA/EFTA States' "cherry picking".

To conclude, in the view of the different legal backgrounds surrounding the two EEA pillars, it is worth to mention the disparity linked to the necessity to transpose EU regulations in Norway and Iceland, having a dualist legal tradition. If for EU Member States and Liechtenstein, EU regulations do not require further national implementation, the other two EEA/EFTA countries instead, can register a "transposition-deficit" also with respect to these direct applicable EU acts[66].

Bearing in mind what has just been discussed, it seems that the general functioning of EEA law is secured on the whole by EEA judicial institutions, whose activism and commitment to homogeneity outbalance the passivity or rather negligence of EEA Contracting Parties[67]. These latter in fact, have failed to promote any amendment of EEA (Main) Agreement, leaving unaltered the core part of EEA law albeit the parallel developments in EU Treaties, heading to a renew and broader understanding of (the old) EU internal market.

2.2 The "dialogical" and "dialectical" relation between the two Luxembourg Courts

Even though in the previous sections, it has been noted that the EEA Agreement formally prescribes a unilateral responsibility towards the EFTA Court, considering those homogeneity rules weighting on it, in general both Luxembourg Courts have collaborated to the progress of EEA law and internal market[68]. This signifies that the CJEU as well, in particular the European Court of Justice, has been and still appears committed to the functioning of the EEA Single Market. As a consequence, if one excludes the existence of the CJEU's monologue in the interpretation of EU relevant provisions and/or corresponding EEA ones, silently and unequivocally followed by the EFTA Court, it means that the EEA Courts' relation results rather in a 'dialogue'. Nevertheless, their interaction is not limited to explicit and reciprocal references but it assumes a unique character owing to their common approach in the exercise of judicial review under EEA law. Not by chance, and as

[66] HOLTER (2017: 14). As reported by the article in question, in 2015 the transposition deficit of Iceland and Norway amounted respectively to thirty-four and five not yet transposed EU regulations. To further information see, Internal Market Scoreboard of July 2018, No. 41, of the EEA EFTA States of The European Economic Area, available online. According to these data, transposition deficit of EU regulations in Iceland has decreased from 2017 to 2018 but it still stands at 1,2%; whereas in Norway the situation is overall constant from the last scoreboard in May 2017 with a transposition deficit remaining at 0,1%.

[67] FREDRIKSEN, FRANKLIN (2015: 684).

[68] See, SKOURIS (2014: 3 f.) where the old president of the European Court of Justice in dealing with the EEA jurisdictions' contribution in the development of the EEA Single Market, remarks that 'judicial homogeneity' is the "golden thread that runs through the relationship between the two courts", clarifying this two-sided process.

already remarked, the EFTA Court does not draw on its EEA judicial counterpart only for interpretation of essentially identical or similar law provisions, but also for the development of EEA corresponding fundamental pillars and doctrines[69], despite due adaptations – compared to the EU ones. It should be noted that the EFTA Court has proved the only international tribunal, beside the ECtHR, able to lessen the autoreferential nature of the CJEU case-law in the light of its authoritative status before the European courts[70]. Even without any obligation, the CJEU has consistently referred to it, in different way and for several reasons that it is to say, as leading or supporting argument, through express or tacit dialogue, or better as a proper source of information[71]. Such a varied scenario strengthens the idea that judicial homogeneity within EEA, conceived as a bidirectional duty, has released the EFTA Court from the passive reception of the EU Courts' jurisprudence. However, this outcome, how it will be further explained below, should not be overestimated and interpreted as a 'maxim'.

At this point, it is right to go through the wide range of possibilities surrounding the Luxembourg Courts' communication, so as to gather the main traits and infer general tendencies on the basis of the existent case-law. Before any kind of classification, it should be specified that when assessing the EEA inter-courts interplay reference is jointly to the EFTA Court, the General Court, the ECJ, its Advocates General and, although to a lesser extent, to EU and EFTA national courts. Thus, the EEA judicial interdependence is compound and entails several actors, albeit with a different degree of involvement. As for the relation between the EFTA Court and the General Court it is hard to deduce some generic and recurrent features, due to the limited number of actual cases of judicial exchange[72]. Far richer is on the other hand, the EEA judicial dialogue between EFTA Court and the European Court of Justice. By rejecting the idea of a hegemonized relation and unilateral influence on the part of the ECJ, it means that there exists a mutual and constructive dialogue. Moreover, if one intends the 'dialogue' in its neutral connotation that is, as a mere confrontation in terms of ideas and viewpoints, such a rapport could result either in a positive correspondence and synchrony or interpretative disagreement and discordance – though with regard to a very few of subject matters. That said, it is understandable the pertinence of a terminology referring to a "dialogical" and/or "dialectical" relation[73]. When speaking about contrast however, this should not be conceived in absolute terms, given that each court's position can be adjusted *a posteriori* if not avoided *a priori* by virtue of a similar strategy, so that the first judicial voice

[69] Ibid., p. 6.
[70] GALLO (2010: 159 f.).
[71] BAUDENBACHER (2008: 118 ff.).
[72] Ibid., p. 120.
[73] GALLO (2007: 164) who detects these two parallel forms of EEA Courts' relationship, by underling the EFTA Court's autonomy to enter in a dialogue with the CJEU to influence it positively or at any rate, to display a different view on how to solve a similar situation.

anticipates or better, guesses the ruling of the second court. This latter circumstance can verify in a series of occasions in which the EFTA Court pronounces on a legal issue not yet investigated by the CJEU, providing it a useful starting point. When the opposite situation takes place, the ECJ's preliminary decision on a relevant subject matter, furnishes a helpful indication on which to rely on, even though some exceptions may follow.

The EFTA Court's relationship with Advocates General is as a matter of fact intense, and as that with the Court of Justice is composite and full of nuances (discuss below). Finally, with respect to EEA Court vertical dialogue with national courts, two are the major considerations which merit to be mentioned. From the EU perspective, national courts of the Member States, levering on a slightly different EFTA Court's position, may ask the Court of Justice to revise its current jurisprudence[74]. Therefore, the parallel EFTA Court case-law on the same matter can create an uncertain legal situation, reason why the ECJ has to further express. Interpretation of EEA Agreement concerns in fact, all the Contracting Parties even though EFTA Court has jurisdiction only within the EFTA pillar, as reminded by the Court Opinion 1/92[75].

On the other hand, the cross-conversation with both the Court of Justice and Advocates General can empower the EFTA Court before national courts, providing it more authority so as to appease any claim for a more "State-friendly" interpretation of EEA law.

The overview provided above is not exhaustive, there are in fact other alternatives if, when dealing with the EEA judicial dialogue, one takes into account contemporarily the EFTA Court, the ECJ and its Advocates General. First of all, as the Advocates General's reliance on the EFTA Court case-law dates back to the origin of the EEA Agreement, in several occasions they have brought its judgements to the attention of the ECJ[76], acting therefore as an intermediator between the two EEA jurisprudences. Secondly, it is also true that the ECJ may directly draw upon the EFTA Court settled-case law, albeit Advocates General have not quoted it, neither in a positive nor in a dialectical manner[77]. What is more, the ECJ may decide to side with the EFTA Court even if the Advocates General Opinions suggest a different outlook on the case. Or on the contrary, these latter negative reference to the EFTA Court's case-law can be endorsed by the ECJ.[78]

To be precise, the EEA judicial dialogue can happen through an implicit or explicit form. The EFTA Court's express reference to the ECJ case-law is essentially an absolute rule. On the other hand, if the EFTA Court has since

[74] BAUDENBACHER (2008: 109 ff.).
[75] Advisory Opinion 1/92 of the Court of Justice of 10 April 1992, *Draft agreement relating to the creation of the European Economic Area*, para 19.
[76] BAUDENBACHER (2013b: 369 f.).
[77] Ibid., p. 355.
[78] Ibid., p. 370.

the very beginning treasured Advocates General opinions, only with the advent of the new century it has started to refer explicitly to them[79]. The Court of Justice instead, in several occasions, whilst relying on specular reasonings – occasionally also to achieve different conclusions – has not always cited the EFTA Court judgments explicitly.

Taking for granted the existence of a dialogue between the EFTA Court and the CJEU a clarification is needed with respect to the content of such an interaction. The object of their judicial exchange may be (logically) both the EEA and the EU law. As far as the first is concerned the most significant fields are those of the EEA State liability, the homogeneity principle and last but not least the precautionary principle in food law[80]. With respect to State liability it is right to recall that it was the EFTA Court to acknowledge for the first time such a principle in *Sveinbjörnsdóttir*[81] which was object of explicit reference by the Court of Justice in *Rechberger*[82]where the EU Court recognized such a principle as part of EEA law. This ECJ judgement has been quoted in its turn – as additional support –by the EFTA Court in *Karlsson*[83], to decline the Norwegian Government's plea for a dismissal of EEA State liability's jurisprudence[84]. As for the principle of homogeneity under EEA law, there exists a settled case-law from both judicial pillars, grounds on the idea that equivalent provisions shall be interpreted uniformly. The maximum expression of such a finding is provided in *Bellio Fratelli*[85] in which the ECJ clearly recognized this operational need as weighing on both sides. What is more, the same Court of Justice expressly cited its previous as well as EFTA Court case-law, reasoning on the same line. With respect to the precautionary principle in EEA foodstuff law, it should be cited the landmark "*Kellogg's*"[86] judgement of the EFTA Court which struck a chord in the CJEU jurisprudence, connected to fortified foodstuff *stricto sensu*, and other surrounding sectors, in dealing with human health protection. Several are also those areas, meaningful for the interpretation of the EU law as such, in relation to which the CJEU takes inspiration from EFTA Court to develop its own standpoint on the matter. A first example is in the sphere of "television without frontiers" in which the EFTA Court had the 'privilege' to pronounce before its EEA judicial counterpart. Reference is to *Mattel Scandinavia and Lego*

[79] *Ibidem*.
[80] GALLO (2007: 164 f.).
[81] Advisory Opinion of the EFTA Court *Erla María Sveinbjörnsdóttir*.
[82] Judgement of the Court *Rechberger*.
[83] Judgement of the EFTA Court of 20 May 2002, Case E-4/01*, Karl K. Karlsson hf. and The Icelandic State*, see in particular para. 25.
[84] BAUDENBACHER (2008: 106).
[85] Judgement of the Court of Justice of 1 April 2003, Case C-286/02*, Bellio F.lli Srl v. Prefettura di Treviso*, see in particular para. 34 in which the Court asserts that "both the Court and the EFTA Court have recognized the need" that EEA Agreement and EU Treaties when substantially identical are interpreted consistently.
[86] Judgement of the EFTA Court of 5 April 2001, Case E-3/00, *EFTA Surveillance Authority v. Norway.*

Norge[87], in which the Court expressed on the meaning of the Television Directive 89/552/EEC[88]. It came to the conclusion that it was prohibited to EEA States to impose a generic prohibition on televisions advertising addressed to children if the advertisement was part of a programme received in another EEA State – even though the state control was judged possible in case of misleading advertisement[89]. The same line has been integrally shared later on by the ECJ in *De Agostini and TV-shop I Sverige*[90].

There are also other sectors which merit to be examined, where the EFTA Court case-law has represented a sort of 'standard for review' of the Court of Justice existent jurisprudence. This occurred independently from the fact that the EFTA Court 'went first' on the issue, since its position convinced the other Court so as to adjust its own. The most significant cases belong to the question of parallel imports from one part, and insurance and liability law on the other. With respect to parallel imports, particularly accent is to be posed here to the lawful commercialization of (pharmaceutical) products once they have been repackaged in a certain manner by the parallel importer. The ECJ case-law in the 'struggle' between intellectual property rights and free trade has tended on balance, to protect the former over the second whereas, the EFTA Court has displayed a more moderating approach in balancing between trade mark owner's rights and free market. In *Paranova*[91], upon request by the Norway Supreme Court, the EFTA Court has been called to express on the interpretation of Article 7(2) of the Trademark Directive 89/104 EEC[92]. The EFTA Court was simply under a duty to clarify if the trade mark proprietor had "legitimate reasons" to prevent the marketing of goods in the importation State, because of undue way of repackaging[93], susceptible to damage the trade mark reputation or that attached to its owner. To start with, the Court highlighted that under Article 34 SCA its task was that to provide a general indication within which national judge was asked to behave, to eventually adapt it to the concrete circumstances of the case under scrutiny[94]. In the

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[87] Judgement of the EFTA Court of 15 June 1995, Joined Cases E-8/94 and E-9/94, Forbrukerombudet and Mattel Scandinavia A/S, Lego Norge A/S, paras 57-58.
[88] Council Directive 89/552/EEC of 3 October 1989 *on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activitie*s.
[89] BAUDENBACHER (2008: 92).
[90] Judgement of the Court of Justice of 9 July 1997, Joined Cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, especially para. 37 where explicit reference to EFTA Court judgement is made.
[91] Judgement of the EFTA Court of 8 July 2003, Case E-3/02, *Paranova AS v. Merck & Co., Inc. and Others.*
[92] Directive of the Council of 21 December 1988, 89/104/EEC, *to approximate the laws of the Member States relating to trade marks.*
[93] In the case at hand, it entailed the addition on the product of "coloured stripes" as a mark of parallel importer's own design. The affixing of this graphic sing was found by the Court not sufficient to constitute "legitimate reasons" under Article 7(2), entitling the trademark proprietor to prohibit the commercialization of the affected good.
[94] Judgement of the EFTA Court *Paranova* para. 38.

present judgement, the EFTA Court admitted first of all, that the so-called "necessity test" as elaborated by the ECJ case-law – with particular reference to *Boehringer I*[95] – cannot be mechanically applied when assessing pharmaceutical products' presentation but that a "comprehensive factual investigation leading to a careful balancing of interests"[96] is preferred. According to the necessity criterion, the action of repackaging, altering the authentic conditions of the product in question, may be as a matter of principle forbidden, unless it is needed to not hinder market access to the parallel imported good and, as long as the trade mark owner's rights are also preserved[97]. In *Paranova* the EFTA Court went beyond the stricter application of the necessity requirement referred to hereinabove. In fact, if the external alterations are applied to the imported product to allow the State of importation to comply with different rules or procedures in force at national level, or still in the interest of their own consumers, it means that the repackaged product can be lawfully put in the market. This is why, at paragraph 44 of this judgement, the EFTA Court asserted as follow:

> "[…] the necessity requirement is relevant to the issue of establishing the parallel importer's right to repackage *as such*, where the conduct of the trade mark proprietor and factual or legal trade barriers hinder effective access to the market of the State of importation. Where, as in the present case, the right to repackage is beyond doubt and the parallel importer has, in exercising it, achieved effective access to the market, the necessity requirement cannot be decisive when interpreting the term 'legitimate reasons' in Article 7(2) of the Directive"[98].

In the second case *Boehringer II*[99] the England and Wales Court of Appeal invited the ECJ to clarify the meaning of 'necessity requirement' in the field of "co-branding". The search for major certainty on the issue was explicable for the insurgence of two strands of thought, one nearer to the stricter approach of "necessity test" at the expense of the parallel importer's rights the second instead, under the aegis of the EFTA Court, far more flexible with respect to packaging of products aiming at the creation of a parallel importer's own design[100]. The Court of Justice endorsed the EFTA Court's standpoint in *Paranova*, also making explicit reference to it[101]. In fact, the ECJ achieved the conclusion that necessity criterion shall be verified only as for repackaging of the products 'as such', not also to the "manner" or "style" related to it[102]. Such a finding echoed that of the EFTA Court in *Paranova* where the Court asserted

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[95] Judgement of the Court of Justice of 23 April 2002, Case C-143/100*, Boehringer Ingelheim KG, Boehringer Ingelheim Pharma KG and Swingward Ltd*, especially para 34.
[96] Judgement of the EFTA Court *Paranova* para. 47. See also, BAUDENBACHER (2013b: 345 f.).
[97] Judgement of the Court of Justice, *Boehringer I,* para. 34.
[98] Judgement of the EFTA Court *Paranova* para. 37, emphasis added.
[99] Judgement of the Court of Justice of 26 April 2007, Case C-348/07, *Boehringer and Others v. Swingward Ltd.*
[100] BAUDENBACHER (2008: 110); *ID*. (2013b: 346).
[101] Judgement of the Court of Justice, *Boehringer II*, para. 38, where explicit quotation to the EFTA Court ruling in *Paranova* is made.
[102] *Ibidem*. See also, BAUDENBACHER (2013b: 346).

that the application of the necessity requirement to the strategy through which the parallel imported good is presented, by means of a particular design or advertising, represented a disproportionate limitation to the free circulation of goods[103].

The second subject in which the ECJ has proved responsive to the EFTA Court (divergent) approach is that related to insurance law under EEA. Without investigating in detail, the facts and circumstances of the relevant cases at hand, what is interesting to note is the change of course in the ECJ jurisprudence, to approach EFTA Court ruling in *Finanger*[104]. In that occasion the EFTA Court was called upon by the Norway Supreme Court, to pronounce on the (in)compatibility of Norwegian national law with EEA law[105]. The Norwegian Automobile Liability Act under examination provided that the passenger of a vehicle, conducted by an intoxicated driver, was not entitled to seek or obtain insurance compensation in case of an accident, if she or he knew or had to know about the status of the driver under the influence of alcohol[106]. This was the argument put forward by the insurance company and rejected by the EFTA Court as in violation of EEA law. What is more, the Court denied the arguments sustained by the Government of Norway, that of Iceland and the appellant, claiming that the EEA Motor Vehicle Insurance Directives only covered insurance law, not also personal liability[107]. According to the Court instead, the affected Directives posed restrictions on the possibility on the part of the insurance company to invoke national statutory provisions on liability in order to circumvent its obligation to provide insurance cover, under particular circumstances[108]. For this reason, it did not matter in that case to make any distinction between personal liability and insurance coverage[109].

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[103] Judgement of the EFTA Court *Paranova* para. 45.

[104] Advisory Opinion of the EFTA Court of 17 November 1999, Case E-1/99, *Storebrand Skadeforsikring AS and Veronika Finanger*.

[105] In that case reference is to three Council Directives labelled as "EEA Motor Vehicle Insurance Directives". See, Council Directive 72/166/EEC of 24 April 1972, Second Council Directive 84/5/EEC of 30 December 1983, and Third Council Directive 90/232/EEC of 14 May 1990 *on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles*.

[106] BAUDENBACHER (2008: 108); ID (2013b: 347 f.).

[107] BAUDENBACHER (2013b: 348).

[108] Advisory Opinion of the EFTA Court, *Finanger*, para. 29.

[109] *Ibidem*. By way of knowledge, it should be remarked that even though the EFTA Court considered the Norwegian act as incompatible with the relevant EEA law, the resolution of the case at issue was not so immediate. In fact, the proceeding before the Norwegian Supreme Court involved a 'horizontal relationship' between private parties rather than a 'vertical' one between the State and its citizens. The ultimate problem was therefore, how to solve such an incompatibility, since the majority of domestic judges opined that national law could not be directly set aside. This conclusion eventually fits the limitations the Court of Justice has posed to the horizontal direct effect in EU law, as far as directives are concerned. EU secondary legislation based-rights may be invoked only against a State not also against a private actor.

Soon in *Ferreira*[110], the ECJ was faced with a similar question. However, in that occasion, the Court did not quote the EFTA Court and expressed differently with respect to the content of the relevant Community law under examination. By endorsing the viewpoint of the insurer, the Court of Justice affirmed that the objective of the three Directives regulating insurance liability "do not seek to harmonize the rules of Member States governing civil liability"[111]. This apparent distance between the two courts was then unequivocally overcame in *Candolin*[112], when the ECJ was confronted with the same facts and EEA provisions to those under scrutiny in *Finanger* by the EFTA Court. Although no direct reference has been made to the EFTA Court case-law, the ECJ quoted the paragraph in which Advocate General Opinion remanded to *Finanger*[113]. The underlying object of the referral dealt with the aim of the Community legislation at hand, which ensures – as convened by the EFTA Court – mandatory insurance of vehicles against personal liability, in the whole area of the then Community[114], or better of the EEA. As it emerged in *Candolin*, the Court of Justice and the EFTA Court agreed evidently on the intention of EU and EEA law, precluding national to get around the obligations stemming from international/supranational law, namely to guarantee that civil liability is covered by insurance.

These actual examples simply testify that the ECJ is not indifferent to the EFTA Court case-law. On the contrary, the former Court is willing and open to acknowledged its main EEA judicial interlocutor's activity also as a positive or negative yardstick to build its position on. What is more, even though the Court of Justice seems to quote expressly the EEA judicial counterpart judgements only once[115], such a trend has at any rate lessened its autoreferential attitude. On the whole, by observing the compound scenario regulating the EEA judicial dialogue, it follows that the CJEU is reactive to the need for a uniform interpretation and application of EEA law, implementing a mutual collaboration in this respect.

If this section has provided a general background on the facets of the EEA judicial dialogue, trying to ordinate them in more disciplined categories, the next paragraphs will deal with some particular cases in which the two Courts resulted to be in contrast, in a permanent or rather provisional way. Dialectical relations and eventually if any, outcomes, are not inherently negative for the homogeneity goal presiding EEA law, since they may reveal useful in two

[110] Judgement of the Court of Justice of 14 September 200, Case C-348/98, *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira and Companhia de Seguros Mundial Confiança SA.*
[111] Ibid., para. 23.
[112] Judgement of the Court of Justice of 30 June 2005, Case C-537/03, *Katja Candolin and Others v Vahinkovakuutusosakeyhtiö Pohjola.*
[113] BAUDENBACHER (2013b: 348). See also, Judgement of the Court of Justice *Candolin*, para. 22.
[114] Judgement of the EFTA Court, *Finanger*, para. 25.
[115] BAUDENBACHER (2008: 119).

regards. First of all, they demonstrate an autonomy of thought on the part of both EEA Courts. Secondly, interpretative disputes in their turn, can strengthen the strategy of cross-communication, so as to encourage adjustments in both Courts' case-law in the light of their reciprocal convincing arguments.

2.2.1 The EFTA Court and the role of Advocates General

The EEA judicial dialogue is varied. On the EU side, it involves more than one 'interlocutor'. Though the ECJ is the main EFTA Court's partner, it should be recalled that both the General Court and Advocates General participate to this EEA judicial cooperation. The role of the Advocate General is regulated by Article 252 TFEU according to which

> The Court of Justice shall be assisted by eight Advocates-General.
> Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General. It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

The Advocate General may be defined as an '*amicus curiae*' supporting the ECJ's work, and acting in the interest of respecting the law, rather than in that of the Union[116].

Conversely, The EFTA Court does not have any Advocate General, owing to EEA Contracting Parties' negligence or worse reticence by EFTA States to contemplate such a figure under the EEA Agreement. According to EFTA countries indeed, the homogeneity rules underpinning EEA system, make Advocates General unnecessary, as it is sufficient to look directly at the ECJ jurisprudence[117]. This does not mean however, that Advocates General do not take part to the cross-referencing practice within the context of EEA law. Actually, EFTA Court and Advocate General's judicial exchange is as fruitful as that developing with the central instance of CJEU that is, the ECJ. Moreover, their relation as well, is two-sided rather than monodirectional. The EFTA Court is not indifferent to Advocates General's contributions to EU/EEA law; thus, it ends to 'borrow' their judicial material from EU pillar. Advocates General in their turn, are prone to use EFTA Court jurisprudence as a reliable source of information, when performing their task under Article

[116] To further information see, VILLANI (2016: 198) who also notes that according to the CJEU jurisprudence, the Court of Justice is not bound neither by Advocates General's Opinions nor by the explanations contained therein. What is more, if in the past Advocate General's Opinions were presented in any case, the current wording of Article 252 TFEU stipulates that their intervention is limited to those cases governed by the Statute of the CJEU.

[117] See, BAUDENBACHER (2016a: 142) where the author identifies two other major explanations for Advocates General's absence within EEA system. The first deals EFTA States' unpreparedness as they did not know the institution of Advocates General. The second instead, with an economic discourse, that is, States' unwillingness to provide for much money than those strictly required for the EEA institutional apparatus.

252 TFEU[118], so as to render their opinions more appealing before the EU Court. Such an occurrence is corroborated by the fact that in many cases, the EFTA Court faces novel legal questions as the first European tribunal within EEA[119].

That said, it is quite obvious why this EU judicial body contributes to the development of EEA law and to the performance of judicial homogeneity between the two parallel EEA jurisdictions[120]. The old President of the EFTA Court Carl Baudenbacher in fact, has attributed Advocates General the function of "entrance door" for EFTA Court case-law into that of the Court of Justice[121].

Even without dwelling on specific cases in which the two institutions confront themselves, it is first and foremost important to provide the overall picture of such a relationship in order to gather its main features as well as, peculiarities. Just as the dialogue between the Court of Justice and the EFTA Court described above, it is possible to identify different scenarios with respect to the interaction between the EFTA Court and Advocates General. By means of an examination of the settled EEA case-law, one will note several forms of judicial dialogue. The present section indeed, will prefer an inductive analysis over a simple case-by-case approach, by providing at the same time some salient examples so as to support the theoretical framework. In general terms, both Advocates General and EFTA Court make reference to each other's work, to welcome or rather criticize their respective position. What is more, the referencing practice may develop through explicit quotations or merely by implicit allusions but in both circumstances these two actors have proved to be receptive to each other's material. If EU Advocates General have started from the outset to rely overtly on EFTA Court jurisprudence, the EFTA Court open dialogue with them began in the 2000s[122]. However, currently the interplay between the EFTA Court and Advocates General has evolved into a daily practice[123].

As far as Advocates General are concerned, the first quotation to EFTA Court case-law was made in 1996, by Advocate General Lenz in a case related to

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[118] See, SKOURIS (2014: 10 f.) who detects in the role of 'Advocates General' a 'value added' providing support to the CJEU from one part and the EFTA Court on the other.
[119] Reference is to the so-called EFTA Court 'going-first' cases. See, BAUDENBACHER (2016b: 187).
[120] See, BAUDENBACHER (2013b: 341 ff.) who conducts a detailed study on the relationship between the EFTA Court and the Advocates General, presenting a varied jurisprudence in this regard. Beyond the manifold sectors in which their cross-reference activity occurs, what is interesting to highlight is that the dialogue policy between the EFTA Court and Advocates General is as rich and composite as that with ECJ. To sum up, there could be a dialectical or rather affirmative correspondence or still, a more or less explicit exchange of opinions.
[121] BAUDENBACHER (2013b: 369); ID. (2016b: 189).
[122] BAUDENBACHER (2016b: 190).
[123] *Ibidem*.

cross-border advertising broadcast[124]. More precisely, the Opinion of Advocate General Lenz in *Commission v. United Kingdom*[125], referred to EFTA Court judgement in *Mattel Scandinavia and Lego Norge*[126]. Only in 2002 the EFTA Court referred[127] explicitly to the Advocate General Jacobs Opinion in *Albany*[128], when dealing with European competition law and collective bargaining agreements.

A description of such a type of 'cross-talk' cannot be complete without considering the intersection of another judicial 'voice', that is to say, that of the ECJ. When including this latter institution, the same generic picture gets complicated. If Advocates General tendentially plays the role of intermediator between these two EEA parallel institutions, the EFTA Court from one part and the CJEU on the other, it may happen that the ECJ draws on EFTA Court case-law, even though it was not encouraged to do so by an Advocate General[129]. An example in this regard is *Bellio* case[130] related to the application of the precautionary principle (discussed below) in the situation of preventive action against Bovine Spongiform Encephalopathy ("BSE"). In that occasion, the Court of Justice build its judgement essentially on the reasoning adopted by the EFTA Court in *Kellogg's*[131], relying largely on the precautionary principle to justify restrictive measures against the free circulation of fish flour for feedstuffs' production[132]. Nevertheless, Advocate General Geelhoed in its relative Opinion[133] to the case, did not make reference to the EFTA Court's relevant jurisprudence and he simply hinted at the precautionary principle.

It may also be possible that EFTA Court, despite a well-established ECJ case-law on an issue, explicitly endorses and quotes Advocates General

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[124] See, MENGOZZI (2014: 53) who sketches out in his article a clear examination on the EFTA Court and Advocates General mutual exchange to the refinement of EEA/EU law. Since Mengozzi has been for many years at the CJEU's employment, he focuses his work essentially on EFTA Court's contribution to Advocates General activity within EU context.

[125] Judgement of the Court of Justice of 10 September 1996, Case C-222/94, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*.

[126] Judgement of the EFTA Court of 16 June 1995, Joined Cases E-8/94 and E-9/94, *Mattel Scandinavia A/S and Lego Norge A/S.*

[127] Judgement of the EFTA Court of Justice of 22 March 2002, Case E-8/00, *Norwegian Federation of Trade Unions and other v. Norwegian Association of Local and Regional Authorities and others*, para. 35.

[128] Judgement of the Court of Justice of 21 September 1999, Case C-67/96, *Albany International BV and Stichting Bedrijfspensioenfonds Textielindustrie*; (related) Opinion of the Advocate General Jacobs of 28 January 1999.

[129] BAUDENBACHER (2013b: 369 f.), see *supra* note 116.

[130] Judgement of the Court of Justice of 1 April 2003, Case C-286/02*, Bellio F.lli Srl v. Prefettura di Treviso*.

[131] Judgement of the EFTA Court of 5 April 2001, Case E-3/00, *EFTA Surveillance Authority v. Norway.*

[132] BAUDENBACHER (2013b: 355 f.). To further information on the circumstances of the case see also ID. (2005: 382 ff.) where the author also emphasises the importance of such a judgment for the acknowledgment of the homogeneity principle on the side of EU.

[133] Opinion of Advocate General Geelhoed of 29 January 2004, Case C-286/02, *Bellio F.lli Srl.*

Opinions[134]. This happened for instance with respect to the EFTA Court judgement in "*University of Oslo*"[135] where it ruled on the earmarking of academic posts for women, referring extensively to Advocates General relevant conclusions. Finally, the Court held that reservation of a certain amount of academic posts for the underrepresented sex is incompatible with the 'principle of equal treatment'[136]. Another actual hypothesis is that, although Advocates General appear more sceptical *vis-à-vis* EFTA Court jurisprudence, to side almost entirely with ECJ settled case-law, this latter Court ends to follow EFTA Court's stance. This occurred in *Commission v. Denmark*[137] in connection to fortified foodstuffs' commercialization, where the ECJ distanced itself from its past jurisprudence to look at the EFTA Court judgement in *Kellogg's*, providing a more innovative approach for the resolution of the case at hand. On the contrary, Advocate General Mischo suggested the Court of Justice to rest on its old *Sandoz* judgement[138], rather than downgrading its importance[139]. Overall, though it has been observed that the EEA judicial dialogue between the EFTA Court and EU Advocates General has triggered a cross-fertilization process, the concrete outcome in each single case varies according to individual attitudes to open such a 'conversation'[140].

Against this background, it is right to advance further observations on the more or less comparable competences carried out by these two EEA judicial under EU Treaties from one part, and EEA Agreement on the other. A striking and curious aspect is that both the EFTA Court and Advocates General issued 'opinions' which have, at least from a formal point of view, no binding effect[141]. In fact, these legal acts may exert a far more persuasive power than

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[134] See, SKOURIS (2014: 12) who observed that Opinions of Advocates General may be an important source of inspiration for the EFTA Court case-law, regardless of whether the CJEU has pronounced on that specific matter.

[135] Judgement of the EFTA Court of 24 January 2003, Case E-1/02, *EFTA Surveillance Authority v. The Kingdom of Norway*, see in particular paras 37 and 40 where explicit reference to Advocates General Opinions is made.

[136] Ibid., para. 59.

[137] Judgement of the Court of Justice of 23 September 2003, Case C-192/01, *Commission of the European Communities v. Kingdom of Denmark.*

[138] Judgement of the Court of Justice of 14 July 1983, Case C-174/82, *Sandoz BV and the Government of Netherland*; see also, Opinion of the Advocate General Micho of 12 December 2002 especially paras 103 and 113 where Micho asserted that *Sandoz* ruling was far from being 'obsolete' in its view and that, this judgement had to be reconciled with the new jurisprudential advancements and trend flowing from EFTA Court's risk analysis, outlined in *Kellogg's*.

[139] See to that effect, BAUDENBACHER (2013b: 358) where the author, as well as old president of the EFTA Court, presents *Commission v. Denmark* case as a 'trade-off' situation for the ECJ. That is, this latter Court was confronted with the alternative to "stick on" *Sandoz* or rather follow EFTA Court new jurisprudence. In this regard see also, ID (2016b: 184 f.).

[140] BAUDENBACHER (2008: 112). Here the author notes that as for Advocates General dialogue policy with EFTA Court, the final result depends on individual persons. For instance, Advocate General Francis G. Jacobs revealed a very responsive partner and collaborator in this regard.

[141] MENGOZZI (2014: 54 ff.) who remarks that such a legal qualification is not *per se* evocative of the subsequent legal effects produced by these 'opinions' in their respective legal order.

that foreseen or expected. With regard to Advocates General Opinions, their decisive role for EU Court's activity is testified by their constant reception on the part of the ECJ, even if the Court could deliberately choose to ignore them[142]. The EFTA Court 'advisory opinions' under Article 34 SCA, as it has been already explained in the foregoing chapter, are tendentially followed by national courts of the EFTA States, despite they are not obliged to do so, pursuant to the mechanism enshrined by the Article in question.

To sum up, EFTA Court judgements have proved to be important precedents for EU Courts and Advocates General alike. The result was that to keep a homogenous and dynamic EEA, as well as that to improve both EU and EEA law.

2.3 A comparative study of the relevant EEA Courts' case law (the three main areas: food safety law, State monopoly, trade mark rights)

The present part of the work will proceed through a case-by-case approach, integrated with backdrop assessments, in order to grasp the effects of the EEA Courts' interaction. Their interdependence, aiming at homogeneity, can also end in contrasts, justified by the different scope underlying the EEA Agreement.

It is necessary to anticipate that the discussion will focus on some main areas of EEA and/or EU law, where the interplay between the CJEU and the EFTA Court has led to a "fertilization" of their case-law.

Their rulings in fact, can act each time as benchmark with which one court intend to comply, or conversely it is preferred to deviate from, according to the specificity of the case at hand, just as the diverging reach of the two sets of norms. It follows that the inherent differences of the EEA law from one part, and of EU law on the other, legitimatize 'heterogeneity', assuming that it is appropriate to pursue persistently 'homogeneity' also under those circumstances. That is to say that, the existence of the EEA Agreement as an independent and "distinct legal order of its own"[143] does reasonably require and explain, though in exceptional occasions, the achievement of dissimilar conclusions. These latter however, may also reveal positive for the status of the EFTA Court as an autonomous thinker, able to understand when the universal uniformity rule does not apply and as a result, it is not exactly inhomogeneity that will prevail.

[142] Ibid.
[143] Advisory Opinion of the EFTA Court, *Sveinbjörnsdóttir* para. 59.

2.3.1 The *Kellogg's* case and its impact on CJEU settled case-law

The first topic to deal with is that related to food law and the (food safety general) precautionary principle, whose application in this field was not very early. The origin of precautionary principle in EU law dates back to the Treaty of Maastricht which ratified a legal basis for it, though in relation to environmental policy and law[144] that is, Article 191(2) TFEU[145], then Article 174(2) EC. The provisions contained therein mirror those enshrined in Recital 9 of the Preamble to the EEA Agreement, always circumscribed to the environment protection. As for its application in food law, it should be noted that despite the absence of any formal reference in the then Community law of the principle of precaution in food law, EU Courts have been confronted very soon with the necessity to balance between the free movement of goods and public health interest[146], in case of scientific uncertainty on the quality or rather, harmfulness of certain kind food. More precisely, a long-standing and recurrent issue in this regard is that of the marketing of the so-called enriched or fortified foodstuff and their potential risks for human health. With respect to such a dilemma – or better mediating activity – measured both the EFTA Court and the CJEU, with reference both to the Court of Justice and the General Court. The mutual exchange in such a sphere of law among these EEA judicial institutions, based on systematic cross-referencing and reciprocal understanding, has fostered the refinement of precautionary principle in food law, sketching out even more its field of application, boundaries and *ratio*. The deepening of such a subject-matter is perfectly consistent and noteworthy for the present analysis, considering the role played by the EFTA Court "*Kellogg's*" judgement of April 2001. The Court's ruling has been welcomed as the first clear example in which a regional tribunal has handled the issue of fortification policy and practice levering *explicitly* on the precautionary principle, as a sufficient legal instrument at the disposal of Member States so as to curb the free circulation and marketing of foodstuffs, for reasons of public health[147].

Nevertheless, despite the merit and the undeniable influence exercised by the EFTA Court in this regard, one cannot overlook the parallel contribution and building of precautionary principle in food law by EU Courts – arising before

[144] ALEMANNO (2007) who describes in his paper the historical evolution of precautionary principle in food law, focusing first on the Court of justice and the General Court relevant judgements, to eventually investigate on the EFTA Court case-law, able to influence the subsequent EU Courts' jurisprudence in this regard.

[145] According to which: "Union policy on the environment […] shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay".

[146] As for the relation of the precautionary principle with the need to find a compromise between the exigence to safeguard human health and the principle of free movement of goods see, Judgement of the EFTA Court of 5 April 2001, Case E-3/00, *EFTA Surveillance Authority v. Norway*, para. 28.

[147] GALLO (2007: 167).

and after the Kellogg's case. The first clues for the principle in question appeared in relation to the validity of some restrictive measures, as the Commission Decision 96/239/EC on emergency measures to protect against bovine spongiform encephalopathy ("BSE") to protect human health[148]. The BSE Decision imposed a generalized ban against the export of United Kingdom's bovine meat, limiting the intra-EU trade and related imports from the country. The United Kingdom contested the legitimacy of the Community's legal act before the Court of Justice, whose verdict started to outline the bases for the precautionary principle in EU food law. Reference is to the case *United Kingdom v. Commission*[149] in which the Court had to manage the problem linked to scientific uncertainty about the hazard of transmission of harmful effects from sick animals to humans, through the consumption of meat. The main argumentation held by the Court was that in situation of possible, even if not absolute health danger, protective measures could be adopted, without waiting that "the reality and seriousness of those risks become fully apparent"[150]. What is more, the institutions' entitlement to implement this kind of decisions was further validated by the very nature of the abovementioned emergency measure, namely 'provisional'. This means that it could be reviewed at any time in the future, once new and more complete scientific information as well as a comprehensive examination of the state of affairs will arise[151]. Finally, in fact, the Court did not judge the Commission decision as overtly inappropriate.

Alongside this 'embryonic' configuration of the precautionary principle in food safety law, it is worth to recall another relevant ECJ judgement in *Sandoz BV* (hereinafter "*Sandoz*")[152], dealing with enriched foodstuff and quoted by the EFTA Court in Kellogg's. The EFTA Court in fact, deemed *Sandoz* as a valid point of departure for its own ruling, due to the need to respect the objective of judicial homogeneity under EEA law when handling similar issue, in which the ECJ "went first". The case at hand in *Sandoz* was connected to food additives' daily intake and their potential adverse effect on human health. The object of the controversy concerned in particular, the admissibility of the sale of sport nutrition products integrated with vitamins by Sandoz company, without a ministerial authorization. Under a request for preliminary ruling, the Court was called upon to determine if Community law – with reference to free movement of goods' provisions – precludes (Dutch) national regulation forbidding, in the absence of administrative authorization, the commercialization of food enriched with vitamins, legally traded in another

[148] Decision of the Commission 96/239/EC of 27 March 1996 *on emergency measures to protect against bovine spongiform encephalopathy*. See also, ALEMANNO (2007).
[149] Judgement of the Court of Justice of 5 May 1998, Case C-180/96, *United Kingdom v. Commission.*
[150] Ibid., para. 99.
[151] Ibid., para. 101.
[152] Judgement of the Court of Justice of 14 July 1983, Case C-174/82, *Sandoz BV and the Government of Netherlands.*

Member State[153]. The core of the problem stemmed, once again, from the scientific uncertainty linked to the effects of an excessive consumption of vitamins for the human organism, as they are not *per se* dangerous substances. Put another way, the risk of vitamins' overconsumption within the overall nutritional intake of a person, was not absolutely certain from a scientific viewpoint, but it could not be completely excluded. In the lack of indisputable scientific assessment and knowability with respect to the exact quantities of vitamins, the Court had mainly to decide if restriction on marketing of food to which vitamins had been added, was permissible on the grounds of the current Article 36 TFEU (the old Article 36 EEC Treaty). The Court concluded that

> in so far as there are *uncertainties* at the present state of scientific research it is for the Member States, in the absence of harmonization, to decide what degree of protection of the health and life of humans they intend to assure, having regard however for the requirements of the free movement of goods within the Community[154].

As a result, national rules banning fortified foodstuffs' marketing, without a prior ministerial permit, and lawfully commercialized in another Member State, were not found to be incompatible with Community law. Finally, the Court adds that notwithstanding the discretion left to the states, by virtue of the proportionality principle, they have to authorize the sale "when the addition of vitamins to foodstuffs meets a real need, especially a technical or nutritional one"[155]. This latter statement is notably significant for the following developments of EEA Courts' case-law, in this restricted field of enriched foodstuffs. That is, this consideration has provided a legal basis for the articulation of an improper *a contrario* argumentation, by means of which national governments have justified their restrictive measures against the free circulation of fortified food products. In other terms, when there is no nutritional need in the population for the addition of given nutrients to certain foods, domestic authorities may decide to prohibit their import or marketing, diverting the attention from the real legitimate reason to justify restrictions namely, the risk to human health.

So far, it has been observed how the ECJ contributes to delineation of the precautionary principle in food law, but although the recurrent occasions in which it was faced with the issues referred to hereinabove, neither an express mention nor a conceptualization of such a principle have been made in EEA Courts' case-law until the *Kellogg's* judgement. Nevertheless, it is right to specify that before the EFTA Court's ruling, the Commission delivered a Communication[156] on the precautionary principle to shed a light on it by providing clearer guidelines than those general and scattered indications furnished by EU Courts' jurisprudences. Later on, in 2002 the precautionary

[153] Ibid., para. 6. See to that effect also, GALLO (2007: 167).
[154] Ibid., para. 16, emphasis added.
[155] Ibid., para. 20.
[156] Communication from the Commission, COM (2000) 01, *on the precautionary principle*.

principle has been formalized by Article 7 of the Regulation (EC) No 178/2002[157] giving to it a statutory recognition within the Union.

At this point it is right to turn to the EFTA Court's Kellogg's case, in order to understand its impact on the EU Courts' case-law and their reciprocal commitment to homogenous application and interpretation of EEA (or EU) law. The foodstuff discipline has revealed as a truly fertile ground on which the EFTA Court, the Court of Justice and the General Court have collaborated along the same line, each relying on the other' s argumentations to consolidate their own position. The *EFTA Surveillance Authority v Norway* case (or simply *Kellogg's*) is in fact, emblematic to perceive the responsive behaviour on the side of EU, to the EFTA Court jurisprudential contributions. Not by chance the *Kellogg's* case has oriented the subsequent evolution and definition of the precautionary principle, chiefly when appealed by a Member States in adopting measures hurting the intra-EU trade[158]. Hence, it was in that case that a problem of enriched food product's imports in EEA/EU law has been solved levering on the aforementioned food safety general principle. The EFTA Court dismissed the Norwegian Government's argument according to which the lack of a nutritional need in the domestic population, justified the ban against the import and commercialization of cornflakes to which vitamins and iron were added, and which were legally produced and marketed in another EEA State[159]. The (misleading) nutritional argument is pertinent in relation to a proportionality test, not central when assessing the validity of restrictive measures affecting commerce in EEA, for which instead, considerations anchored to public health protection are preferred[160]. The reasoning around proportionality requirement evokes indirectly that put forward by the Court of Justice in *Sandoz*[161]. In terms of law, the EFTA Court had to handle with the interpretation and application of Articles 11 and 13 EEA, the first linked to the free movement of goods while the second with derogation to this general imperative in the light of specific circumstances – amongst which protection of human health is an example[162]. Thus, the Court had to evaluate if prohibitive action by the State even if in contrast to Article 11 EEA, was legitimate by virtue of Article 13 EEA. In this respect, it is appropriate to

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[157] Regulation (EC) of the European Parliament and of the Council of 28 January 2002, no 178/2002, *laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety*.
[158] ALEMANNO (2007).
[159] BAUDENBACHER (2005: 379). ID. (2008: 94).
[160] Judgement of the EFTA Court, *EFTA Surveillance Authority v. Norway*, paras 27-28.
[161] Judgement of the Court of Justice, *Sandoz*, paras. 18-19, dealing with the principle proportionality, according to which Member States in prohibiting imports from another State, shall limit themselves (only) to what is necessary for the protection of human health.
[162] Pursuant to Article 11 EEA "[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties". On the other hand, Article 13 EEA recites that "[t]he provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans […]". These two Articles mirror respectively, Articles 34 and 36 TFEU.

highlight that the accent posed on human health protection as the primary concern to safeguard, when implementing restrictive measures, is shared both by the EFTA Court and the European Commission submitting observations pursuant to Article 20 of the EFTA Court's Statute. In fact, as already underlined in the foregoing sections, it is rare, considering the need to preserve homogeneity in EEA law, that the point of view of the EFTA Court distances itself from that of the Commission[163].With the purpose to grasp the contents and the required threshold so that a State may invoke the precautionary principle, it is indispensable to focus jointly on the weak considerations advanced by the Government of Norway, and the Court's reasoning clarifying parameters to be met when invoking the application of food safety preventive measures. As a matter of fact, Norwegian Government's argumentations have been deemed insufficient by the Court to restrict imports on breakfast cereals integrated with vitamins and minerals, reason why the country has eventually been accused of failing to fulfil its obligation under EEA law, notably those deriving from Article 11 EEA. In a similar way to what has been affirmed by the ECJ in *Sandoz*, the EFTA Court itself acknowledges that in the absence of harmonisation and well defined scientific results, it is up to Contracting Parties to establish the level of human health protection they are willing to ensure, paying due account to EEA requirements, as those related to free movements of goods[164]. As a consequence, they enjoy a margin of discretion as for the risk assessment and management, under which they can appeal to precautionary principle in order to legitimise a marketing ban[165]. Anyway, the same Court overtly states that such a discretionary power is subordinated to judicial review in order to avoid a leap from discretional to arbitrary decisions[166].

The invocation of the principle in question is not so straightforward, that is to say that some preconditions shall be respected. The EFTA Court synthetically draws up them in its judgment, to better frame, in general, the application of those precautionary measures and at the same time to dismantle the pleas put forwards by the Kingdom of Norway to prohibit (cornflakes) imports. So that precautionary principle may be invoked, it is sufficient to display the existence of "relevant scientific uncertainty" with respect to the hazard for human health connected, in that particular circumstance, to the addition of nutrients on food products[167]. In fact, though relying on the most recent scientific data a comprehensive risk analysis can be adequately made, this may reveal

[163] See Judgement of the EFTA Court, *EFTA Surveillance Authority v. Norway*, paras 15 and 27 where the Commission and the EFTA Court stressed the primary concern of human health rather than the nutritional need's aspect, to justify any government's limiting measures.
[164] See Judgement of the EFTA Court, *EFTA Surveillance Authority v. Norway*, para. 25.
[165] Ibid. See also, BAUDENBACHER (2008: 94) where the author depicts its own analytical viewpoint on the Kellogg's case, by reconstructing the facts, the points of law, and background considerations.
[166] Ibid., paras 25 and 32, respectively on the subordination of discretionary measures to judicial review and rejection of arbitrary measures on the basis of precautionary principle.
[167] Ibid., paras 25-26.

inadequate to detect with certainty the nature of the danger. However, owing to the probability that persistence of significant harm will occur, the precautionary principle endorses the implementation of restrictive manoeuvres[168]. The preventive as well as limiting measures, shall rest on scientific evidence, be proportionate, non-discriminatory, transparent and last but not least, consistent with other comparable actions already undertaken[169]. Once there is sufficient place for precautionary principle, it should be complemented by the proportionality one. Bearing in mind such a framework, within which the precautionary principle flourishes as a valid regulatory mean to curb free movement of goods in EEA, it is possible to turn the attention to the reasons for the EFTA Court's dismissal of Norway's trading ban. Two are the major points to be stressed. First of all, the absence of a nutritional need has been considered a too soft argument to justify an import ban, what is more, Norwegian fortification policy has found to be inconsistent since it has allowed the enrichment of other domestic food products for many years[170]. On the other part, the comprehensive risk evaluation carried out by Norwegian authorities has been judged inadequate, given that mere hypothetical or conjectural considerations are not sufficient[171]. In the light of the abovementioned evaluations, it follows that the use of precautionary principle in that situation, simply corresponded to a concealed manifestation of trade protectionism[172].

The Kellogg's judgement struck a chord in the EU Courts' subsequent case-law, as it has been repeatedly quoted in the General Court, then CFI, relevant sentences and those of the ECJ alike. Therefore, the systematic cross-talk among these courts in this sphere, contributed to the shaping of the precautionary principle.

In cases *Pfizer Animal Health*[173] and *Alpharma*[174] concerning the addition of antibiotics in animal feedings, the CFI recognized the precautionary principle, making explicit mention to it, as a general principle of Community law, arguing that at least implicitly it had already been acknowledged by the old and settled Community courts' case-law. Nevertheless, it has been observed that from these judgements it follows mainly a negative definition of the principle in question, related to conditions which are deemed *insufficient* so that precautionary measures can be adopted[175]. According to the General Court "preventive measure *cannot* properly be based on a purely hypothetical

[168] Ibid., paras 30-31.
[169] Ibid., para. 26.
[170] Ibid., paras 40 f.
[171] Ibid., paras 37 and 42.
[172] Ibid., para. 33.
[173] Judgement of the Court of First Instance of 11 September 2002, Case T-13/99*, Pfizer Animal Health SA v. Council of the European Union*, see in particular para. 115.
[174] Judgement of the Court of First Instance of 11 September 2002, Case T-70/99 *Alpharma Inc., v. Council of the European Union*, see particularly para. 136.
[175] ALEMANNO (2007)

approach to the risk, founded on mere conjecture which has not been scientifically verified"[176], which is essentially what the EFTA Court opined in *Kellogg's*.

Later on, in *Commission v. Denmark*[177] the ECJ faced a similar issue to that under scrutiny in *Kellogg's* which lent a useful aid to the Court. As a premise, it should be noted that the Kingdom of Denmark's supporting argument was built on *a contrario* deduction, like that of the Norwegian Government in *Kellogg's*, inferred from the Sandoz's judgement hereinabove. This means that according to the Danish Government, lacking a nutritional need within the national population for a given fortified foodstuff, domestic authorities may prohibit its production and marketing within the country, pursuant to Article 30 TEC, currently Article 36 TFEU. Nevertheless, while rejecting the Danish Government's stance, the ECJ recognized the precautionary principle defined in *Kellogg's*, and it detected analogous prerequisites to enable its application[178], complementing the panorama formerly outlined by the General Court in this respect. The *Commission v. Denmark* case, is important substantially for two aspects. The first one is related to the wide consideration attributed to the EFTA Court's *Kellogg's* judgement, explicitly cited six times, when the ECJ was confronting (again) with the task to mediate between free trade and public health protection. The second instead, refers to the effect that the EFTA Court's judgement on fortified foods' issue had on the ECJ previous and settled case-law. In fact, in *Commission v. Denmark* the Court had to clarify the meaning of those conclusions achieved in *Sandoz*, which lead to misinterpretations, with regard to the nutritional need requirement. Emblematic to that effect is paragraph 54 of this ruling in which the Court of Justice asserted that

> "contrary to the interpretation of the Sandoz judgement suggested by the Danish Government, the absence of such a need cannot, by itself justify a total prohibition, on the basis of Article 30 EC, of the marketing of foodstuffs lawfully manufactured and/or marketed in other Member States"[179].

More than a simple revision, one could argue that the ECJ finally overruled *Sandoz*'s decision, adhering completely to *Kellogg's* judgement[180].

By way of knowledge, it is opportune to underline that the EFTA Court judgement just cited, influenced the EU Courts' jurisprudence also in other sectors than those strictly conned to fortification policy and food additives[181]. An example is the case of *Monsanto Agricoltura Italia SpA v. Presidenza del*

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[176] Judgement of the Court of First Instance, *Pfizer Animal Health SA*, para 143; Judgement of the Court of First Instance, *Alpharma*, para. 156, emphasis added. See also, BAUDENBACHER (2008: 95).

[177] Judgement of the Court of Justice of 23 September 2003, Case C-192/01, *Commission of the European Communities v. Kingdom of Denmark.*

[178] SKOURIS (2014: 8).

[179] Judgement of the Court of Justice, *Commission v. Denmark*, para. 54.

[180] BAUDENBACHER (2016b: 185).

[181] BAUDENBACHER (2008: 95).

Consiglio dei Ministri[182] in which the Court of Justice had to handle the problem of precautionary principle's application in relation to the release of genetically modified organisms, relying on EFTA Court ruling in *Kellogg's*.

Precautionary principle whose application is subject to judicial review, is a general principle of EU food safety law, reason why it creates an 'onus' upon the courts to define its limits, positive content and justifiability. As a 'principle' in fact, it has also to be counterbalanced with other ones (as that of proportionality for instance), thus, it requires a 'mediating activity' towards judicial institutions. However, if the answers provided by the courts are not coherent, there could be a problem of legal certainty[183], curiously associated to a problem of definition of 'scientific uncertainty' on the adverse effects of some fortified food products. Nevertheless, it stems from the foregoing analysis that the EEA judicial dialogue in this field has fostered a common vision among the Courts, a development of EU/EEA law and produced greater clarity as regards precautionary principle's application.

2.3.2. Assessing the autonomy of the EFTA Court looking through the sectors of alcohol advertisement and State alcohol monopolies

Resting on the theme of the use of precautionary principle outside the field of food safety, it is necessary to refer to the EFTA Court judgement in *Pedicel AS v Sosial- og helsedirektoratet* ("*Pedicel*")[184]. In a request under Article 34 SCA a Norwegian Court asked *inter alia*, how the use of precautionary principle in the sector of wine advertisement rather than on the product as such, was compatible with both the EFTA Court and Community Courts' case-law. In answering, after that the EFTA Court listed some related cases of the three EEA Courts, it dismissed the application of the precautionary principle in the case at issue. By taking a decision prior to its judicial 'colleagues" on the matter, the Court showed autonomy and prudence alike[185]. If it is true that the Court expressed first on this subject area, at the same time it seems that it eluded to give a direct answer to the question. In fact, the EFTA Court rejected the relevance for the precautionary principle in that case as there was not uncertainty with respect to the harmful effects of alcohol on human health but on the other hand, it affirmed that it is not contested that "uncertainty *may be* present with regard to the assessment of the effects of the advertising on the consumption of alcoholic beverages"[186]. According to the Court, the situation related to the pending case did not leave room for the application of the principle, as it had been formulated until that moment by

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[182] Judgement of the Court of Justice of 9 September 2003, Case C-236/01, *Monsanto Agricoltura Italia SpA and Others and Presidenza del Consiglio dei Ministri and Others*.
[183] ALEMANNO (2007).
[184] Judgement of the EFTA Court of 25 February 2005, Case E-4/04*, Pedicel AS and Sosial- og helsedirektoratet (Directorate for Health and Social Affairs)*.
[185] GALLO (2007: 169) who reasons on the EFTA Court's ability to pronounce first on a question, whose conclusions may also influence the CJEU future jurisprudence, when called on to express on similar matters.
[186] Judgement of the EFTA Court*, Pedicel AS*, para. 60, emphasis added.

the EEA judicial institutions. To be critical, not in an oppositional manner, it is possible to state that eventually the Court put a limit on the extension of the precautionary principle in a domain where no EEA Court had still pronounced or, that it simply opined its 'incompatibility' with that specific sector of alcoholic beverages. The rationale for a similar conclusion can derive from the fact that, in the opinion of the EFTA Court, the wine advertisement is "inseparably linked"[187] to that product's sale or trade and ultimately, to its consumption.

Pedicel case is noteworthy also for another reason, given that in that occasion, the EFTA Court took the distances from the European Commission and ESA's stance. In order to provide some background information, it should be summarily explained that the case dealt with the applicability of Article 11 EEA and Article 36 EEA, respectively on the free movement of goods and of services, to wine. This latter product in fact falls outside those listed in Article 8(3) EEA enumerating the goods covered by the EEA Agreement. Even though the non-application of Article 11 EEA to trade in wine, the Commission and the Surveillance Authority opined that the sale of the service of wine advertisement was feasible under Article 36 EEA[188]. This result was deemed possible if one discerns between the sale of the product from one part, and the sale of the advertisement service on the other. As regards the EFTA Court however, such a distinction does not work since, the service at issue was inherently connected to the sale/trade of wine[189]. The *ratio* guiding the EFTA Court's position is anchored, as it has manifestly stated, to the difference in scope between the EU and EEA law. The Court noted that EEA Agreement differently from what was at that time the Treaty establishing the European Community ("EC Treaty"), does not entail agricultural or fishery products[190]. The explanation for the exclusion of some products from EEA Agreement's coverage, is rooted in the wider discretion left to EEA/EFTA States, with respect to the regulatory power in some areas, as for instance that of alcoholic beverages[191]. The existence of such a difference implies a distinct interpretation of EEA/EU rules in that particular case, in order to preserve the will of the masters of the Agreement, which excluded some fields of competences from the EEA level.

Another prominent topic, object of a comparative analysis, is that of State alcohol monopolies. In case of *Wilhelmsen* v. *Oslo kommune*

[187] Ibid., para. 34.
[188] Ibid., paras 31 ff. This because the true interest of Pedicel's business was that to sell an advertisement space (to wine) rather than the product by itself. See also, Article 36 EEA pursuant to "there shall be no restrictions on freedom to provide services within the [EEA] territory".
[189] Ibid., para. 34.
[190] Ibid., para. 24.
[191] Ibid., para. 25. For a critical assessment on *Pedicel* case see also, GALLO (2010: 163).

("*Wilhelmsen*")[192], the EFTA Court reached a different conclusion from that adopted by the Court of Justice, in a subsequent and similar case, as regards the circumstances of facts and law. In *Wilhelmsen* the EFTA Court was called upon to express on the interpretation of Articles 11, 13 and 16 EEA in order to clarify if EEA law precludes Norwegian legislation on the sale of alcoholic beverages[193], governing a State domestic monopoly for the retail sale of these products. Basically, it had to balance between the establishment of national (State-owned) monopolies having a commercial character intended thus, to pursue a public aim, with the fundamental principle of free circulation of goods, within the common market. The problem arose from the discriminating licensing system provided by national legislation with respect to foreign producers, from which the monopolistic company (Vinmonopolet) was *not* entitled to make direct imports. To be more precise, the affected national provisions conferred by default a wholesale license to domestically-established producers of beer, needed as a precondition to supply alcoholic beverages to Vinmonopolet[194]. However, the same national regulation imposed to producers residing in another EEA State to be represented by a licensed wholesaler and importer in Norway, whose licence had to be granted by Norwegian licensing authorities[195]. Therefore, a foreign producer, compared to a domestic one, had to apply for and obtain a wholesale licence, in order to supply its products to Vinmonopolet and eventually to resale them to consumers. The controversy derives in that specific case, from the failure to grant a licence to a given company for sale of beer with more than 4.75% alcohol by volume, given that only Vinmonopolet outlets are entitled to sell beverage having this high alcohol content[196]. The EFTA Court finally asserted that the exclusive right of sale conferred to the monopoly company hereinabove, was incompatible with Article 11 EEA concerning the prohibition against restrictions on imports, in derogation of which could neither be invoked the application of Article 13 EEA. In fact, even though such a restrictive measure could potentially be justified for reasons of public health, in the light of Norwegian alcohol policy's intention to decrease alcoholic beverages' supply and consumption, the Court dismissed the applicability of any exemption by virtue of Article 13 EEA. This because, it esteemed 'disproportionate' the measure provided by Norwegian national legislation to pursue its aim[197], ending in an arbitral and/or disguised restrictive action basically to protect national products from external ones. Additionally, Norwegian Alcohol Act with particular reference to licencing

[192] Advisory Opinion of the EFTA Court of 27 June 1997, Case E-6/96, *Tore Wilhelmsen AS and Oslo kommune.*
[193] Norwegian Act of 2 June 1989, no. 27, *on the sale of alcoholic beverages* ("the Alcohol Act"), with reference to Section 3-1 paragraph 1.
[194] Advisory Opinion of the EFTA Court, *Wilhelmsen AS*, para. 88.
[195] Ibid., paras 59 ff. In the case at hand, under the Norwegian Alcohol Act the licensing authority was Oslo commune, which dismissed Wilhelmsen's application arguing that only retail outlets belonging to Vinmonopolet could sell strong beer.
[196] Ibid., para 93.
[197] Ibid., pars. 91 ff. See also, GALLO (2007: 173).

provisions contained therein, was found to be incompatible also with Article 16 EEA. Pursuant to this Article in fact, State monopoly of a commercial character shall be adjusted so that there will be no discrimination in terms of conditions under which products are delivered and traded between EEA nationals. However, the Court observed that it was the whole and intrinsic rationale of the monopoly, so as regulated by national legislation, to cause discrimination between domestic and foreign products, owing to a licencing system applying more heavily to outside producers[198]. Therefore, to sum up, for the EFTA Court, the Norwegian Alcohol Act's contested provisions, resulted incompatible both with Article 11 and 16 EEA. It is exactly in such a conclusion which resides a different interpretative approach to that embraced, later on, by the Court of Justice in *Allmänna Ăklagaren v. Harry Franzén* ("*Franzén*")[199]. In that occasion the Court tackled a very similar situation and it was called to judge the compatibility of Articles 30 and 37 TEC with a Swedish Law on Alcohol of 16 December 1994. The controversy, as in *Wilhelmsen*, dealt with that part of the national normative discipling a State-owned monopoly corporation, charged with the exclusive retail sale of wine and other alcoholic beverages[200]. Like the EFTA Court, the Court of Justice ascertained a violation by the domestic monopoly regime, of Article 30 of the EC Treaty (now Article 34 TFEU), mirroring Article 11 EEA. Unlike the EFTA Judge however, it found the Swedish act compatible with the Article 37 EC (now Article 37 TFEU), regulating State alcohol monopolies of commercial nature, corresponding to Article 16 EEA. The Court of Justice reached a different outcome since it did not attribute to the functioning of the monopoly by itself the discrimination between Member States' nationals. On this point, it should be noted that the position of the Court of Justice in *Franzén* recalls the arguments put forwards by the Commission in *Wilhelmsen*[201]. This latter in fact, submitting observations before the EFTA Court in the latter case, has sustained that

> "any discrimination against imported products found in this case should be shown to relate to the operation of the retail monopoly and not to other aspects of the legislation, such as the import stage. […] [P]rovisions concerning import and wholesale do not relate to the operation of the retail monopoly [thus, to Article 16 EEA]"[202].

This explanation offered a basis for the reasoning elaborated in the subsequent relevant case by the Court of Justice. In *Franzén* in fact, the Court asserted that the questions posed by the national court to its attention concerned not only Swedish law provisions linked to the existence of the monopoly but also

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[198] For an in-depth analysis on Wilhelmsen case, as regards the circumstances, the points of law and the EFTA Court decision see, GALLO (2007: 173); ID. (2010: 160 f.).
[199] Judgement of the Court of Justice of 23 October 1997, Case C-189/95, *Allmänna Ăklagaren v. Harry Franzén*.
[200] For a comparative study on EEA Courts' jurisprudence related to State alcohol monopolies see, GALLO (2007: 174); ID (2010: 161)
[201] GALLO (2007: 176).
[202] Advisory Opinion of the EFTA Court, *Wilhelmsen AS*, para. 99.

rules on production and wholesale licences, that even without guiding directly the operation of the monopoly, exercised an influence on it[203]. To grasp the logic behind its argumentation, illustrative is paragraph 36 of its judgement where the Court argued that

> "the effect on intra-Community trade of the other provisions of the domestic legislation which are separable from the operation of the monopoly although they have a bearing upon it, must be examined with reference to Article 30 of the Treaty [now Article 34 TFEU]"[204].

On the basis of this thinking, it is understandable why the Court of Justice in *Franzén* acknowledged only violation of Article 30 TEC. Such an article represented the sole legal basis to contest the discriminating (production or wholesale) licence system to import alcoholic beverages, not also that governing State commercial monopolies (Article 37 TFEU).

Bearing in mind the abovementioned discussion, a last consideration can be drawn with respect to State alcohol monopolies' sector and, EEA Courts' judicial activity. That is to say, the diverging interpretative line undertaken by the two EEA Courts is not motivated by a different scope underlying EEA law, but by a distinct reasoning *per se*[205]. As a result, on this issue the EFTA Court did not completely guess the EU Court's viewpoint. Nevertheless, although they did not share the entire interpretative logic, they converged in terms of result, namely on the inadmissibility of national legislation under examination so that judicial homogeneity goal was not ultimately undermined[206].

2.3.3 From the international to Community exhaustion principle in EEA law: the EFTA Court's change of mind

The last topic which is worth to deal with, in a comparative perspective between the two EEA central judicial institutions, is that of trade mark rights exhaustion and parallel importations. Such a field has revealed as one of the most interesting to investigate on the nature of the EEA Courts relations. In fact, when examining the relevant judgements in this regard, doubts arise with respect to EFTA Court's equal role to its judicial counterpart, mainly the ECJ. The EFTA Court in *Maglite*[207], pronounced *first* on the question of international exhaustion, reaching a different interpretation to that

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[203] Judgement of the Court of Justice, *Allmänna Ăklagaren v. Harry Franzén*, para. 34.

[204] Ibid., para 36.

[205] See, GALLO (2007: 176) who wonders on the motives underlying interpretative disagreements in the cases cited above, in order to understand if they are explicable in terms of differences in scope between EEA and EU law or because of the diverging circumstances surrounding them.

[206] Ibid., 180.

[207] Advisory Opinion of the EFTA Court of 3 December 1997, Case E-2/97, *Mag Instrument Inc. v California Trading Company Norway, Ulsteen*.

subsequently adopted by the ECJ in *Silhouette*[208]. Despite both Courts were called on to interpret the Council Directive 89/ 104 /EEC to approximate the law of Member States on trademarks[209], they achieved opposite conclusions, in light of a weaker degree of economic integration inherent to EEA law. Thus, it seems that a divergence in scope between EU and EEA legal systems justifies a deviation from the EEA jurisprudential homogeneity aim[210]. Trade mark rights' subject-matter results in a privileged ground for a comparative assessment also for another and most striking motive, that is to say, for being the first case in which the EFTA Court had the occasion to express *after* that a disagreement with the ECJ already existed[211]. Nearly ten years later, the EFTA Court's Opinion in "*L'Oréal*"[212] finally upheld the ECJ's view, overruling its *Maglite*'s judgment. Such an outcome is symptomatic of how the EFTA Court left the homogeneity's diktat prevail over any margin of discretion in interpreting EEA law, also when legitimized by a gap in terms the Agreement's range, far more restricted than that of EU Treaties[213].

To be critic and by adopting a detrimental approach with respect to the EFTA Court, one can reasonably argue that more than a dialogue, the circumstances hereinabove, endorsed a monologue recited by the ECJ[214]. Or better, that the EFTA Court's independence is conditional – rather than absolute – to the ECJ's future adherence to its standpoint.

At this point, it is right to proceed gradually in order to solve the main cruxes around the issue, starting with preliminary information related to the question of trade mark rights exhaustion in EU/EEA law, to turn then to a more in-depth analysis of the three sentences cited above.

It appears that the exhaustion of trade marks' rights represents the *sedes materiae* to clarify the EFTA Court's full deference towards the Court of Justice and the limits to a free dialogue between them[215]. It does not matter the timing with which the EFTA Court and ECJ intervened on an issue, what eventually weights, is the need of preserving a coherence between their case-law and the two distinct but overlapping sets of norms with which they operate. As a consequence, the *L'Oréal* case has showed the boundaries of the

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[208] Judgement of the Court of Justice of 16 July 1998, Case C-355/96, *Silhouette International Schmied GmbH & Co. KG and Hartlauer Handelsgesellschaft mbH.*

[209] First Council Directive of 21 December 1988, 89/ 104 /EEC, *to approximate the laws of the Member States relating to trade marks*. Hereinafter referred to as the "Trade Mark Directive".

[210] See, GALLO (2010: 174) who stresses that the different reach underlying EEA and EU law justifies *ex post* a derogation from the *a priori* goal of judicial homogeneity.

[211] Ibid., 163 ff.

[212] Judgement of the EFTA Court of 8 July 2008, Joined Cases E-9/07 E-10/07, *L'Oréal Norge AS; L'Oréal SA and Per Aarskog AS; Nille AS; Smart Club AS.*

[213] GALLO (2010: 174).

[214] Ibid., p. 166, In this sense has reasoned Daniele Gallo in fact, levering a transversal examination crossing the EEA Courts' case-law on the matter, starting from EFTA Court judgement in *Maglite*, moving then to ECJ *Silhoutte* case, to end up with *L'Oréal,* where the EFTA Court overcame its case-law on international exhaustion principle within EEA.

[215] Ibid., pp. 140 ff.

EFTA Court's authority, though in relation to a single field of competence, that is, that of intellectual property rights. The exhaustion principle mediates between two conflicting intents, free circulation of goods from one hand, and the exclusivity of industrial and commercial property rights. The same Article 36 TFEU in fact, allows for imports and exports' restriction to protect these rights[216]. Just to provide a general explanation, according to this principle, trade marks' rights of the proprietor are exhausted after the first sale of a product by the same owner or with his consent. The exhaustion principle in substance permits the trade mark proprietor to control the first transaction of the good in the market, while easing the further sales, subject to parallel importations. What is more, it should be specified that the application of the principle in question varies according to the territorial arch it is intended to cover. It follows therefore, the existence of a national, regional (Community) or international exhaustion, which implies different market areas, as for the applicability of the principle's effects. Additionally, the trade mark rights exhaustion principle curbs the fragmentation of the (internal) market, and responds to the interests of consumers, ensuring them the origin and quality of the good[217]. In last resort, such a trading practice fosters the exchange of genuine products and fight counterfeiting; when the status of the product is altered in fact, the proprietor may oppose to parallel importations. Otherwise, there could be the risk of damaging his own reputation or at the very least, that attached to the trade mark[218].

When the EEA Courts' judgements were delivered, national legislations of EEA Contracting Parties were harmonised by the EEC Trade Mark Directive, referred to in Annex VII to the EEA Agreement. In fact, as reminded by the EFTA Court in *Maglite*, since the entry into force of the Agreement, according to Article 2(1) of Protocol 28, the EEA Contracting Parties shall adjust and update their intellectual property exhaustion legislation in order to render it consistent with EU, then Community, law[219]. Furthermore, the same Article also stipulates that "without prejudice to the future development of case-law" provisions on exhaustion of intellectual property rights shall be interpreted in compliance with the ECJ's jurisprudence into effect at the moment of the signature of the EEA Agreement[220]. Consequently, the EFTA Court in its *Maglite*'s judgement acknowledged that until that moment, the Court of Justice case-law had excluded national exhaustion to widen it to the EU, then Community, level but that no indication had been provided yet, with respect

[216] Ibid., 165.
[217] Advisory Opinion of the EFTA Court *Maglite*, para 20. See also GALLO (2010: 165).
[218] See, to that effect Article 7(2) of the Trade Mark Directive pursuant to, the exhaustion of rights conferred by a trademark "shall not shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialization of the goods, especially where the condition of the goods is *changed* or *impaired* after they have been put on the market".
[219] See, Advisory Opinion of the EFTA Court *Maglite*, para 22.
[220] Ibid. See also, Judgement of the EFTA Court, *L'Oréal*, para. 28.

to the international exhaustion principle[221]. As a consequence, and by virtue of EEA law's adherence to EU one, it was reasonable to speak about of an EEA-wide exhaustion. However, what the EFTA Court in *Maglite* had to establish was whether this latter applied as a minimum or maximum standard for EEA/EFTA States. The object of content in the three and subsequent judgements, was in particular the meaning of Article 7(1) of the EEC Trade Mark Directive, derogating Article 5, and leaving open the admissibility or otherwise, of international exhaustion of trademark rights, related to goods put on the market outside the EEA. To be precise, Article 5(1) of the Trade Mark Directive, reconciling EEA national rules on exhaustion of intellectual property, states that "[t]he registered trade mark shall confer on the proprietor exclusive rights therein"[222]. Article 7(1) instead, indirectly enshrines the Community/EU exhaustion principle assuming that "[t]he trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market *in the Community* under that trade mark by the proprietor or with his consent"[223]. What is more, it should be observed, as it did the EFTA Court in its *Maglite*'s decision, that the first version of the EEC Trade Mark Directive alluded to an international exhaustion principle, whereas the ultimate draft presented a geographical restriction to circumscribe the perimeter of the extinction of trade marks' rights to the common market[224]. The result was a recognition of the Community exhaustion principle at the secondary law level, but nothing was stipulated with respect to its applicability also at the international sphere. Before scrutinizing the argumentation and legal reasonings put forwards by the EFTA Court to come to its, later objected, decision, it is appropriate to start with the facts underlying the *Maglite* case. The Court had to rule on the legitimate (parallel) importation in Norway by the California Trading Company Norway of Maglite's lights from United States, to resale them in the Norwegian country. The Mag Instrument Inc's American business registered the Maglite's trade mark in Norway where it relied on a sole authorized importer, entitled – in exclusivity – to supply these products. As a result, the American enterprise accused the California Company for undertaking parallel importations without the consent of the trade mark owner[225]. At the heart of the litigation there was a different interpretation the plaintiff from one hand, and the defendant on the other conferred to Article 7(1) of the Trade Mark Directive. According to the Mag Instrument Inc business, the provisions contained therein provided an EEA regional exhaustion as both the minimal and maximal threshold the Directive in question may allow for. On the contrary, for the California Norwegian

[221] Advisory Opinion of the EFTA Court *Maglite*, para 22. To further information see, GALLO (2010: 163 ff.) who provides an excursus on the EU normative related to the exhaustion of intellectual property rights.
[222] Article 5 of First Council Directive of 21 December *to approximate the laws of the Member States relating to trade marks*.
[223] Ibid., Article 7(2), emphasis added.
[224] Advisory Opinion of the EFTA Court *Maglite*, para 23.
[225] Ibid, paras 5 ff., for details on the facts of the *Maglite* case.

Company the EEC Directive had not ruled out the possibility to maintain international exhaustion of trade mark rights. In this sense operated also the Norwegian Act of 3 March 1961, No. 4, relating to trade mark, which did not ratify explicit statutory dispositions on the exhaustion[226]. Thanks to this backdrop information it is possible now, to focus on the EFTA Court's position, retracing its line of thought. At first, it specified that the ECJ had not pronounced yet with respect to the possibility of interpreting Article 7(2) as leaving room to Member States for introducing or maintaining international exhaustion principle in their respective legal orders[227] – beside the Community one. Therefore, the issue at the core of the EFTA Court and ECJ's tacit interaction, is around the likelihood to admit, on the basis of Trade Mark Directive's provisions, international exhaustion of trade mark rights along with the EEA-wide one. Before entering in the merit of the interpretative dilemma, the EFTA Court enumerated the advantages related to the international exhaustion such as competitive prices, wider offer of products from the global market or still, the preservation of the origin and quality of the goods. Such a principle indeed, responds to trade mark's function and as a result, to consumers' interest by guaranteeing the identity and provenience of trade marked products, which should be preserved through parallel imports[228]. Interestingly, such considerations were endorsed more or less explicitly by the Opinion of Advocate General Jacobs in *Silhouette*, though by drawing from the arguments of the Swedish Government, submitting observation to the case, but whose discourse echoed that of the EFTA Court[229]. In reconstructing the EFTA Court's decision in *Maglite*, it should be highlighted that according to the Court, neither the Directive nor the related Annex VII to the EEA Agreement were fully clear on how to solve the problem of international exhaustion at the national level of the EEA Contracting Parties. In addition, no further reliance could be made on the ECJ jurisprudence, since the EFTA Court was faced with the problem before the other Court provided any relevant ruling from which to draw inspiration. In this scenario the EFTA Court, arrived autonomously at a conclusion, advancing sound explanations, rooted in the specific configuration of EEA economic integration.

In the EFTA Court's opinion, Article 2(1) of Protocol 28 to the EEA Agreement, on the harmonisation of rules concerning exhaustion of rights between the two EEA pillars, merely recognized the EEA-wide exhaustion as

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[226] Ibid., paras 4 ff.
[227] Ibid., para. 19.
[228] Ibid., paras 19 ff.
[229] See, BAUDENBACHER (2005: 373 ff.) who draws the parallel between the EFTA Court and Advocate General Jacobs argumentations relating to the advantages of international exhaustion. To that effect also, Opinion of the Advocate General Jacobs of 29 January 1998, Case C-355/96, *Silhouette*, paras 48 ff. The Advocate General in fact, found "extremely attractive" the arguments proposed by the Swedish Government in relation to the function of trade marks such as that "to guarantee the consumer the possibility of identifying the origin of the product[…].[Moreover] [t]he adoption of international exhaustion would bring substantial advantages to consumers, and would promote price competition".

a *minimum* standard, unlike what was argued by the plaintiff in the proceedings before Norwegian court[230]. That is why for the EFTA Court, EEA/EFTA States were free to decide "whether they wish[ed] to introduce or maintain the principle of international exhaustion of rights conferred by a trade mark with regard to good originating from *outside* the EEA"[231]. In fact, the 'silence' of the then Community law and jurisprudence on the matter, left the EEA States' courts and legislators a margin of discretion on how to interpret and handle the unclear state of affairs. It is not so striking to note that the EFTA Court's future disagreement with the ECJ could be partly predicted from the EFTA Court's rejection of the Commission's viewpoint. This latter in fact, contested the possibility to interpret Article 7 of the Directive consistently with the international exhaustion, because a flexibility granted to States in this regard, could lead to discrepancies within the common market, as for parallel imports from third countries[232]. Along with the meaning of Article 7 of the Trade Mark Directive, it is worth to recall the *ratio* put forward by the Court to support its stance. Those motivations are also necessary to understand the detachment operated later on, by the ECJ in *Silhouette*, as they are grounded on unavoidable dissimilarities between the two legal systems underpinning EEA and EU law. First and foremost, the EFTA Court states that the EEA Agreement does not entail a customs union, but rather a free trade area and that the scope of the Agreement is different from that of the EU Treaties[233]. Therefore, such differences hold true also when applying the trade mark rights' exhaustion principle. Secondly, the principle of free movement of goods, to be safeguarded uniformly within the internal market, conditions only the commercialization of goods originating from within the Union (then Community). But the case at issue dealt with products belonging to, and imported from the US market hence, it was not bound by the imperative of free circulation of goods within EEA[234]. Last but not least, the Court opined that the EEA Agreement does not establish a common foreign trade policy, so that it is up to EEA/EFTA States to cultivate and entertain commercial relations with third countries[235]. Consequently, a binding interpretation of Article 7 of the Directive as requiring EEA/EFTA States to respect a mandatory "Community-wide exhaustion", would be at odds with the underlying goal and less reaching nature of EEA integration, by limiting their exhaustion regime *vis-à-vis* third partners.

Once analysed the EFTA Court's sentence, it is possible to focus, on the European Court of Justice judgement in *Silhouette*, in a comparative as well as opposition manner. In the case in question, the ECJ did not make explicit

[230] Advisory Opinion of the EFTA Court *Maglite*, para 22.
[231] Ibid., para. 28, emphasis added.
[232] Ibid., para. 24.
[233] Ibid., para. 25.
[234] Ibid., para. 26. In this regard, see also GALLO (2007: 175); ID (2010: 169) where the author also wonders whether the EFTA Court would have inferred the same conclusion with respect to products originating from within the EEA rather than from outside that Area.
[235] Advisory Opinion of the EFTA Court *Maglite*, paras 27 ff.

reference to the EFTA Court's *Maglite* judgement, which conversely, had been referred to by the Advocate General Jacobs in its Opinion[236]. However, it could be argued that the ECJ constructed an *a contrario* argument on the basis of *Maglite*'s case, relying on different premises and reaching an opposite result as regards the interpretation of Article 7(1) of the Trade Mark Directive. Under a request for preliminary ruling, the Court was asked to construe the meaning of the Directive hereinabove, in relation to facts concerning the importation in Austria by an Austrian company ("Hartlauer") of glasses and frame for glasses from Bulgaria, bearing the *Silhouette*'s trade mark[237]. This trade mark was registered in several countries and in Austria as well, where the proprietor sold the products by its own. The legal issue in fact, similarly to *Maglite*, arouse on behalf of *Silhouette*'s enterprise, suing Hartlauer for its unauthorized sale of *Silhouette*'s spectacles in Austria, even though they had not been marketed within EEA, neither by the trade mark owner nor by its approval[238]. In addition, just like in Maglite, the product came from outside the EEA, as Bulgaria was not yet a member of the Community/EU. Therefore, once again, the problem was that to establish if Trade Mark Directive, mainly its Article 7(1), authorized Member States to apply, within their respective legal orders, an international exhaustion in addition to the Community/EU one. This also implied to assess whether Austrian law, legitimizing exhaustion of trade mark rights for products put on market from outside EEA, directly by its holder or through its consent, was incompatible with Article 7 of the Directive. When outlining the logic pursued by ECJ, it is useful to deepen those points which contrast, particularly, with those delineated shortly before, by the EFTA Court in *Maglite*. In fact, even without express references, it seems that they are elaborated by dichotomy on the basis of the EFTA Court judgement[239]. The first critical aspect regards the understanding of the degree of Trade Mark Directive's harmonisation as a minimum or rather, maximum benchmark national rules may provide for. As just discussed, for the EFTA Court the Directive only instructed EEA Contracting Parties to respect EEA-wide exhaustion as a minimum standard. The ECJ opined instead, that the Directive at hand, required a full-fledged harmonisation of national legislations. According to the Court of Justice in fact, despite the third recital of the Preamble to the Directive did not oblige Member States to a "full-scale approximation of the[ir] trade mark laws", it is also true that the Directive sought to harmonise substantive rules related to this field, which in the light of the same recital are those "national provisions of law which most directly affect the functioning of the internal market"[240]. Reason why, overall the Directive, and Article 7 in particular did not preclude "harmonisation relating

[236] Opinion of the Advocate General Jacobs of 29 January 1998, Case C-355/96, para. 43.
[237] GALLO (2010: 167). See also, Judgement of the Court of Justice, *Silhouette*, paras. 6 ff.
[238] Judgement of the Court of Justice, *Silhouette*, para. 10.
[239] GALLO (2007: 172) where the writer affirms that behind the ECJ's reasoning in *Silhouette* it is possible to recognized an indirect criticism against the EFTA Court's thesis in *Maglite*.
[240] Judgement of the Court of Justice, *Silhouette*, para. 23.

to those rules from being *complete*"[241], so as to avoid internal market disparities. If the EFTA Court moved towards the idea of a greater discretion for the EEA Contracting Parties, the same was not for the ECJ. This latter Court affirmed indeed, that it was not for Member States to determine freely the exhaustion of trade mark rights in relation to goods commercialized in non-member countries[242]. Such an outcome is the only able to guarantee the coherence and functioning of the internal market. What is more, the scenario under which *some* Member States would opt for international exhaustion whereas *others* merely for the Community exhaustion principle, may create obstacles to free movement of goods and service alike within the single market[243].

Briefly, in its *Silhouette*'s ruling, the ECJ acknowledges at the level of secondary law, the EEA-wide exhaustion principle while dismissing the joint and *ad hoc* applicability of the international exhaustion, pursuant to Member States' national will[244]. On the point of law, it means that national rules when dealing with parallel importations cannot be irrespective of the origin of the trade marked goods. As a result, national legislation cannot entail exhaustion of trade mark rights as for products – bearing that mark – put on market from outside the EEA by the initiative of the proprietor himself or at least with his consent[245]. Up to here, it is quite clear how the two EEA Courts arrived at very opposite results, mainly understandable by virtue of the diverging fundamentals underpinning the systems with which they confront.

By way of conclusion, it should be explained the 'U-turn' performed by the EFTA Court in *L'Oréal* case. From the foregoing, and as previously anticipated, with this judgement the EFTA Court 'overrode' its *Maglite* decision to eventually side, after many years, with the ECJ's view. Without commenting again this turning point in terms of EU-EFTA Courts relations, the following section will study the content of the *L'Oréal* Advisory Opinion, in order to better grasp the explanations provided by the Court to justify such a change. This breaking with the past affects an old EFTA Court's orientation, widely accepted by virtue of a divergence in EEA/EU law's application field. The facts and the legal issue recall substantially those in *Maglite* and *Silhouette*. L'Oréal is the holder of "Redken" trade mark whose products are supplied in Norway since 1980. The defendant is the company "Nille Holding AS" which carried out parallel imports of products marked "Redken" from United Stated to Norway. However, the trade mark owner accused the parallel importer for commercializing those products in Norway, without they have been put on the market within the EEA by L'Oréal itself or, with its

[241] *Ibidem*, emphasis added. In this regard see also, GALLO (2010: 166 f.).
[242] Judgement of the Court of Justice, *Silhouette*, para. 26.
[243] Ibid., para 27. On the issue of trade mark laws' harmonisation, as envisaged by the ECJ in Silhouette see also, GALLO (2007: 171 f.); ID. (2010: 169).
[244] GALLO (2010: 168).
[245] Judgement of the Court of Justice, *Silhouette*, para. 31.

authorization[246]. The main object of controversy stems from a different interpretation of the international exhaustion principle with respect to EEA and the legitimate if any, limitation to trade mark rights. For the plaintiff in fact, a mandatory EEA-wide exhaustion of trade marks rights should be in force in Norway. On the contrary, the defendant argued that both the Norwegian Trade Mark Act and the Trade Mark Directive did not prevent a State from applying international exhaustion. As a result, since the Redken's products have been already traded in US market through the owner's permission, according to Nille Holding company a second consent was not needed when importing and reselling them into Norway[247]. On the point of (EEA) law, the EFTA Court was asked – once again – to construe the meaning of Article 7(1) of the Trade Mark Directive, as precluding or not the unilateral application of international exhaustion on the part of EFTA States. Put another way, the Court should express on the legitimacy of parallel importations from third countries, outside EEA, happening without the consent of the trade mark owner – whose exclusive rights may be infringed. The EFTA Court was confronted with a dilemma, since EEA jurisprudence resulted in a disagreement on such a matter, as testified by the *Maglite* and *Silhouette* judgements described above. As far as the exhaustion principle, both cases have ruled out its national application. Nevertheless, with respect to Article 7(1) of the Trade Mark Directive, they came to opposite conclusions. If from one part, the EFTA Court upheld the international exhaustion of trade mark rights, on the other, the ECJ acknowledged the EEA-wide exhaustion as the maximum standard EEA Contracting Parties may provide for.

In order to understand the EFTA Court's position in *L'Oréal* case, leading to a complete adherence to the ECJ case-law, it is possible to rely on political and juridical explanations alike[248]. As for the first type of argument, the EFTA Court underlined that in the aftermath of the decisions by the two EEA Courts in *Maglite* and *Silhouette*, many EU Members pushed for a revision of the Directive, claiming a more explicit reference to international exhaustion principle. EU States essentially may exploit the EFTA Court jurisprudence to circumvent the compelling authority of the CJEU, their obligations under EU law, so as to give primacy to their domestic interests and to the advantages stemming from the international exhaustion principle[249].

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[246] As far as the facts of the case see, Judgement of the EFTA Court, *L'Oréal*, paras. 4 ff.

[247] In this regard see, Gallo (2010: 170) whose analysis clearly retraces the distinct positions held by the plaintiff from one hand and the defendant on the other.

[248] For a clear and brief analysis on the main considerations put forwards by the EFTA Court in *L'Oréa*l see, GALLO (2010: 171).

[249] *Ibidem*. It is illustrative in this regard, the wording adopted by the author when labelling Member States' behaviour, as it referred to reasons of clear 'political opportunity. He also highlights in an analytical perspective, the novelty associated to such a circumstance. That is to say that, it is very unusual and noteworthy that Member States, party of a *sui generis* international organization, draw on the case-law of another regional tribunal, even if operating within the same EEA system, to bypass the ECJ binding jurisprudence. What is more, the author argues that it was exactly on the basis of a risk of inconsistency between the two EEA pillars

The remaining legal arguments used by EFTA Court to dismantle its previous and settled case-law on the issue, are mainly rooted in conventional provisions at the level of EEA Agreement. From the start, the Court reminded the primary objective under EEA system, namely, that of homogenous interpretation of substantially identical provisions. The underpinning purpose is that to preserve the functioning of a unique EEA Single Market, including however, two separate economic areas[250]. On the other hand, despite the merger of different legal orders within a coherent arrangement, they involve distinct integration systems, the EEA Agreement implying a weaker one[251]. In these terms, reasoned the same EFTA Court, wondering whether purposive and operational diversities may occasionally prompt different interpretations between EEA and EU law[252]. In effect, it is precisely the existence of two judicial bodies, interacting within an international institutional framework – and dealing with similar norms – that leaves room for an eventual interpretative contrast, although not irreversible[253]. It is also true that the EFTA States' forward-looking action, has tried to curb such a danger by *ad hoc* provisions. An emblematic example is provided by Article 3(2) SCA, which, as already explained in the foregoing analysis, suggests the EFTA Court to comply with the "*principles* laid down by the relevant ruling by the Court of Justice"[254], following the signing of the EEA Agreement. To make a long story short, the implication is an ever-lasting adherence to ECJ evolving jurisprudential orientations.

Nevertheless, if at the time of *Maglite* case there was no ECJ indicative judgement in that regard, the same cannot be said with respect to *L'Oréal*. By scrutinizing intellectual property's rules, reference should be made to Article 2(1) of Protocol 28 cited above. This Article in fact, exhorts Contracting Parties to construe EEA rules on exhaustion of trade mark rights in compliance with the relevant rulings of the Court of Justice preceding the entry into force of the Agreement, "[w]ithout prejudice to future developments of case law"[255].

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that, the Court reversed its new approach towards exhaustion principle, in order to comply with judicial homogeneity goal.

[250] In this regard see, SKOURIS (2014: 3 ff.) providing an interesting description on the contribution of the CJEU to the development of the EEA Single Market. Furthermore, the work of the old president of the ECJ sketches a picture of EEA judicial dialogue, bearing in mind the contextual and institutional differences in which the respective courts operate.

[251] *Ibidem*. The EU tighter integration mechanism explains in part, the EEA/EFTA State opt-out from the Union, and the rationale of EEA Agreement as an 'intelligent' device allowing EFTA third countries to take advantage of EU common market while rejecting further and more political bonds.

[252] See to that effect, the Judgement of the EFTA Court, *L'Oréal*, paras. 27 ff. where the EFTA Court started to reverse gradually its *Maglite* final judgement going back and forth its past and current case-law.

[253] Ibid., para. 28.

[254] See Article 3(2) SCA, emphasis added. This provision fits very well with the present L'Oréal case, in which the EFTA Court substantially welcomed the 'principle of Community exhaustion' laid down by the ECJ case-law.

[255] On the interpretation of Article 2(1) of Protocol 28 see, Judgement of the EFTA Court, *L'Oréal* paras 28 ff.

To start with, on the points of law, referring to Agreement's provisions enshrining homogeneity rules, the EFTA Court maintained that neither Article 3(2) SCA, nor Article 2(1) of Protocol 28 overtly manage the circumstance where the EFTA Court has decided first on a matter in which the ECJ has come later, to an opposite interpretation[256]. One of the most salient consideration, attached to such unsolved legal problem, concerns the effects for the (EEA) single market. According to the EFTA Court, the drawbacks for the internal market, inherent to an interpretative disagreement between the two Courts, are the same independently of which EEA Court has ruled on a subject-matter first[257]. In order to avoid discrepancies between the EEA pillars, EEA law has to be construed coherently to EU law and ECJ new case-law, *irrespective* of what the EFTA Court has opined on the same issue, beforehand[258]. It is right to remark that, in reaching a conclusion, the EFTA Court asserts that both Courts have provided for sound justifications in *Maglite* and *Silhouette* judgement alike, by framing them in their respective legal framework. What was at stake however, was whether the two distinct EEA/EU backgrounds represent "compelling grounds" for a different meaning to be attributed to Article 7(1) of the Directive[259]. What ultimately the EFTA Court was called upon to decide, was if the Trade Mark Directive left the issue of international exhaustion, with respect to goods coming from outside EEA, to be adjusted by domestic law through unilateral measures[260]. While distancing from its own and prior interpretation, the EFTA Court does not deny the supporting arguments related to it. That is to say, relevant differences still persist, but they may be downgraded in the case at hand. From an analytical point of view, it should be observed that at first, the Court does not think in an affirmative way *stricto sensu*, when evaluating Agreement's provisions for a mandatory EEA-wide exhaustion. What the Court asserts is that the wording of both Protocol 28 and Annex VII 'does not exclude', rather than 'provides for', EEA-wide exhaustion of rights[261]. Accordingly, Article 7(1) of the Trade Mark Directive shall be interpreted as precluding "unilateral introduction or maintenance of international exhaustion of rights […] regardless of the origin of the goods in question"[262]. This implies eventually that the different regulation for foreign trade policy with third country cannot be judged as an overriding objective, within EFTA pillar, justifying an interpretative disagreement on the matter.

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[256] Ibid., para. 29.
[257] To that effect, cfr., Judgement of the EFTA Court, *L'Oréal* para. 29.
[258] *Ibidem*.
[259] Ibid., paras. 30 ff. where the EFTA Court questions about EFTA States' authority to deal independently with the exhaustion of trade mark rights, by virtue of differences in scope and purpose between EEA and EU rules.
[260] Ibid., para. 32.
[261] Cfr., in particular para. 33.
[262] Ibid., para 38. It is evident from such a declaration that the EFTA Court by its *L'Oréal* judgment has overruled its *Maglite* decision.

Chapter 3

3.1 The European/multi-level judicial dialogue. The EFTA Court looking to Strasbourg and Luxembourg Courts

3.1.1 A multi-layered judicial interaction in Europe: beyond and within the EEA two-pillar system

The interaction between the EFTA Court and CJEU, as already denoted in the first chapter of the present work, is a *sui generis* example of judicial dialogue within the broader regional or rather, international trend. The purpose of the following sections is to focus on the European area, widening the perspective by including, within EEA Courts' interrelationship, also another international judicial body that is, the European Court of Human Rights (hereinafter also, "Court of Strasbourg"). It is quite obvious how such a regional cooperation, involving the three main 'stakeholders'[1] mentioned above, develops notably with respect to a process of fundamental rights' "cross-fertilisation". The field of fundamental rights, in fact, is emblematic to investigate on a multi-level judicial interdependence, occurring in Europe among national, supranational and international judges[2].

Before deepening the issue of fundamental rights in EEA law, it is fair to provide a more general framework on this European inter-courts ('layered') dialogue. First of all, it should be clarified that this spontaneous or rather, required judicial interrelationship is due to the existence of overlapping as well as autonomous bodies of law, triggering at the international level, parallel and intertwined legal orders, interacting amongst them and which coexist with national systems of rules. Thus, it goes without saying that the European Convention on Human Rights ("Convention"), together with the EEA Agreement and EU Treaties, constitute self-governing legal orders, entailing their own normative basis, with which their respective judicial institutions operate. The element of 'independence' as regards both this *corpus* of international norms and the functioning of their judicial bodies, does not provide, however, a clear picture over the state of affairs. That is to say, although being separate, these different legal regimes are in practice closely dependent on each other. Their independent character is corroborated by the lack of any hierarchical order presiding the relation among international legal systems, even though they entail an overlapping jurisdiction in terms of

[1] The use of the term, though adapted in a different context, is borrowed from WAHL (2014: 288), who speaks about 'stakeholders' when referring to the EEA/EFTA relevant players' position , such as that of EFTA States, the EFTA Court, or still the Surveillance Authority, *vis-à-vis* the binding nature of the Charter of Fundamental Rights.

[2] In this regard see again, WAHL (2014: 288) who, while questioning the legal status of the Charter of Fundamental rights within the EFTA pillar of EEA, emphasises how fundamental rights' subject-area fosters a truly "constructive judicial dialogue which takes place amongst the manifold courts and tribunals of Europe, whether at national supranational or international level".

territories, citizens and areas of competence[3]. In other words, they act internationally on an equal footing between them, just like domestic legal orders do at a lower layer[4]. On the other hand, these multi-level legal systems condition each other, so as to guarantee a minimum level of coherence and concrete effectiveness[5] in the interpretation and application of norms. Inasmuch as these domestic, supranational or international courts, may be confronted with similar legal problems, they have to develop common approaches to solve them[6], in order to provide as better as possible legal certainty across the area covered by their jurisdiction.

The first main instrument to cope with overlapping systems of norms, so that eventual conflicts may be lessened (or better avoided), is a more or less systematic dialogue among the various judicial institutions involved, interacting formally or informally just as, in a vertical or rather horizontal way[7] – according to the dimensions concerned namely, national, inter- and supranational.

Nevertheless, by looking jointly to the two Luxembourg (EEA) Courts and the Strasbourg Court it should be specified that the content of their dialogue is not exactly the same. This refers indirectly to the different scope underlying the Convention, the EU Treaties and the EEA Agreement or briefly, to their respective 'functional' jurisdictions. If the EEA Courts share their commitment to ensure an "equal treatment of individual and economic operators as regards the four freedom and condition of competitions"[8], these two Luxembourg Courts' relation with the ECtHR regards mainly fundamental rights' protection. This latter field indeed, provides a breeding ground for of "cross-fertilization" and cross-referencing among these courts. In this respect further clarifications are needed. If the ECJ and ECtHR's judicial exchange is based on mutual understanding and a two-sided relationship, by contrast, the same cannot be said with respect to the EFTA Court and the Strasbourg Court. Though EFTA Court makes reference to the European Convention on Human Rights as well as to the ECtHR case-law,

[3] See, LEBECK (2014: 253 ff.) who describes how international legal orders are both independent with respect to their 'creation' as well as 'application' of norms, but also dependent on a more or less extensive degree of cooperation to ensure coherence among overlapping systems of norms, in the absence of 'constitutional hierarchy'. Interestingly, in Lebeck's view, the supranational legal orders develop a sort of 'presumption for precedence' over the other international as well as national legal system.
[4] Ivi., p. 254.
[5] *Ibidem*.
[6] On the judicial bodies' involvement in analogous legal issue see, KOKOTT, DITTERT (2014: 44) where reference is made for instance to the financial crisis across Europe. This occurrence is the precondition for the development of a formal and informal judicial dialogue in the European continent, where there exists a multi-level system of norms, demanding the coordination of different national, regional or international courts, which are so required to act by adopting similar strategies.
[7] To further information on these forms of 'judicial dialogue' please refer to the first paragraph of Chapter 1 of the present document.
[8] Recital 15 of the Preamble to the EEA Agreement.

this latter Court is far from considering EEA Agreement's provisions in its own jurisprudence and from quoting EFTA Court's judgement. As a result, the dialogue between the EFTA Court and the Court of Strasbourg is monodirectional and 'unrequited'[9].

By bringing the ECtHR into play, the issue of the EEA Courts' interaction gets more complicated. First and foremost because the EFTA Court's references to the Strasbourg Court do not occur under well-defined homogeneity rules as for what happens in relation to the CJEU. Secondly, the EEA Agreement does not include neither the ECHR nor the Charter of Fundamental Rights (or simply "Charter"). However, the direct or indirect relevance of the Convention or Charter-related rights for the EEA Agreement is explicable due to the principle and/or goal of homogeneity between EEA and EU law. In effect, and as already stated in the foregoing discussion, general principles of law are other flexible and cross-cutting legal expedients able to ensure a minimum level of consistency amongst national, supranational or international legal orders[10] – lacking a formalised hierarchy of norms. Thus, it means that the EFTA Court's deference to the principle of homogeneity has let fundamental rights in, within EEA law, whose protection is accorded on the basis of general principles of law[11]. Stated otherwise, homogeneity between the two EEA pillars functioned as a 'gateway' for fundamental rights' protection at the level of EEA law, encouraging the EFTA Court to rely on the ECtHR and the Charter, as well as to the Strasbourg and Luxembourg Courts relevant jurisprudence in this respect[12]. It is quite obvious that if the principle of homogeneity is central to frame the EEA Courts' relation, the general principles of protection of fundamental rights is, on the contrary, essential to understand the wider relation between the EFTA Court, the ECJ and the ECtHR. At this point a digression concerning ECJ fundamental rights case-law, together with the relation between the Court of Justice and the Court of Strasbourg is needed, so as to better clarify the position adopted by the EFTA Court in this regard.

[9] BJÖRGVINSSON (2014: 266). In the author's opinion such an unbalanced outcome could in principle be adjusted if considering the indirect incidence of EEA law on the ECHR's judicial activity, by means of corresponding EU law provisions which are under the attention of the Court. Thus, there seems to be possible that EEA law is granted implicitly a similar legal significance to that of EU law.

[10] To that effect see, LEBECK (2014: 261) who devotes particular attention to the function of general principle of EEA and EU law.

[11] Ibid., p. 259.

[12] Ibid., p. 257. As for the relation between homogeneity and fundamental rights' protection under EEA law see also, WAHL (2014: 283 ff.).

3.1.2 The ECJ and the multi-level constitutionalism in Europe

The European Court of Justice has a long-standing tradition for fundamental rights' protection which dates back to the 1960s[13]. Helpful in this instance, has been not only the ECHR to which EU Member States are party, but also the dialogue with national constitutional courts, notably the German Constitutional one[14]. The interrelationship between the Court of Justice and national (constitutional) courts has eventually enhanced ECJ's consciousness for protection of fundamental rights. This trend intended to appease from one hand, domestic judges' concerns for respect of national constitutional rights at the EU level, and on the other, to strengthen their control by the CJEU, reducing domestic courts' claim to have a (final) say on the matter. The constitutional principle of primacy of EU law over the same domestic constitutions, in fact, has not easily been accepted by Member States' national constitutional or supreme courts[15]. These latter, in fact, have tendentially followed the example of the German Constitutional Court, according to which effective protection of fundamental rights at the EU level is required. Such an outcome could also be pursued levering on the possibility to use human rights' protection, provided by German Basic Law or national constitutions in general, as a standard for review of EU law[16]. The dialogue between ECJ and national courts, however, is not exhaustive to grasp the overall picture of fundamental rights' protection under EU law. The premise is that a judicial control in this regard could be pursued by the European Court of Justice even without any external pressure, that is to say, for the peculiar nature of the EU legal order as such. The definition of the EU Treaties as a "constitutional charter […] based on the respect of *rule of law* […] for the benefit of which the States have limited their sovereign rights […] and the subjects of which comprise not only Member States but also their nationals" is emblematic to that effect.[17]. The constitutional nature of EU primary law is explicable first and foremost due to the so-called "constitutional triad"[18] (or principles) of primacy, direct effect and State liability (discussed above) having a bearing upon individuals within their respective domestic legal orders and constraining the exercise of public authority[19]. Additionally, any legal order

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[13] WAHL (2014: 284) who specifies that fundamental rights' protection is well-rooted in EU law through the active role of the Court of Justice making reliance to human rights' treaties to which EU Member States were party, even before referring directly to the ECHR.

[14] In this regard operates since the 1970s the so-called "Solange" case-law of the German Constitutional Court, claiming the necessity to verify Community law's compatibility with Basic Law's fundamental rights, considering the lower status the then Community primary law accorded to them. To that effect see, KOKOTT, DITTERT (2014: 45).

[15] On the constitutional tensions between EU law and national constitutions see, SUAMI (2014: 536).

[16] *Ibidem*.

[17] Opinion 1/91 of the Court of 14 December 1991, *relating to the creation of the European Economic Area*, para. 21, emphasis added.

[18] For the expression see, BAUDENBACHER (2004: 383).

[19] On the *sui generis* nature of EU legal order see, SUAMI (2014: 540) alluding to a 'single sovereign entity' replacing domestic law with other 'domestic law'.

claiming to be founded on the 'rule of law' has to guarantee that its rules comply, in their substance and implementation, with fundamental rights.[20]

Nevertheless, the importance of fundamental rights at the EU level has been improved not only through the vertical dialogue with European national courts. At a supranational plane, a cross-fertilization in the field of fundamental rights has developed by means of the ECJ's awareness of ECHR's salience, just like via more or less recurrent references to the Court of Strasbourg jurisprudence in this respect[21]. Referral to the ECtHR case-law has also been made by domestic courts or tribunals in Europe, looking at the Strasbourg Court as an important reference point when faced with fundamental rights questions, so that a minimum standard of protection may be ensured across the European continent[22]. Consequently, the wide deference on the part of national as well as supranational courts to ECtHR judgements has boosted an increasing degree of coherence and coordination among different judicial institutions[23]. Furthermore, the supranational commitment to the respect of fundamental rights, by EU law and the ECJ's control activity, has proved *per se* as a (further) valid instrument to promote and/or supervise national rules' compatibility with the ECHR. It is apparent so, why fundamental rights have revealed a 'fertile soil' for cross-fertilization' phenomenon between multi-level judicial bodies.

If the relationship between the EFTA Court and ECtHR is neither framed under statutory rules nor directly encouraged in the light of the content of specific EEA Agreement's provisions, the same does not occur with respect to the ECJ and ECtHR's judicial dialogue. That is to say, these latter Courts' interdependence is far more formalised. The general ECJ's jurisprudential approach as to fundamental rights' protection at the EU level, has been ultimately ratified by the entry into force of the Lisbon Treaty on December 2009. Reference is above all to Article 6 TEU, elevating the Charter's legal status to the rank of EU primary law[24], providing a legal basis for EU's

[20] On this point, BJÖRGVINSSON (2014: 279 f.) who draws a parallel between the rule of law to which adhere EFTA States and the respect of fundamental rights under EEA agreement. By way of knowledge it should be observed that both human rights and the rule of law are enshrined in Article 2 TEU, enlisting the fundamental values of EU law.

[21] It should be noted that even though overall, the ECJ follows ECtHR's judgements, it does not feel to be obliged to comply with them, as the ECJ is not a party to the ECHR. To that effect see, BRONCKERS (2007: 604).

[22] See, KOKOTT, DITTERT (2014: 47) who refer to the Human Right Court as a sort of 'template' to follow in Europe, for the protections of fundamental rights and freedoms.

[23] *Ibidem*.

[24] To be precise, the Charter of Fundamental Rights has been introduced with the Nice Treaty of 2001, into force since 1st February 2003. However, the Nice Charter of Fundamental Rights *alias* Charter of Fundamental Rights of the European Union, has become legally binding only with the Lisbon Treaty.

accession to the European Convention on Human Rights[25] and acknowledging fundamental rights as general principles of Union's law.

In order to better understand the all but 'spontaneous' tie between the ECJ and ECtHR relevant is Article 52(3) which recites as follows:

> "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

These provisions envisage a minimum standard of protection to be ensured under the ECHR, that is to say that the Charter shall not allow for a lower degree than that accorded by the Convention. It follows therefore, that Court of Justice is under a duty to observe Strasbourg Court case-law in the interpretation of Charter-related freedoms and rights, corresponding to those enshrined in the ECHR[26].

3.1.3 'EEA relevance' of the ECHR and the multi-level normative framework in the EFTA pillar

Against the aforesaid background, it is possible to focus on the EFTA Court's response *vis-à-vis* its EEA counterpart fundamental rights' case-law. Primarily, it is fair to emphasise that ECJ's commitment to fundamental rights' protection predates the entry into force of the EEA Agreement. What is more, after the Lisbon Treaty, the European Court of Justice's jurisprudence has increasingly referred to Charter-based rights and dealt with fundamental rights' issue[27]. With this in mind, two are the major consequences for the EFTA pillar of the EEA. The first relates to homogeneity rules addressing the EFTA Court under EEA law that is to say, Article 6 EEA and Article 3 SCA exhorting the EFTA Court to consider the relevant rulings of the Court of Justice, prior and after the signature of the Agreement. The second has to do with the rising importance of fundamental rights at the EU level, and consequently also for the ECJ case-law. In fact, if EFTA Court would decide

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[25] Union's accession to the European Convention on Human rights is now in a standstill. The draft accession agreement has been rejected by the Court of Justice pursuant to Article 218(11) TFEU in Opinion of the Court of Justice of 18 December 2014, 2/13, on *the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*. However, what is important to highlight for the present analysis is that the international draft agreement in question has set up a series of rules disciplining and framing EU's accession to the Convention system. Examples in this regard are Protocol No. 8 to Article 6(2) envisaging some particular arrangements in the view of EU's participation to the Convention; or still, Protocol 14 amending Article 59 of the ECHR, to allow for the Union to accede it. See on this point, BJÖRGVINSSON (2014: 274). Interesting in this regard, is also the parallel drawn by the ECtHR's judge Robert Spano between ECJ's Opinion 1/91 on the refusal of an EEA common Court, and the Opinion 2/13, both based on the autonomy of EU law. To that effect see, SPANO (2017: 481 f.).

[26] WAHL (2014: 285).

[27] SPANO (2017: 482).

to disregard fundamental rights this would limit the parallel possibility to refer to ECJ more recent jurisprudence[28]. As a result, despite the absence of explicit as well as legally binding provisions concerning fundamental rights under the EEA Agreement, homogeneity rules and principle, related to the CJEU's judicial activism and evolving nature of EU law, have engendered a "positive side-effect"[29]'incorporating respect for fundamental rights on the basis of general and unwritten principles of EEA law. To sum up, if the principle of homogeneity ensures uniformity between EU and EEA law, whose distinct characteristics under traditional public international law have been investigated above, general principles of fundamental rights in their turn, provide for a certain degree of consistency amongst national, (quasi)supranational and international law – given in this instance by the European Convention[30].

Yet, since neither the Convention nor the Charter have been made part of the EEA Agreement, these human rights documents seem to have only an *indirect* relevance for the interpretation and application of the Agreement by way of the CJEU case-law, to which the EFTA Court is clearly bound. Such an explanation is however too narrow, that is, respect for fundamental rights under EEA law can be inferred also from other salient reasons. In fact, strictly connected to the principle of homogeneity is that of reciprocity enshrined in Recital 4 of the Preamble to the EEA Agreement. Pursuant to this principle, EEA Agreement-based rights to the benefit of EFTA and EU nationals and economic operators alike, should be the same in both EU and EFTA pillars of the EEA[31]. What is more, despite the circumscribed scope of the EEA Agreement (compared to EU Treaties), which has not incorporated any provisions referring to fundamental rights, these latter are often mentioned by CJEU judgements when interpreting or applying EU legislation, annexed to the Agreement, according to its relevance for EEA law[32]. It is true that not all EU secondary legislation is relevant for the purpose of the EEA Agreement. As a matter of fact, by virtue of the Agreement, EFTA States are under a duty to implement those EU legal acts related to the four fundamental freedom and competition rules, which deal essentially with the functioning of the internal market. However, fundamental rights standards may have an implicit

[28] On this point see, BJÖRGVINSSON (2014: 287).
[29] WAHL (2014: 285).
[30] Additionally, in Carl Lebeck's view the protection of fundamental rights and of proportionality within EEA system acts as a constraint against EEA institutions and national governments' discretionary action, to the benefit of individual autonomy. To that effect see, LEBECK (2014: 260 f.).
[31] For an overview over the principle of reciprocity see, BARNARD (2014: 154 f.). Moreover, the EFTA Court acknowledged such a principle in its Judgment of 28 September 2012, Case E-18/11, *Irish Bank Resolution Corporation Ltd and Kaupthing Bank hf.*, para. 122 in which it states that "[t]he objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EFTA and EU citizens and economic operators enjoy, relying upon EEA law, the same rights in both the EU and EFTA pillars of the EEA". On this point see also, WAHL (2014: 283 f.).
[32] BJÖRGVINSSON (2014: 279).

incidence in the interpretation of that internal market secondary legislation – within both pillars of EEA. In addition, it has been noted that some secondary EU legal acts, made part of EEA law, may refer to the Charter in their preamble[33]. In the absence of any decision by the Joint Committee excluding those provisions when incorporating them, it is apparent how references to EU Charter cannot be overlooked by the EFTA Court[34]. Such an assertion is endorsed by the wording of Protocol 1 EEA on horizontal adaptations, according to which the introductory part of the act (preambles) "are relevant to the extent necessary for the proper interpretation and application, within the framework of the Agreement, of the provisions contained in such acts"[35].

Though it has been argued more than once, that the EEA Agreement lacks explicit provisions for the respect of fundamental rights, it is worth mentioning Recital 1 of its Preamble according to which in the Contracting Parties' view an "European Economic Area will bring to the construction of a Europe based on peace, *democracy* and *human rights*"[36]. This wording, partly recalls Recital 4 of the Preamble to TEU and Article 2 TEU enumerating EU founding values. Similarly, to the EU pillar in fact, the statement of Recital 1 implies that the EEA Agreement is grounded on the principles of democracy and fundamental rights on the basis of which this shall be interpreted, implemented and enforced[37]. In this view, though excluding EEA law's commitment to the respect of a 'supranational obligation' in the field of fundamental rights, as reflected in the Charter, it is possible to derive such a duty from the EEA/EFTA States' legal systems based on democratic principles, strictly related to the protection of those same rights[38].

Furthermore, if the link between the EEA Agreement and the European Charter is justifiably implicit, since it derives above all from the CJEU case-law, far more 'direct' is the relation with the Convention and consequently, between the EFTA Court and the ECtHR in the sphere of fundamental rights' protection. All EEA States are party to the ECHR; thus, they are all subject to the judicial control of the ECtHR and to its interpretation of the Convention rights. As a result, EEA Contracting Parties in the EU and EFTA pillar alike,

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[33] An example in this regard is recital 31 of the Directive of the European Parliament and of the Council of 29 April 2004, 2004/38/EC, *on the right of citizens of the Union and their family members*, pursuant to "[t]his Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union".

[34] On this point see, WAHL (2014: 288).

[35] On this point see also, FREDRIKSEN, FRANKLIN (2015: 647).

[36] Emphasis added. See, BJÖRGVINSSON (2014: 274 ff) who discusses about the relevance of the ECHR when applying EEA law, raising three main questions that is, which is the dispositive normative basis for the EFTA Court's adjudication when observing respect for human rights; who is responsible to ensure the observance of fundamental rights when EEA secondary law is applied, and last but not least, if it is possible to postulate, similarly to EU law, the existence of a "presumption of Convention compliance" under EEA law.

[37] Ibid., p. 275.

[38] Ibid., p. 264.

cannot allow for a lower fundamental rights standard than that established by the Convention[39].

In the elaboration of fundamental rights as general and unwritten principles of EEA law, the EFTA Court notably draws on the Convention and the ECtHR case-law, and (more) occasionally on the Charter-based rights. In effect, although the Convention is not formally part of the EEA Agreement, it represents a "common denominator" for European countries, in assessing fundamental rights' observance[40]. That is why, when the EFTA Court confronts with human rights' issues, it looks first and foremost at Convention's provisions to define the scope and content of these rights. Reference to the Charter is an "added value"[41] in this respect, and it may be judged unnecessary if considering its non-binding legal status under EEA law. Through an overview over EFTA Court case-law in this respect, it emerges that the ECHR and/or the ECtHR judgements represent the main legal criteria to assess whether, in the implementation of the Agreement human rights are respected[42].

Before proceeding further, to dwell on the critical aspects or simply arising questions surrounding the theme of fundamental rights in EEA law, it is fair to advance some considerations in the light of what has just been examined. First of all, whilst both the Convention and the Charter have not been incorporated at the EEA level, the EFTA Court has referred to them, though not expressly bound to do so. Moreover, no problem seems to exist when Charter rights reiterate those contained in the European Convention, from which international legal obligations flow for the EEA/EFTA States. By contrast, the scenario in which the ECJ and the ECtHR disagree on the interpretation of rights which are rooted in both human rights legal sources appears far more challenging. The EFTA Court will be faced hence with a dilemma, given that from one part, it is compelled to adhere to the Court of Justice jurisprudence, in the light of the principle of homogeneity, but on the other, it cannot neglect either the fundamental rights' minimum threshold provided for in the Convention.

In short, when comparing human rights legal sources, namely the Charter and the Convention, the result in practical terms for the EFTA Court jurisprudence is not exactly the same. The EFTA Court's general tendency is that to rely on Convention's provisions when pursuing its fundamental rights approach, in order to strike a balance between requirements under (intern)national[43] and EEA/EU law. This does make sense considering the far more limited margin

[39] SPANO (2014: 482).
[40] BJÖRGVINSSON (2014: 278 f.).
[41] See, WAHL (2014: 286).
[42] BJÖRGVINSSON (2014: 277).
[43] Reference here is to EEA/EFTA States' principle of sovereignty and their commitment to those international legal instruments/treaties to which they have consented, as for instance the EEA Agreement as well as the European Convention on Human rights.

of discretion and compelling authority the EFTA Court enjoys *vis-à-vis* EEA/EFTA States countries than that of the CJEU with respect to EU Members. In addition, it is true that neither the Convention nor the Charter are formally binding in the context of the EEA Agreement, but EEA/EFTA States have not accepted the Charter, thus it is harder to deduce a general acceptance of this latter human rights' legal source at the EEA level, without violating national sovereign rights[44]. Notwithstanding, the EFTA Court referred to the CJEU fundamental rights' jurisprudence, even prior the Charter became binding at the EU level[45].

On balance, the principle/goal of homogeneity brings the EFTA Court closer to the CJEU and impliedly to its fundamental rights' case-law preceding and following the moment in which the Charter has been placed at the same rank as the EU primary law, with the Lisbon Treaty. More delicate is conversely, the issue of Charter-related rights in the shaping of EFTA Court fundamental rights' approach, which is related to the contested legal significance it has under EEA law. Nonetheless, fundamental rights have been absorbed in the form of general and unwritten principles of EEA law, fostering EFTA Court's further compliance with national law, EU law and equally the ECHR. Overall, such principles are able only in part to offset uncertainty related to their protection within the EFTA pillar of the EEA, lacking any written provisions regulating fundamental rights standards to be met[46]. It is right to recall however, that the general principle of homogeneity, rather than granting the EFTA Court a wider margin of discretion when applying it, clearly binds EFTA Court's judicial activity to that of its EEA judicial counterpart, but the same cannot be said as for fundamental rights. These latter in fact being general and *unwritten* principles of EEA law, with open-ended content and value, allow the EFTA Court for a greater degree of flexibility when it comes to interpret and apply them with respect to litigation procedures to which it is called on to express. Ultimately, they may also act as an autonomous basis for incorporation of constitutional norms within the EEA[47], while preserving the distinct characteristics of EEA law, and approaching it to national as well as international law.

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[44] On the normative impact of EU Charter for EEA fundamental rights see, SPANO (2017: 479 ff.).

[45] See to that effect, Judgement of the EFTA Court of 19 June 2003, Case E-2/02, *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v. EFTA Surveillance Authority*, especially para. 37 in which the Court discussed about access to justice within the EEA framework and it referred *inter alia* to the Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores v. Council of the European Union,* C-50/00. It is worth citing what the Court affirmed in that occasion before coming to the conclusion that the appellants lacked *locus standi*, that is "the significance of judicial function appears to be on the increase, both at national and international level. The idea of human rights inspires this development, and reinforces calls for widening the avenues of access to justice". On this point see, also, WAHL (2014: 285).

[46] SPANO (2017: 479).

[47] On the 'constitutionalisation' of EEA and the role of general principles of law see, LEBECK (2014: 262).

When broadening the perspective beyond the EEA pillars and focusing on fundamental rights' status under the EEA Agreement, a "tripartite" connection arises among EU law, EEA law and international law[48], as well as amongst their central judicial instances that is, the CJEU, the EFTA Court and the ECtHR.

By way of conclusion, it is possible to affirm that irrespective of what is the primary source of human rights in EEA, by examining above all EFTA Court recent jurisprudence in this regard, it follows that they are important values upon which fundamental aims of EEA Agreement are construed and pursued, promoting as a matter of fact, further convergence between different level jurisdictions. Consequently, when dealing with the EFTA Court and fundamental rights' legal significance within EEA system, one will be confronted with a classical multi-level normative context, within which national, supranational and international judges operate[49]. Furthermore, such a scenario is rather interesting if considering the EEA law's hybrid nature[50] in relation to both EU law and international law, attributing the EFTA Court the challenge to mediate between them.

3.2 The issue of fundamental rights of EEA law

Against the aforesaid background, it is possible to examine in the following sections which are the major problematic aspects related to the topic of fundamental rights in the EEA legal system. It is also interesting to move from the core content of EEA Agreement that is, (four) fundamental freedoms to turn the attention to fundamental rights, wondering about their legal status within EEA.

The main purpose is to adopt a transversal approach by examining the interconnection amongst different bodies of law, starting from EEA law and EU law, to include at the same time national law of EEA/EFTA States and international law, given by the European Convention. Such an intent cannot elude a scrutiny of the distinct features of both EU and EFTA pillar of EEA, that justify a (slightly) different fundamental rights approach by the Court of Justice and the EFTA Court, respectively. The overarching theme of fundamental rights has a particular significance within the EEA two-pillar structure, since, unlike the EU side, the EFTA one lacks an inner human rights' parameter (like the Charter) to refer to, so as to ensure their respect at the EEA normative level.

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[48] With respect to the relation between EU law and EEA law from one part and international law on the other see, SUAMI (2014: 539 f.).

[49] SPANO (2017: 476) who focuses primarily on the relation between the EFTA Court and the Strasbourg Court under EEA law, where the EU Charter does not apply.

[50] On the intermediary character of EEA law between international law and EU one, see, SUAMI (2014: 534 ff.).

It is necessary to proceed by steps, premising that it is not feasible to offer exhaustive responses for each potential question, considering the scarce judicial practice and legal doctrine on the value of fundamental rights within the framework of EEA[51]. More than answers, the aim is to describe which may be the possible scenarios arising before the EFTA Court, relying on hypotheses and actual cases alike.

To begin with, and to better frame the overall discussion, it will be sketched out a comparison between the two EEA pillars, so as to highlight the considerable differences, which cannot be disregarded in the context of fundamental rights' protection by the EFTA Court. In fact, the distinctive feature of EEA law 'as such', and in relation to EU law, is likely to have a bearing on which might be the most suitable solution in the EEA context as to EEA human rights' related disputes. That is to say, the *ratio* put forwards by the EU Courts' judgements may not always fit in the EEA legal order. As a result, the EFTA Court's task to cope with dissimilarities between the two EEA sides, still with reference to human rights' safeguard, is not an easy one. The starting point is once again, homogeneity which cannot be conceived in its turn separately from dynamicity of EU and EEA law. Later on, it will be examined the rapport between the Charter and/or the ECHR with the Agreement, so as to understand how much place there exists for EU fundamental rights as reflected in the Charter. Of course, the whole investigation will be supported by the EFTA Court relevant case-law, articulated *ex post*, by means of an inductive analysis, in some main categorisations, describing the most recurrent as well as noteworthy patterns.

3.2.1 The two pillars of EEA: respecting homogeneity while securing each other's distinctiveness

Before evaluating the principal elements, which render EEA system an example of "imperfect", though advanced, internal market compared to the EU one, it should be recalled how both EEA and EU legal orders have progressively evolved beyond what is traditional under public international law[52]. The EU law and the EEA law have progressively developed and 'constitutionalised' through the elaboration of *ad hoc* principles, by the EEA central judicial institutions through a formal and 'vertical' dialogue with national courts. As far as the ECJ is concerned, this outcome has been achieved under the preliminary ruling procedure pursuant to Article 267 TFEU, whereas, with respect to the EFTA Court this occurred via advisory opinions regulated by Article 34 SCA. Reference is to direct effect, primacy and State liability which have found more or less equivalent, though adapted, EEA principles. Thus, the instrument of dialogue between (quasi)supranational and domestic judges has promoted the evolution of EU and EEA law and contemporarily defined the essential traits of both legal

[51] As clearly pointed out by BJÖRGVINSSON (2014: 279 f.).
[52] To that effect see, Advisory Opinion of the EFTA Court of 10 December 1998, Case E-9/97, *Erla María Sveinbjörnsdóttir and The Government of Iceland*, para. 59.

orders[53]. The main result was to offer citizens and private actors the possibility to enjoy of their rights – as acknowledged by EEA and/or EU law – within their national legal orders. The striking aspect of the direct effect of a norm, is the conferral of subjective rights from supranational to domestic level, regardless of the willingness on the part of the State[54]. Nevertheless, as already discussed in the foregoing sections, the same concept does not apply without any adjustment within the EFTA pillar of EEA, where it is more correct to refer to 'quasi-direct' effect. As a matter of fact, under the EEA law, EFTA States agreed to achieve the objective of a homogenous European Economic Area, providing rights applicable to citizens and undertakings, without devolving sovereign prerogatives to common institutions, outside the boundaries established by their constitutions[55]. In this regard, it should be pointed out that, pursuant to Protocol 35 EEA as well as Article 7 EEA, no one EEA Contracting Party has consented to transfer legislative powers at the EEA level. Consequently, the EU secondary legislation's direct applicability or direct effect is subordinated to the adoption of specific implementing measures in their respective national legal orders[56]. This means that EU law has a more independent status with respect to domestic systems of Member States, if compared to that enjoyed by EEA law *vis-à-vis* EFTA countries. The same reasoning holds true also in relation to the enforcement mechanisms under EU and EEA law. Once again, the difference is connected to the degree of discretion left towards EEA Contracting Parties – in the two pillars – when interpreting or enforcing EEA/EU secondary legislation. Or the other way around, such a divergence is rooted in the more or less coercive power exercised by EU or EFTA institutions when called to ensure the correct interpretation and application of EU and/or EEA law[57]. An example in this regard is given by the binding nature of preliminary rulings delivered by the European Court of Justice, compared to the advisory opinions issued instead, by EFTA Court, which EFTA national judges are not – at least formally speaking – obliged neither to request nor to follow. It goes without saying that such a diverging grade of independence between EU and EEA legal orders, with respect to national law, applied at the same time, when considering the external dimension of their autonomy in relation to international law.

Despite those dissimilarities, the EEA Agreement's main and express intent is to ensure that the implementation and respect of internal market rules take place in compliance with EU standards (as mandated by homogeneity). Interestingly, the EU has developed and improved over the years its own standard also as far as the protection of fundamental rights is concerned. The

[53] On the role of judicial dialogue between ECJ and EFTA Court from one part and EEA national courts on the other as to the development of EU and EEA law respectively, see, KOKOTT, DITTERT (2014: 49).
[54] To further information on the 'direct effect' in EU law see, VILLANI (2016: 258 ff.).
[55] On the less far-reaching aims of the EEA Agreement see, BJÖRGVINSSON (2014: 264).
[56] Ibid., p. 264 f.
[57] Ibid., p. 270.

question is therefore, how much human rights standards under EU law, bind EEA law. What is more, the issue of fundamental rights has risen additional attention after the Lisbon Treaty, where the Charter of Fundamental Rights acquired the same position as EU Treaties. However, such a change "*ratione materiae*" in EU primary law has not been matched by a parallel evolution in the EFTA pillar of EEA. As a consequence, dynamicity of EU law has not been corresponded by a homogenous transformation under EEA law, providing implicitly a sort of "two-speed" EEA cooperation[58].

3.2.2 The problem of responsibility for alleged violation of Convention rights and "equivalent protection" under EU/EEA law

The description or better, reminder about the differences between EEA and EU orders provided above, paves the way for another kind of reflection, still related to the impact of fundamental rights standards under EEA law. The objective of this part is to reason about the consequences within EU and EEA pillar alike, for alleged violation of an international legal obligation flowing from the Convention, when the (EEA) State is fulfilling its duty under EU/EEA law. What matters hence, is to understand who should be held responsible for ensuring that fundamental rights are respected, and that their protection does not go below the threshold guaranteed by the Convention[59]. The starting point is Article 1 of the ECHR, according to which State responsibility under the Convention is dependent on the fact that the alleged breach occurred within its jurisdiction. Such a finding, however, cannot apply in its entirety in every case, above all if assuming that the respondent State action, though accomplished within its territory and by its own domestic authorities, derives from the necessity to comply with another international commitment. In this view, the attribution of responsibility is not so straightforward as enshrined in Article 1 ECHR and under the context of EU law, it may be related to the more or less wide margin of discretion enjoyed by the EU State.

The relevant example to start with, in order to understand the dynamics surrounding such a possibility within EU system, is that of the *Bosphorus Airways* Judgement[60] delivered by ECtHR, to eventually widen the analysis

[58] On this point see, WAHL (2014: 281) who originally describes the gap between the two pillars of EEA, in terms of material law, evoking the image of EEA integration as a clear example of "two-speed" or "multi-speed" in Europe, by extending the term's applicability outside the limited perimeter of EU to embrace that of EEA Single Market.

[59] Reference is to the "equivalent protection test" or doctrine, to cope with overlapping system of norms and in order to safeguard respect for fundamental rights. On this point see also, BJÖRGVINSSON (2014: 267).

[60] Judgement of the ECtHR of 30 June 2005, Application No. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*. It is important to note that the following discussion treasures of the contribution made by BJÖRGVINSSON (2014: 267 ff) who uses the *Bosphorus* case as the preliminary step to question the possibility to extend or otherwise to the EEA Agreement, the presumption of compatibility with the Convention standards, which applies to the EU law by virtue of its very specific traits.

so as to consider the similar or rather, impracticable outcome at the EEA level. In that specific case, the ECtHR acknowledged the so-called "presumption of Convention compliance" by EU, then Community law, on the basis of which the Court held that the respondent State did not "depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC"[61]. Beyond such a conclusion, it is interesting to retrace the reasoning elaborated by the Court, based on the peculiar characteristics of EU legal order, to finally evaluate whether the same argumentations hold true, at least from a theoretical point of view, also for the EEA Agreement[62].

The case regarded the seizure of an aircraft, leased by the Bosphorus Airways company from Yugoslav Airlines ("JAT"), which has been impounded by Irish authorities when it was located in Ireland for maintenance work[63]. The impounding by Irish Government was based on the EEC Council Regulation No 990/93[64], adopted in its turn to comply with UN sanctions regime against Yugoslavia. The Bosphorus airline company contested the Irish authorities' decision to impound before the High Court in Ireland, which quashed the Irish Minister for Transport's decision of seizing, arguing therefore, the inapplicability of the Regulation at hand against the aircraft. On 8 August 1994 the Irish Government appealed against the High Court Judgement of 21 June 1994 before the Supreme Court, which requested *inter alia* a preliminary request to the ECJ, asking substantially if the Regulation in question, especially Article 8[65] could act as the proper legal basis for the aircraft's impoundment[66]. The ECJ finally ruled that the Bosphorus Airways' leased aircraft, was covered by the Regulation and in the later judgement of November 1996, the Supreme Court endorsed the Court of Justice decision[67].

Once before the ECtHR, the Bosphorus Airways' airline company claimed that the action carried out by the Irish competent authorities was to be considered as a reviewable act of discretion, pursuant to Article 1 ECHR and

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[61] Judgement of the ECtHR, *Bosphorus*, para. 158. In this regard see also, BJÖRGVINSSON (2014: 269 f.).

[62] The thoughts advanced for EEA law are merely conjectures, considering the eventuality in which the ECtHR will be confronted with individual applications claiming a violation of fundamental rights protected by the Convention, stemming from the application and enforcement of EEA/EU secondary legislation.

[63] As far as the circumstances of the case are concerned see, Judgement of the ECtHR, *Bosphorus*, paras 11 ff. See also, BJÖRGVINSSON (2014: 267 f.).

[64] Council Regulation (EEC) of 26 April 1993, No. 990/93, *concerning trade between the European Economic Community and the Federal Republic of Yugoslavia* (Serbia and Montenegro).

[65] According to which "[a]ll vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States".

[66] Judgement of the ECtHR, *Bosphorus*, especially paras 42-43.

[67] BJÖRGVINSSON (2014: 267 f.).

that the decision to impound, corresponded to a violation of private property guaranteed by Article 1, Protocol No. 1 to the Convention.

As far as the ECtHR's assessment is concerned, the starting point is the general rule provided for by Article 1 ECHR which implies that it is for States Parties "to answer for any infringement of the rights and freedoms protected by the Convention"[68]. The same Court also recognized that the contested action was executed by the Irish authorities in response to a decision issued by the Minister for Transport to carry out the aircraft's seizure within the Irish territory. As a consequence, the applicant airline company "fell within the jurisdiction of the [respondent] Irish State"[69]. Interestingly, the Court went on questioning about the legal basis for the contested "interference" against possession's right of the Bosphorus Airways company, to come to the conclusion that

> "[this] was not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law and, in particular, Article 8 of Regulation (EEC) no. 990/93"[70].

Such a finding is the pre-condition to understand the reason why the Court held that there was no violation of Article 1, Protocol No. 1 of the Convention on the part of the Irish State. In this way, the Court shared ultimately the Government's argument[71] according to which the decision of impounding amounted to an obligation flowing from the State's membership to an international organization, rather than to an exercise of discretion *per* se. Once so established, the crucial concern was to ascertain whether fundamental rights found an equivalent protection under that (supranational) organization. Where the same level of protection is deemed to be met within the EU legal order, it is presumed that the State in question, has not derogated from its Convention's duties, when it simply implemented those legal obligations descending from EU membership. As a consequence, State liability for a breach of the Convention is excluded, to the extent that, within the EU, fundamental rights benefit from a comparable protection to that of the Convention system[72]. Or, in other terms, the disputed State action is justified as long as EU provides for a corresponding fundamental rights' protection.

Against this background, the Court moved on to assess whether such presumption of compliance arises in the case at issue, premising that the

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[68] Judgement of the ECtHR, *Bosphorus*, para. 136.
[69] Ibid., para. 137.
[70] Ibid., para. 148. On this point see also, BJÖRGVINSSON (2014: 268).
[71] In this regard see, Judgement of the ECtHR, *Bosphorus*, paras 109-110.
[72] Such a precondition is deeply important to resect if considering the role of the Convention as a "constitutional instrument of European public order" for the protection of human rights. See to that effect, Judgement of the ECtHR, *Bosphorus*, para. 156.

Convention does not preclude its Contracting Parties from conferring sovereign powers to another supranational organization[73].

In order to understand if this 'presumption of compatibility' with the Convention system existed in the case under scrutiny, the ECtHR examined the evolution of fundamental rights' protection under EU then Community legal order. To begin with, despite originally it lacked express provisions referring to those rights, they have been then acknowledged as general principles, becoming at the same time a legality standard of Community's acts[74]. Furthermore, the Court noticed that the ECJ had repeatedly referred to Convention provisions and to the Strasbourg Court jurisprudence and that CJEU jurisprudential activity in the field of human rights has been progressively ratified by several treaty amendments[75].

When speaking about 'equivalent protection' the ECtHR held that this shall include both substantive guarantees and mechanisms to check their observance. For this reason, the Court finally turned the attention to the EU judicial system, maintaining that pursuant to Article 177 EEC (now Article 267 TFEU) the ECJ exercises a control on the proper implementation of Community law by domestic judges, as well as on the fundamental rights guarantees contained therein[76].

Following this line of thought, the Strasbourg Court concluded that

> the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, "equivalent" […] to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community"[77].

From the foregoing analysis it is possible to draw some considerations. By reaching such a conclusion it seems that the Court found a way to bypass the problem of State liability for alleged violation of Convention requirements, deriving from its compliance with EU legal obligations, and it avoided to express on the incompatibility of a Union's legal act with the Convention standards. The Court 'cautious' position is explicable by the fact that, under the Convention, in particular pursuant to Article 1 ECHR, the State is the sole actor that could be held responsible for action or rather, omission of its organs, since the Union is not a Contracting Party[78].

The "equivalent protection test" or put it another way, the "presumption of Convention compliance" within the context of EU system, has been developed

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[73] Ibid., para. 152.
[74] Ibid., paras 159 ff.
[75] *Ibidem*.
[76] Ibid., para. 164.
[77] Ibid., para 165. On this point, see also, BJÖRGVINSSON (2014: 269).
[78] On the responsibility of the State under the Convention see, Judgement of the ECtHR, *Bosphorus* paras 152-153.

in *Bosphorus*, relying on the *sui generis* nature of EU law[79], in particular as regards its autonomous character with respect to national law, limiting the independent exercise of discretion by EU Member States[80]. This configuration is easy to detect in *Bosphorus* through two main aspects, which leave no room for discretionary power by the State. The first is connected to the 'direct applicability' of EU regulations, which do not require further implementing measures at domestic level in order to be effective. The second one refers to the binding nature of ECJ rulings, which in the case at issue bound the Supreme Court of Ireland, orienting the resolution of the dispute before it[81].

From a comparative perspective, the foregoing analysis paves the way for evaluations on the EFTA side of EEA, in case of EEA/EFTA States' action resulting from a legislative act which has been adopted to fulfil their duties under EEA law. However, if the *Bosphorus* judgment and the formulation of 'equivalent protection' has been evidently influenced by the distinct traits inherent to EU law, doubts arise on the application of the same considerations with respect to EEA law[82]. In fact, this latter is ranked as 'quasi-supranational' law in the light of the weaker degree of integration weighting on EFTA States' domestic systems. More precisely, the element of 'direct applicability'(or direct effect) of any EEA legislation, flowing from an EU directive or regulation alike, is subordinated to implementation on the part of the State. Furthermore, the EFTA Court's judicial control on the respect of EEA law by domestic judges is limited compared to that of the ECJ, since formally non-binding. Thus, the mechanism controlling fundamental rights' guarantees at the EEA level, if any, differently from the EU, is not entirely independent, since national judges remain actually, free from assessing constitutional legitimacy of EEA law's provisions[83]. It means that EEA/EFTA State are neither completely deprived of a margin of appreciation in the application of relevant EU/EEA secondary legislation, nor EEA institutions are totally independent in ensuring EEA Agreement's presumption of compliance with Convention requirements. That is to say, these international institutions cannot claim to exercise any mandatory power with respect to the fundamental rights'

[79] On this point see, BJÖRGVINSSON (2014: 268 ff.) who observes that the distinguishing features of Community legal order played a key role for the conclusion reached by the Strasbourg Court as to the presumption of compliance with the Convention human rights standards.

[80] To that effect it is worth to specify how besides an EU 'monist approach' with respect to national law, the Union embraces rather a 'dualist position' when considering EU law relation with international law. That is to say, if from one hand, EU law can take primacy over domestic law, international law on the other, is far from taking precedence over EU norms. The ultimate aim is that to protect EU legal order from both inner and outer interferences. To further information see, LOCK (2015: 36 f.).

[81] BJÖRGVINSSON (2014: 268-271) where the author, when referring to EU legal order's special nature, relevant for the ECtHR *Bosphorus* judgement, insists on the force of direct applicable Union's acts, able to bypass State intermediary action in national order of its Members, but also on the "independent enforcement mechanism" of which an example is that of ECJ preliminary rulings.

[82] See, *supra* note 60.

[83] BJÖRGVINSSON (2014: 278).

safeguard, when EEA Agreement-related rules are applied and enforced at the national level[84]. In short, if one can reasonably affirm that EU Member States may in certain occasions, enjoy a narrow leeway when it comes to implement EU legislative acts, as well as a limited say in determining a comparable fundamental rights' protection within EU organisation, the same cannot be said, at least in theory, as for EEA/EFTA Contracting Parties[85].

Lastly, the framework for fundamental rights' protection at the EU level, detected by the ECtHR, as regards both substantive guarantees and tools entitled to ensure their observance, is not matched by an equivalent system within EEA. First of all, the EEA Agreement does not contain explicit provisions in this regard and the EFTA Court, unlike the CJEU, has not a long-standing tradition in the field of fundamental rights[86].

From the foregoing, it appears that the concept of "equivalent protection" does not find overall, a solid basis under EEA Agreement. Presumably, the hypothesis of a comparable protection in the field of fundamental rights could rest on judicial homogeneity's rules[87], linking the EFTA Court jurisprudence to that of the CJEU, which is in its turn, committed to respect those rights in equal measure to the Convention standards or, in a broader sense.

3.2.3. The rights of the EU Charter and of the Convention: a comparison in the EEA context

When comparing EU Charter and the Convention as important human rights documents in Europe, it is pertinent for the present study, to clarify which is their relative normative status within the EEA system.

First of all, it should be observed that the EFTA Court jurisprudence on fundamental rights has explicitly recognized the ECHR as well as the judgements of the Court of Strasbourg as "important sources for determining

[84] In this regard see, BJÖRGVINSSON (2014: 277 f.) in which, through a sort of *a contrario* argumentation, based on the different features of EEA systems compared to the EU one, the author observes which are the related implications as far as the protection of fundamental rights is concerned. That is, he wonders if, though starting from opposite premises, the principle of homogeneity could eventually suffice so that equivalent protection is met under EEA Agreement.

[85] Ibid., p. 271. In Björgvinsson's view in fact, the problem in extending Bosphorus' argumentations to EEA legal system, is that the most part of EU characteristics, underlined by Strasbourg judges in that specific case, do not apply equally to the structure provided by the EEA Agreement.

[86] Ibid., pp. 271 ff. Moreover, as regards EU then Community law's provisions referring to human rights, cited by the ECtHR in *Bosphorus* see, Judgement of the ECtHR, *Bosphorus*, especially paras 77-81 in which mention is made for instance, to Article 6 of the Treaty on the European Union of 1992, or still, to some other provisions related to the Charter of Fundamental rights proclaimed at Nice and so on.

[87] See for instance, Article 6 EEA or Article 3 SCA. In this respect see also, BJÖRGVINSSON (2014: 279).

the scope of these rights"[88]. Whereas on the other hand, EFTA Court settled case-law in this field has avoided to expressly address the question of the legal status of the Charter within the EEA[89], though referring to it in several occasions. As examined above[90], the Charter has a more limited or better indirect impact than the Convention on the EFTA side of EEA, since EFTA States have not accepted nor incorporated it into the Agreement. Conversely, the Convention represents a human rights treaty to which they have acceded, even before the adoption of the EEA Agreement itself.

The purpose of this sub-section is therefore, to summarily describe the two main configurations stemming from these fundamental rights instruments under EEA law, in order to assess, if it is the case, the potential problems within the EFTA pillar.

The first hypothesis refers to a situation in which Charter-related rights correspond to those contained in the Convention, the second instead, to a case of wider protection under the EU Charter, when providing for rights which are not covered by the ECHR[91]. The first circumstance does not create particular problems or concerns on the EFTA side, neither for EFTA Contracting Parties nor for the EFTA Court when confronted with those rights in disputes arising before it. In fact, although EFTA States could deny to acknowledge an automatic application as well as "direct relevance" of the EU Charter, their duty to respect the rights contained therein, derives from another international legal obligation to which they have consented. As far as the EFTA Court is concerned, it seems that reference to a Charter-based right having a legal basis also in the Convention, represents an additional value in the Court's fundamental rights approach[92]. In this respect, the only problematic issue to cope with is connected to the possibility that the CJEU and the ECtHR may develop a different interpretation for corresponding rights provisions. Against this situation, the EFTA Court has to strike a balance between the principle of homogeneity and the minimum standard for protection of fundamental rights as reflected in the ECHR[93].

More complex is the second scenario dealing with EU Charter rights that are not mirrored in the Convention. Primarily it should be highlighted that in

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[88] See, Judgement of the EFTA Court of 12 December 2003, Case E-2/03, *Ákæruvaldið v. Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson*, para. 23.
[89] In this regard see, SPANO (2017: 481). In the author's opinion the EFTA Court has found a way 'to evade' such an issue.
[90] See in particular point 3.1.3.
[91] In this respect see, WAHL (2014: 294 f.) who distinguishes between Charter rights reproducing those of the ECHR and Charter-based rights which instead, are not matched by equivalent provisions under the Convention.
[92] Ibid., p. 293. In Wahl's view, when the EFTA Court quotes Charter rights which mirror those of the ECHR, it makes the reference so as to "avoid giving the impression that the Charter has any real 'bite'". What is more, in such a circumstance, by recognizing that a right under the Convention is enshrined also in the Charter the Court is merely affirming the 'obvious'.
[93] On this point see, SPANO (2017: 482).

principle an extensive protection is allowed by virtue of Article 52(3) of the Charter and thus, not at odds with Convention requirements. Furthermore, where such a higher level of protection is met within the EU pillar of EEA, there would be an imbalance on the EFTA side, altering the objective of a homogenous European Economic Area stated in Recital 4 of the Preamble and Article 1 EEA[94]. In addition, it is also true that not every EU Charter right is 'relevant' for EEA law. It depends on the underlying subject, that can to a greater or lesser extent fit with the scope of the EEA Agreement[95]. In this view, the 'onus' on the EFTA Court would be that to establish 'EEA relevance' through a case-by-case approach[96]. Moreover, the application of EU Charter rights could contrast with EFTA States' sovereignty, circumventing the element of consent as a precondition to obey to an international duty[97]. In this regard, it is worth to mention the recent EFTA Court judgement in *Enes Deveci and Others*[98] where the Court was called on to assess the legal value of a Charter right, not also included in the Convention. The case dealt basically with the transfer of undertakings and the related problem to solve was whether the transferee was still obliged to observe collective agreements concluded by the transferor[99]. From a legal point of view, the EFTA Court, under a request for advisory opinion, was asked to interpret the Directive 2001/23/EC on the rights of employees in the event of undertakings' transfers[100]. The defendant (the Scandinavian Airline System) claimed that the Directive shall be construed in compliance with Article 16 of EU Charter, providing for the freedom to conduct a business, which found impliedly a legal basis also in Article 3 of the same Directive[101]. The defendant (the transferee) developed its plea relying on the principle homogeneity, pursuant to which, although the Charter has not been made part of the Agreement, a uniform interpretation is needed "since in relation to that

[94] See, WAHL (2014: 294 f.) who alludes to a "lop-sided European Economic Area" to depict the situation in which the EFTA pillar affords a lower level of protection than the EU one.
[95] Ibid., p. 295 f. Wahl in fact, makes a distinction between clearly irrelevant provisions as those of Article 39 of the Charter, regulating 'the right to vote and to stand as a candidate at elections to the European Parliament' and others evidently relevant Charter rights in the EEA context, as for instance, Article 45 on the right of free movement.
[96] WAHL (2014: 295 f.).
[97] See, SPANO (2017: 480) who insists on States' claim for sovereignty when wondering about the normative impact of the EU Charter for EEA fundamental rights.
[98] Judgement of the EFTA Court of 18 December 2014, Case E-10/14, *Enes Deveci and Others and Scandinavian Airlines System Denmark-Norway-Sweden*.
[99] For a generic overview on the case at hand see, SPANO (2017: 480 f.). To further information on the facts see, Judgement of the EFTA, *Enes Deveci* paras 15-26.
[100] Council Directive of 12 March 2001, 2001/23/EC, *on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses*.
[101] See in particular Article 3(3) of the Directive according to which "[f]ollowing the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement".

provision there are no difference in scope and purpose between EEA and EU law"[102]. That is why, the Directive's relevant provision could not be read separately from Article 16 of the Charter so that the transferee's interest will be safeguarded, against transferred employees' interpretation precluding the defendant from applying another collective agreement[103]. For the purpose of the present analysis it is important to emphasise the standpoint adopted by the Norwegian Government in the case at hand, as well as the EFTA Court's approach, which leaves unsolved the issue of the legal significance of the EU Charter for EEA law. The Norwegian Government after arguing that the application of the Charter at the EEA level is likely to affect EFTA State's sovereign rights submitted that

> "the Charter provides, in some respects, for fundamental rights beyond those common to the EEA States. That is the case with regard to Article 16 of the Charter. The right to conduct business is not, at least not in such a general manner, reflected in other international legal instruments by which the EEA States are bound. That warrants caution in equalling the scope of Article 16 of the Charter with fundamental rights common to the EEA States"[104].

Equally important is the (in)conclusive stance embraced by the EFTA Court as regards the legal value of Article 16 in particular, and more in general of Charter within the EEA system, evading clearly the question, though endorsing in principle the freedom to conduct a business. To that effect, it should be observed that in the Court's opinion, there was no motive to handle the issue of Article 16 of the Charter and that

> "[t]he EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union. The actors of a market are, inter alia, undertakings. The freedom to conduct a business lies therefore at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national law and practices"[105].

From the forgoing, it follows that the status of the EU Charter under the Agreement remains quite contested and uncertain. However, considering the EEA two-pillar structure and the homogeneity rules governing its functioning, as well as fundamental rights' relevance within EEA owing to a strong judicial cross-fertilization in this field among different level jurisdictions, a more adequate way to find an answer to the question, could be to reframe it in other

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[102] With respect to the defendant's point of view see, Judgement of the EFTA, *Enes Deveci* para. 40. To that effect see also, SPANO (2017: 480).
[103] See, Judgement of the EFTA, *Enes Deveci* para. 34.
[104]Ibid., para. 44. To further information on the EFTA States' position with respect to the EU Charter's legal effect under the EEA Agreement see also, WAHL (2014: 289 ff.) who specifies that EFTA States have not yet assumed a coherent and "uniform" perspective as far as the Charter's impact on EEA law, as it emerged from the proceedings before the EFTA Court, involving them or to which, they simply take part. Their position could vary from rejecting *a priori* Charter's relevance for the interpretation of the Agreement or conversely, they could rely on it, in conformity with the principle of homogeneity, to bridge the gap between EEA and EU law.
[105] Judgement of the EFTA, *Enes Deveci* para. 64. In this respect see also, SPANO (2017: 481).

(rhetorical) terms. That is to say, rather than wondering why the EFTA Court should refer to Charter rights, there seems more appropriate to ask why not?[106]

3.2.4 The evolution of EFTA Court fundamental rights case-law and its possible configurations

To start with, similarly to the CJEU, the EFTA Court case-law in the field of fundamental rights covers both the aspect of their 'substantive protection' and of 'procedural guarantees'[107]. Furthermore, since the EEA Agreement lacks explicit provisions regulating the protection of fundamental rights, these latter have been conferred the status of general and unwritten principles of EEA law.

One of the first case in which the EFTA Court was confronted with a (substantive) fundamental rights' issue was in *TV 1000*[108], concerning prohibitions on television broadcasting of pornography. In that judgement the EFTA Court, while providing an interpretation of Directive 89/552/EEC[109] on television broadcasting activities, eventually acknowledged at the EEA level, the freedom of expression and its potential restrictions, as enshrined by Article 10 ECHR[110]. Furthermore, when the EFTA Court focused on the changeable conceptions of public morality, whose exigencies differ over time, it referred *inter alia* to the Strasbourg Court jurisprudence[111].

Later on, in *Ásgeirsson*[112] the EFTA Court went one step further, maintaining that provisions of the EEA Agreement as well as procedural provisions of the SCA shall be interpreted on the basis of fundamental rights[113]. Through this statement the Court implied that fundamental rights act as legal basis for EEA adjudicative activity. EFTA Court ruling in *Ásgeirsson* is important also for another reason, since one of the defendants claimed before the domestic judge

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[106] See WAHL (2014: 288) who denotes that when examining the EU Charter 'direct' and/or 'indirect' relevance under EEA law, the most suitable question would rather be "why ought the EFTA Court not refer to the Charter?".

[107] See LEBECK (2014: 259 f.).

[108] Judgement of the EFTA Court of 12 June 1998, Case E-8/97, *TV 1000 Sverige AB and The Norwegian Government*, in particular para. 26 where the Court asserts that "[p]rotection of minors is a legitimate goal of each of the Contracting Parties to the EEA Agreement. The protection of the mental and moral development of minors forms an important part of the protection of public morality […] [whose] requirements vary, depending on time and place".

[109] Council Directive of 3 October 1989, 89/552/EEC, *on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities*.

[110] Pursuant to Article 10(2) "[t]he exercise of these freedoms […] may be subject to […] for the protection of health or morals" See also, BJÖRGVINSSON (2014: 275).

[111] Judgement of the EFTA Court, *TV 1000*, para. 26. On this point, see also, SPANO (2017: 477).

[112] Judgement of the EFTA Court of 12 December 2003, Case E-2/03, *Ákæruvaldið v. Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson.,*

[113] Ibid., para. 23. The EFTA Court went on affirming that "the Convention and the Strasbourg Court are important sources for determining the scope of these rights".

that, reference to the Court under procedure of Article 34 SCA, is likely to infringe Article 6 ECHR by extending the length of the proceedings. The EFTA Court replied that Article 6(1) protects the right "to a fair and public hearing within a *reasonable* time"[114]. To that effect, it referred to ECtHR judgement in *Pafitis*[115], where the Strasbourg Court opined that a delay of two years and seven months, due to a national court's request for a preliminary ruling before the ECJ, cannot be considered when examining the duration of the proceedings[116]. If so, the European Court of Human Rights held that the system envisaged by Article 177 EEC would be "adversely affected", just like the purpose underlying it[117]. Following this line, the EFTA Court asserted that the same reasoning should hold true also for the procedure provided for by Article 34 SCA, aiming at strengthening inter-court dialogue to ensure EEA law's proper application[118].

Thanks to the analysis developed so far, this last part will sketch out the EFTA Court case-law into three main categories, framing its fundamental rights jurisprudence within more established 'patterns'[119].

The first group includes those EFTA Court judgements, where a fundamental right's issue has been settled relying substantially on the Strasbourg Court case-law just like Convention's provisions, as the primary normative source to draw from. The ECJ jurisprudence and/or EU Charter rights instead, act rather as supporting arguments. In this regard, one should mention the case of *Arnulf Clauder*[120]where the EFTA Court delivered an advisory opinion under a request by the Administrative Court of Liechtenstein, for the interpretation of Citizenship Directive 2004/38/EC[121], in particular Articles 16(1) and 7(1) thereof[122]. Mr Clauder, the plaintiff was a German national who had acquired

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[114] *Ibidem*, emphasis added.
[115] Judgement of the ECtHR of 26 February 1998, Application No. 20323/92, *Pafitis and Others v. Greece*.
[116] On this point see, SPANO (2017: 477).
[116] Judgement of the EFTA Court, *Ásgeirsson* para. 23.
[117] *Ibidem*.
[118] Ibid., para. 24.
[119] It should be specified that the following discussion borrows from Robert Spano's contribution on the issue. In Spano's opinion three are the main strands of the EFTA Court fundamental rights case-law. The first is related to cases in which the EFTA Court draw directly on ECtHR judgements or the Convention to solve questions brought to its attention. The second category instead, concerns those EFTA Court judgements where reference to fundamental rights answers the need to "operationalise the principle of homogeneity". The last alternative deals with the case in which a fundamental freedom may be affected to foster a goal based on a fundamental right. To that effect see, SPANO (2014: 483 ff.).
[120] Judgement of the EFTA Court of 26 July 2011, Case E-4/11, *Arnulf Clauder*.
[121] Directive 2004/38/EC of the European Parliament and of the Council *on the right of citizens of the Union and their family members.*
[122] Pursuant to Article 16(1) "Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there". Article 7(1) acknowledges the Union citizens' right of residence for more than three months in other Member States if satisfying certain preconditions, including that to "have sufficient resources

a right of permanent residence in Liechtenstein after being steadily a resident there, since 1992. In 2010 he applied for a family reunification permit for his wife, a German national who was residing at that time in Germany. However, Liechtenstein Government dismissed his application on the grounds that he was economically inactive, being a pensioner in receipt of social welfare assistance. Thus, he was weighing on the State's financial resources, not having sufficient economic means for him and his wife[123]. Nevertheless, Mr Clauder challenged the Government's decision before the national court which refer the case to the EFTA Court. To begin with, the EFTA Court noted that protection of family life of EEA States' national is essential to lessen any impediment to the exercise of fundamental freedoms covered by the EEA Agreement[124]. The Court added that preventing an EEA national from the possibility to create a family in his host State would undermine his freedom of movement, or more precisely his right to move and reside freely within the EEA[125]. Beyond this background information, the Court's major assessment was built upon the EEA relevance of Article 8(1) of the Convention. At paragraph 49 of its judgement the Court recalled that

> "All EEA States are parties to the ECHR, which enshrines in Article 8(1) the right to respect for private and family life. According to established case-law, provisions of the EEA Agreement are to be interpreted in the light of fundamental rights […]. [Additionally,] the same right is protected by Article 7 of the Charter of Fundamental Rights"[126].

Therefore, its fundamental rights approach to the case at hand answers the need to ensure a right recognized by both human rights' legal instruments. In conclusion, the EFTA Court endorsed the complainant's right for family reunification, although dependent on social assistance of the host State.

Afterward, a similar approach has been upheld by the Court also in *Posten Norge AS v. EFTA Surveillance Authority*[127] concerning EFTA Surveillance Authority's decision to impose fines against "Norway Post" (the State-owned Norwegian postal service) for violation of competition rules, in particular of Article 54 EEA, condemning undertakings' dominant position within area covered by the Agreement. Basically, the EFTA Court noted that, the case at

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for themselves and their family members not to become a burden on the social assistance system of the host Member State".

[123] On the fact see, the Judgement of the EFTA Court, paras 11-17.

[124] Ibid., para. 35. See, SPANO (2017: 484).

[125] Ibid., para. 46. To that effect see also, SPANO (2017: 487).

[126] Judgement of the EFTA Court, *Arnulf Clauder*, para. 49. For a comment on *Arnulf Clauder*, para. 50. See also, BJÖRGVINSSON (2014: 276); WAHL (2014: 292).

[127] Judgement of the EFTA Court of 18 April 2012, Case E-15/10, *Posten Norge AS v. EFTA Surveillance Authority*.

issue should be analysed in the light of the guarantees provided for by Article 6 ECHR, notably those related to the criminal proceedings[128].

Important for the purpose of the present discussion and in order to draw a parallel with the *Arnulf Clauder* case cited above, is the statement delivered at paragraph 86, where the Court recognised that

> "[t]he principle of effective judicial protection including the right to a fair trial, which is inter alia enshrined in Article 6 ECHR, is a general principle of EEA law. It may be noted that expression to the principle of effective judicial protection is now also given by Article 47 of the Charter of Fundamental Rights"[129].

Once again, reference to Convention rights is followed by a mention of corresponding provisions contained in the EU Charter.

As regards the second category of EFTA Court judgements, in relation to fundamental rights' protection, one will be faced to a certain extent, with the inverse situation to that described earlier. That is to say, referral to fundamental rights' serves the purpose of ensuring a homogenous interpretation and application of EEA rules to those of EU law[130]. It follows that the ECJ and/or EU law represent the main 'reference points' and the Strasbourg Court case-law affords for its part, an additional support, so as to achieve the overriding objective of homogeneity within the EEA system. An example in this regard, is given by the EFTA Court judgement in *Irish Bank*[131] where the EFTA Court was asked to intervene, following a request for an advisory opinion by the Supreme Court of Iceland which amended in essence, on appeal[132], the questions to be posed, as couched by the District Court. This means that the EFTA Court dealt, *inter alia*, with procedural provisions of EEA law, namely with Article 34 SCA, mirroring Article 267 TFEU, reasserting that, provisions of SCA, just like those of EEA Agreement, are to be interpreted in the light of fundamental rights[133]. The complainant (the Irish Bank Resolution Corporation) levering on ECJ previous case-law, contested the appellate decision of the Supreme Court – modifying the original questions – by invoking a homogenous interpretation between Article 34 SCA and 267 TFEU, answering substantially the same purpose[134]. The plaintiff also argued that in order to preserve a homogenous EEA and to avoid imbalances, all

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[128] BJÖRGVINSSON (2014: 276) where the author highlights that the nature of the competition infractions as well as the gravity of the fines inflicted call for the applicability of those provisions of Article 6 ECHR related to the criminal sphere.
[129] Judgement of the EFTA Court *Posten Norge AS v. EFTA Surveillance Authority*, para. 86.
[130] See, SPANO (2017: 484 ff.). See *supra* note 119.
[131] Judgement of the EFTA Court of 28 September 2012, Case E-18/11, *Irish Bank Resolution Corporation Ltd and Kaupthing Bank hf.*
[132] Icelandic law in fact, provides for an 'appeal system' with respect to advisory opinion's requests or rejection of motion thereof in the District Court, entitling the Supreme Court to have in essence a final say on the matter.
[133] Judgement of the EFTA Court, *Irish Bank Resolution*, para. 63, where the Court made reference to its relevant case-law, among which, to its judgement in *Ásgeirsson* (cited above).
[134] Ibid., para. 44.

individual and economic operators shall have the same opportunities in terms of access to justice and judicial remedies, regardless of whether, they came from an EU or an EFTA State[135]. Such a framework implies in that specific case, Icelandic District Court's right to refer to the EFTA Court on an equal footing to that enjoy, before the ECJ, by its judicial counterparts in the EU[136].

The EFTA Court while recognizing that Article 34 SCA recalls essentially Article 267 TFEU, on the basis of which the former has been defined, considerable differences still exist between the two, with the aim to preserve the less ambitious scope of EEA integration[137]. The Court however, sought to emphasise the value of referral mechanism under Article 34 SCA, reading it in conjunction with Article 6(1) ECHR and surmising the risk that, the denial to refer by a court of last instance, may violate Convention right to a fair trial[138]. To this end, the EFTA Court mentioned ECtHR judgement in case *Ullens de Schooten*[139], in which this latter court coped with the meaning of Article 263(3) TFEU, on the obligation to refer in EU law on the part of highest courts[140]. In the Strasbourg Court's opinion, although in that circumstance there had been no infringement of the applicants' rights protected by 6(1) ECHR, where a refusal to refer a question to ECJ appears to be unsubstantiated, the fairness of the proceedings may be affected[141]. According to the EFTA Court, the ECtHR's argument could also apply when a domestic court of last resort dismisses a decision to refer, presented by a lower court or to the circumstance in which it endorses the request, while modifying substantially the issues to be addressed[142].

From the foregoing, it emerges that Convention rights as well as the ECtHR case-law, may act as an added value for the EFTA Court's reasoning, instrumental to lessen formal divergences between the two EEA pillars.

The last hypothesis to deal with, as regards EFTA Court fundamental right case-law, is the one having a detrimental impact on the EEA Agreement's fundamental freedoms. That is, when the pursuit of an action, grounded on

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135 *Ibidem*.
136 *Ibidem*.
137 Ibid., para. 57. As a result of the less far-reaching degree of integration related to EEA legal order, the Court stated that its relation with EEA/EFTA domestic courts of last resort appear to be more "partner-like".
138 Ibid., para. 64.
139 Judgement of the ECtHR of 20 September 2011, Applications Nos. 3989/07 and 38353/07, *Ullens de Schooten and Rezabek v. Belgium*.
140 It should be reminded that such a duty does not exist under EEA law, but the same EFTA Court observes that national courts may be equally bound in this respect, by virtue of the principle of loyal cooperation provided for by Article 3 EEA. To that effect see, Judgement of the EFTA Court, *Irish Bank* para. 58.
141 For a more in-depth analysis of *Ullens de Schooten* case see, BJÖRGVINSSON (2014: 272 f.) who points out that in *Irish Bank* judgement the EFTA Court "is flirting with the idea of extending *Ullens de Schooten* case to the advisory opinion procedure. In this regard see also, SPANO (2017: 485 ff.).
142 Judgement of the EFTA Court, *Irish Bank,* para. 64.

fundamental rights, would occur at the expense of a fundamental freedom. A pertinent example of this kind, is to be found in the recent EFTA Court judgement in *Holship Norge AS*[143]. In this case, under a request for an advisory opinion by the Norwegian Supreme Court, the EFTA Court was asked to judge the lawfulness of a trade union's boycott, in order to procure acceptance of a collective agreement by a Norwegian company, whose parent company resided in another EEA State. The core legal issue was to determine whether the boycott at hand constituted a restriction of the freedom of establishment, ensured by Article 31 EEA[144]. The case in the main proceedings involved Holship, a Norwegian shipping agent, possessed by a Danish company, mainly in charge of cleaning operations of fruit crates. The author of the boycott was the Nordic Transport Workers' Federation ("NTF"), protecting the interests of dockworkers in the port of Drammen. By boycotting Holship's activity, NTF aimed at producing the company's acceptance of a particular collective agreement, namely the so-called Framework Agreement on a Fixed Pay Scheme for Dockworkers, since Holship was not a party thereof. The application of the Framework Agreement extends to thirteen ports in Norway, among which that of Drammen[145]. According to a "priority engagement clause" contained in the Framework Agreement, unloading and loading operations of ships in a Norwegian port, shall be conducted by those dockworkers engaged by the Administration Office ("AO"), a non-profit making actor, unless otherwise decided[146]. Holship however, has signed a separate collective agreement applying to cleaning works and to unloading and loading activities alike. The dispute arose since Holship employed by its own some workers to carry out loading and unloading operations, rather than joining the collective agreement system managed by AO. Against this backdrop, the EFTA Court had to ascertain to which extent the boycott against Holship was likely to adversely affect its freedom of establishment, guaranteed by the Agreement under Article 31, and if a potential restriction could be justified under Article 33 EEA. The EFTA Court admitted from the outset that the boycott as that of the case at issue, could deter or worse preclude the establishment of undertakings from other EEA countries, leading to a restriction of the freedom provided for by Article 31[147]. On the other hand, it observed that such a freedom may also be limited in the light of "overriding

[143] Judgement of the EFTA Court of 19 April 2016, Case E-14/15, *Holship Norge AS and Norsk Transportarbeiderforbund*. See also *supra* note 119, as far as Robert Spano's categorisations are concerned.

[144] Pursuant to Article 31 EEA "[…] there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. […] Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings […]".

[145] For a brief overview on the facts see, SPANO (2017: 489 f.).

[146] Judgement of the EFTA Court, *Holship Norge AS*, especially paras 17-23. In this regard see, also SPANO (2017: 489),

[147] Judgement of the EFTA Court, *Holship Norge AS*, para. 120. For a comment on the *Holship* judgement see, SPANO (2017: 489 ff.).

reasons of general interests"[148]. After, the Court reminded the status of fundamental rights as general and unwritten principles of EEA law, pointing out that

> [w]here overriding reasons in the public interest are invoked in order to justify measures which are liable to obstruct the exercise of the right of establishment, such justification, provided for by EEA law, must be interpreted in the light of the general principles of EEA law, in particular fundamental rights[149].

In conclusion, the Court stated that exemptions to Article 31 provided for under national law of EEA States have to be consistent with fundamental rights and eventually, it is up to the referring judge to evaluate such a compatibility, on the basis of Article 11 ECHR and the relevant Strasbourg Court case-law[150]. In addition, it is not sufficient that the restrictive measure fulfils a legitimate aim in the "abstract", but it should be assessed whether such an action "genuinely" seeks to safeguard workers, without exceeding what is strictly required to reach the intended objective[151]. It follows that fundamental rights standards (as well as human rights relevant sources) should be taken into account also when reasoning on eventual fundamental freedoms' restrictions under EEA law, being important general principles to protect individual autonomy, together with the principle of proportionality, that has been recalled also in *Holship* judgement by the Court[152]. Finally, an assessment guided by a fundamental right approach seems able to mediate, as far as possible, between individual rights which are inherent to fundamental freedoms, and collective rights.

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[148] Judgement of the EFTA Court, *Holship Norge AS*, para. 121. See also Article 33 EEA pursuant to which "[t]he provisions of this Chapter [on the right of establishment] and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health [by overriding reasons of public interest]".

[149] Ibid., para. 123.

[150] *Ibidem*. Interestingly, it should be noted that EFTA Court's statement in this respect recalls the position embraced by the Commission submitting observations, which quoted *inter alia* Article 11 ECHR and referred to Court of Strasbourg relevant case-law. See to that effect, Judgement of the EFTA Court, *Holship Norge AS*, paras 103 ff.

[151] Ibid., paras 125-130. On this point, see also, SPANO (2017: 490).

[152] See, Judgement of the EFTA Court, *Holship Norge AS*, para. 130. With respect to the principle of proportionality see also, LEBECK (2014: 260 f.).

Conclusions

From the forgoing analysis some conclusions can be drawn. That is to say, some considerations can be pointed out, once for all. Firstly, the present study proves how the coexistence of different systems of norms as well as of judicial institutions requires, even more, a systematic interaction, so as to avoid contrasts in viewpoints and jurisprudences, within and beyond Europe alike. It goes without saying that in a globalized world, affected by cross-cutting issues, judicial bodies can find themselves to handle similar legal questions; thus, a common approach would be suitable in order to provide as far as possible legal certainty to the benefit of the actors involved. But it is wise to proceed step by step. First and foremost, it has been explained that globalization has weakened the State-centric view of the international community, fostering contemporarily the multiplication of international organizations and "proliferation" of international courts or tribunals, of which the CJEU and the EFTA Court are to be considered prominent examples in this respect. The intensification of international adjudication, since the end of the Second World War, went hand in hand with the so-called trend of "judicialization" of international law. It is impossible not to mention the risk related to development of these international judicial bodies for the coherence of international law, due to the danger of eventual and arising conflicting case-law, that is, contrasts in the interpretation and application of norms. A threat which is understandable if considering the lack of a hierarchical order presiding over their relation to settle jurisprudential inconsistencies, likely to undermine the unity of international law. But it is also true that these international institutions reveal to be the more adequate ones to solve particular cases in the view of the general interest. States from their side, have voluntarily, and in a progressive way, start to devolve part of their competences to regional and/or international organizations for the pursuance of objectives they were unable to achieve *uti singuli*. Furthermore, they have also revealed increasingly willing to accept international courts' jurisdiction, as the preferred centre to settle disputes among them[1].

If it is true that conflicts may arise, this does not mean however, that the uniformity of international law is at risk once and for all. "Law is not an exact science"[2] thus, also divergences could be redressed in the future by changes in the courts' settled case-law and, recurrent judicial dialogue may prove to be beneficial to that effect. Thanks to a close cooperation amongst these

[1] On this point, BUERGENTHAL (2001: 272) who admits that the proliferation of international tribunals entails "adverse consequences" as for instance the insurgence of conflicting case-law, but overall, such an international trend has proved to be useful for the development and relevance of international law in the modern-day diplomatic relations. To that effect see also, LOCK (2015: 11).

[2] In the words of BAUDENBACHER (2016: 184) who refers to 'homogeneity' in EEA law as a "process-oriented concept".

courts, each other's jurisprudence can act as a valuable source of inspiration, on the basis of which each judicial body could reverse its own original approach, when that provided by another "partner" appears to be more suitable to face a specific legal issue. Therefore, the danger of "*fragmentation*" of international law, inherent to that of "proliferation" of international courts, shall be downsized, since the intensification of international adjudication has fostered in its turn, a process of "cross-fertilization" namely of jurisprudential interaction among different judicial institutions. This inter-court constructive dialogue not only allows for a sufficient degree of convergence amongst different judicial instances and/or systems of norms, but it is also instrumental to the *development* of international law.

These considerations of general character fit perfectly with a singular experience of judicial cooperation, within both the international and regional context. That is to say, the interrelationship between the EFTA Court and the CJEU is a very *sui generis* form of cooperation, being regulated under the EEA Agreement by specific and wide uniformity rules. This premeditated system of judicial dialogue, inside the broader international trend, recalls in part, the hierarchical relations amongst courts developing at domestic level, where their rapports occur within well-established framework. The overriding objective/principle of homogeneity, provided for by statutory provisions, not only founds and equally orients EEA law, but it also links the EFTA pillar to the EU one, binding as a result, the EFTA Court to the CJEU case-law in an ever-ending process. It follows that the concept of 'homogeneity' goes hand in hand with that of 'dynamicity' or development of EU/EEA law. Nonetheless, it is not correct either, to assign to the EFTA Court an ancillary role, while disregarding completely that it may prove, by its own, able to exercise a bearing upon its EEA judicial counterpart. This happens *inter alia*, thanks to the EFTA Court's possibility to express first on some particular matters, where no CJEU precedent exists, or still by means of its judicial authority 'as such', corroborated by the strength of its judgements as clear, concise and focused[3]. Be that as it may, the EFTA Court has without any doubt lessened the self-referential nature of the CJEU jurisprudence. The EU Courts in fact, whilst not compelled to do so, have repeatedly made reference to EFTA Court case-law.

Additionally, a more in-depth analysis on the relation between the EFTA Court and CJEU reveals that both a "dialogical" as well as "dialectical" relation may prove functional to the evolution of the EEA Courts case-law, which goes together with the development of EU and EEA law alike. Or at the very least, differences in the Courts' viewpoints, are mainly justifiable in the light of concrete reasons, deep-rooted for instance, in the less far-reaching scope of EEA integration, which seems to exclude the possibility to refer to a

[3] See SKOURIS (2014: 10) who defines the EFTA Court judgement as "clear", "straightforward" and "authoritative", observing that they are playing a key role in enhancing the judicial dialogue among courts in Europe.

real 'inhomogeneity' in those specific circumstances. Nonetheless, interpretative disagreements, if any, have turned out rather "short-lived"[4].

The originality of the cooperation between the EFTA Court and CJEU may also raise questions around the possibility to apply such an example as a model for international judicial dialogue, among different courts inside and beyond Europe[5]. Even though, the framework under which their close dialogue develops is quite unique, considering that the EEA Courts share essentially the same law and they are equally involved in the economic integration of the (EEA) Single Market. As a result, the consistency of EEA law serves the purpose of providing, as far as possible, common solutions to the advantage of individuals and economic actors concerned, as enshrined by Recital 15 of the Preamble to the EEA Agreement[6].

A last remark, which is at the same time the premise to understand the whole functioning of the EEA legal system, has to do with the "hybrid" character of EEA law, labelled as "quasi-supranational" law. It is not the moment for sketching out again, the motives justifying its distinct(ive) essence, but rather to reason about the promising role the EFTA Court might have in this regard. For such an aim it is necessary to broaden the perspective so as to include another European court, that is, the ECtHR from which both the EFTA Court and the CJEU have been inspired, as regards fundamental rights' standards to be ensured in Europe. This field works indeed, as a compound example of cross-fertilization amongst multi-level jurisdictions that is, national, international and supranational ones. The tripartite relation amongst these three European judicial institutions brings together three independent bodies of law: EU Treaties, EEA Agreement and ECHR as well as their underlying legal systems. It follows that this specific kind of relation, though not developing on equal terms in the EU and EFTA pillars of EEA, ends up involving national, (quasi)supranational and international legal orders, which are separate, but with overlapping systems of norms. Thereby, while being *independent* these intertwined legal orders are *dependent* on each other. This convergence is eventually eased by the inter-court dialogue and the spread of general principles of law. At the level of EEA law, it is worth mentioning from on hand the principle of homogeneity, and the principles of fundamental rights' protection on the other, to frame EFTA Court's relationship with the CJEU and with ECtHR respectively. Considering that the EFTA Court has already displayed its ability to deal with the very specific nature of EEA law, *vis-à-vis* both supranational and international law, it cannot be excluded that the same Court may be equally capable when assessing the legal significance

[4] See BAUDENBACHER (2016b: 191).
[5] On this point see, SKOURIS (2005: 128 f.) who wonders whether the ECJ and EFTA Court relation may be considered as a paradigm for international cooperation between judicial institutions, while stressing however the peculiar features regulating EEA judicial interaction.
[6] Pursuant to Recital 15 "the objective of the Contracting Parties is to arrive at […] an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competitions".

of the EU Charter and the European Convention under EEA law. That is, a readiness to handle with supranational and international law from both an inner and outside perspective. This also implies the EFTA Court's willingness to cope, when necessary, with uniform, or rather conflicting fundamental rights case-law – issued by the CJEU and ECtHR. In short, the intermediary feature of EEA law could go hand in hand with the intermediate role played by the EFTA Court with respect to the other two European judicial instances. If one does not rule out the hypothesis of an increasing significance of fundamental rights' protection in the context of EEA law, the EFTA Court could have a (final) say on the matter, with respect to those situations in which the Court of Justice and the Court of Strasbourg disagree on the interpretation of corresponding provisions. In other terms, the EFTA Court rather than being impartial, can eventually side either with the CJEU or the ECtHR.

To sum up, Europe is a perfect place where to start to analyse the international phenomenon of "judicialization" of international law, together with that of "proliferation" of international courts. The EFTA Court and CJEU judicial dialogue does not merely reproduce the international trend in a lower 'dimension' that is, from the international to the regional one. The foresaid cooperation is as unique as fruitful to be esteemed as a "paradigm" for the international judicial cooperation[7]. It also brings into play domestic courts of EEA States and the European Court of Human Rights hence, paving the way for a multi-level judicial dialogue, aiming ultimately to provide further coherence amongst overlapping legal orders, as well as to promote the development of EEA and EU law. However, whilst being *interdependent*, these courts endeavour to preserve as far as possible their own *independence*, that, in the case of the CJEU has been jealously claimed in the light of the autonomous character of the EU legal order, to which the autonomy of EU Court(s)' jurisdiction is inherently attached. As far as the EFTA Court is concerned, the independent status of its judicial activity is much more limited, by virtue of the goal/principle of homogeneity, which eventually binds it to the CJEU case-law. Notwithstanding it is not feasible to attribute to the EFTA Court and to the EEA law the same autonomous character[8] as that enjoyed by the whole EU system and the CJEU, the EFTA Court judgements are as authoritative as those delivered by its EEA counterpart. Although the 'autonomy' of the EFTA Court cannot be preserved in its entirety, its 'authority' within the EFTA pillar and towards the EU one, is indisputable.

[7] See *supra* note 5.
[8] Of course, in relation to both national and international law.

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Summary

Europe is a meaningful context where to start to review the international phenomenon of "judicialization" of international law, as a corollary of the process of "proliferation" of international courts, by studying it at lower 'layer', that is from the international to the regional one. Basically, this implies a rise in international permanent courts as a means of dispute settlement mechanisms within the world of the international diplomacy. The most salient examples are to be found in Europe, with the establishment of the European Court of Human Rights ("ECtHR"), the European Court of Justice ("ECJ") and later on, of the EFTA Court[1]. Notwithstanding, it seems correct to specify that though such a phenomenon interested notably Europe, the tendency to a 'regionalization' acquired in its turn an international character, since international courts of human rights or of regional economic integration progressively sprang out also beyond the European continent[2].

A research study focused on the interaction among two European courts, that is, the CJEU and the EFTA Court therefore, cannot set aside more general explanations around the phenomenon of "proliferation" of international courts, within which, this kind of judicial cooperation represents a very *sui generis* example. The interaction between the EFTA Court and the CJEU is a regional judicial cooperation within the wider international trend, involving in its turn, a multi-level judicial dialogue with the other national courts. It goes without saying that the coexistence of different systems of norms as well as of judicial institutions demands, even more, a systematic interaction, so as to avoid contrasts in standpoints and jurisprudences, within and beyond Europe alike.

The present analysis, aims at contextualizing primarily the phenomenon of "judicialization" of international law, as a result of an intensification of international adjudication, in order to understand the causes as well as consequences or worse, drawbacks of such an occurrence. Briefly, if internationally the multiplication of adjudicatory bodies could be perceived as a risk for the coherence of international law, owing to the possibility of conflicting case-law amongst these manifold courts, it finishes by promoting an informal and voluntary judicial dialogue, outside any predetermined procedure, so as to ease such a danger[3]. Thus, judicial institutions became

[1] BAUDENBACHER (2004: 382).
[2] LOCK (2015: 10 f.).
[3] Formalised forms of judicial dialogue are to be found in Europe, essentially between national courts and international and supranational courts, through preliminary ruling systems envisaged by the EU Treaties as well as by the EEA Agreement as to the EFTA Court, under the label of 'advisory opinion procedure'.

even more conscious of the need to take into account each other's jurisprudence, ending up interacting amongst them even outside any mandatory rules. It follows that the danger of "fragmentation" of international law, inherent to that of "proliferation" of international courts, shall be downsized, since the intensification of international adjudication has fostered in its turn, a process of "cross-fertilization", namely of jurisprudential interaction among different judicial institutions. This inter-courts' constructive dialogue not only allows for a sufficient degree of convergence amongst different judicial instances and/or systems of norms, but it is also instrumental to the development of international law.

In a globalized world, affected by cross-cutting problems, judicial bodies can find themselves to cope with similar legal issues; thus, a common approach would be beneficial in order to provide as far as possible legal certainty in the interest of the actors involved. But it is wise to proceed step by step. Globalization has weakened the State-centric view of the international community, fostering contemporarily, the multiplication of international organizations and "proliferation" of international courts or tribunals, of which the CJEU and the EFTA Court are to be considered salient examples in this respect. The development of international adjudication, since the end of the Second World War, went hand in hand with the so-called trend of "judicialization" of international law. It is impossible not to mention the risk inherent to the increase of these international judicial bodies for the coherence of international law, due to the danger of eventual and arising conflicting case-law, that is, contrasts in the interpretation and application of norms. A well-grounded threat due to the lack of a hierarchical order presiding over their relation to settle jurisprudential inconsistencies, likely to undermine the unity of international law. But it is also true that these international institutions reveal to be the more adequate ones to solve particular cases in the view of the general interest. States from their side, have voluntarily, and in a progressive way, start to delegate part of their powers to regional and/or international organizations, vesting them with functional competences for the pursuance of objectives they were unable to achieve by themselves. Furthermore, they have also revealed increasingly willing to accept international courts' jurisdiction, as the preferred centre to settle disputes among them, rather than relying on diplomatic instruments of conflict resolution.

The way of proceeding adopted by the present analysis allows to better frame the CJEU and EFTA Court relation within the wider international and regional context, to finally deepen their distinguishing features. The CJEU ad EFTA Court relationship in fact, is a very interesting as well as emblematic case study in this regard. It reproduces in part common characteristics regulating courts' interconnections at the international level, as for instance frequent

cross-referencing to each other's jurisprudence, but on the other hand, the CJEU-EFTA Court judicial dialogue goes far beyond than that. As a matter of fact, the exigency to preserve a homogeneous interpretation of substantially identical provisions, with which these two courts operate, and an organicity in their respective case-law, is ensured through specific as well as written uniformity rules. In other words, their interdependence is anything but fortuitous, since it develops within pre-established procedures, shaping *ex ante* a "cross-fertilization" between these main European judicial bodies. Additionally, in the European Union, the institutions involved in such a judicial 'exchange' are jointly the General Court, the European Court of Justice and its Advocates General. These latter, even if with different level of intensity, have entered into dialogue with the EFTA Court, though not formally obliged to do so.

An analysis, whose object is the interaction between the two aforesaid courts, is logically comparative. This does not mean that the purpose of such a study is merely descriptive. Conversely, it aims at assessing the nature and content of their dialogue, trying to evaluate whether it is an equal, or rather unbalanced relationship. That is why, it will be necessary to examine the procedural framework, under which the EFTA Court and the CJEU interacts as well as what occurs on a practical level, by looking at their respective uniform or conflicting case-law. As a consequence, a critical assessment will follow both when scrutinizing statutory provisions regulating their judicial cooperation and, in analysing their relevant jurisprudence.

Nevertheless, a study based on the interplay between the two courts cannot leave out of consideration the role played by CJEU and the EFTA Court within their respective legal orders. In other words, when dealing with the interaction of two courts, an understanding of the functions, the competences and the authority of each judicial body is in a certain sense needed. In this way some considerations can be drawn as regards their similarities or rather differences, mirroring the context under which they work. An assessment of this kind is the prerequisite to understand the CJEU and EFTA Court approach in itself, together with that adopted under the general framework of the Agreement on the European Economic Area (or "EEA"), the legal basis for their relation, but also the law they have in common and they are asked to interpret and apply. Under the EEA context, the process of the "mirror jurisdiction" given by courts' frequent cross-referencing is upheld by a very particular phenomenon of "mirror legislation", that is homogeneity of norms, which has a 'static' as well as 'dynamic' configuration. In the EEA system, "mirror jurisdiction" derives from the overriding goal of "judicial homogeneity" informing EEA law, provided for by uniformity rules addressed to the EFTA Court as well as from its deference to the CJEU case law and method of interpretation. The

"mirror legislation" instead, derives and contemporarily strengthen itself, thanks to the objective of the "legislative homogeneity" given by written provisions just like a constant incorporation of secondary law. The aim of 'homogeneity' consequently, goes hand in hand with that of 'dynamicity' or development of EU/EEA law.

The first logical step in order to understand the dialogue between the EFTA Court and the CJEU is to look at the system underlying the EEA Agreement and provisions thereof, which frame in their turn, the dialogue between the EFTA Court and the CJEU.

The difficult birth of the EFTA Court takes place in parallel to that of the EEA Agreement, reproducing the core of European Union material law, related to the four fundamental freedoms and competition rules, so that the EU internal market is extended beyond its traditional boundaries, to the three EFTA States (Norway, Iceland and Liechtenstein). Such an Agreement established a very particular "two-pillar" structure so as to preserve the independence of the EEA Agreement's parents organizations, that is, the European Union and the European Free Trade Association. The EFTA States for their part, engaged in a far more straightforward intergovernmental cooperation, whereas the EU Members committed themselves to a burdensome supranationalism. There exist indeed, relevant dissimilarities with respect to the two legal systems deriving from EU and EEA law and the EEA two-pillar approach is a sophisticated device designed to preserve the autonomy of its two underpinning organizations. It has created a joint structure, based on two separate legal systems linked through common bodies, but based on independent enforcement mechanisms with EU and EFTA institutions acting within their own legal order. By virtue of the limited scope of the EEA Agreement, the gap between the two EEA pillars is essentially bridged by the EFTA Court judicial 'activism' since, this court does not limit itself to observe the CJEU jurisprudence, but to inherit also the reasoning and the interpretative method followed by the EU Courts, so as to embraced the EU fundamental doctrines, adjusting them in the EEA context. Reference is to direct effect, primacy and State liability which have found more or less equivalent, though adapted, EEA principles. The main result is to offer citizens and private actors the possibility to enjoy of their rights – as acknowledged by EEA and/or EU law – within their national legal orders. That is way, EEA law has been ranked to the status of "quasi-supranational" law. The "hybrid" character of EEA law stems first of all, from the less far-reaching scope of the Agreement as well as from the less binding nature of the economic integration against EFTA States. There exist considerable differences as to the degree of discretion left towards EEA Contracting Parties in the two pillars or the other way around, in terms of the more or less coercive power exercised by EU or EFTA institutions when

called to ensure the correct interpretation and application of EU and/or EEA law. Pursuant to Article 7 EEA and Protocol 35, EEA Contracting Parties agreed not to transfer any legislative power at the EEA level, thus to devolve States' prerogatives beyond the boundaries established by their constitutional requirements.

Interestingly, the study of the CJEU and the EFTA Court relation allows to further deepen other equally pertinent issues, such as the autonomy character of the EU legal system. The establishment of the EFTA Court, under the original form of an "EEA Court", has been vetoed in fact, by the CJEU in order to preserve the autonomy of its jurisdiction and of EU law alike. As the guardian of the EU law in general, and of internal market rules and rights in particular, the Court of Justice had to express on the acceptability of a new court, with which a jurisdictional conflict as well as interpretative contrast could have arisen. That risk appeared intensified given that, the EEA Agreement duplicated the fundamental material body law of EU Treaties, essentially to widen its geographical reach. The establishment of the EFTA Court, having jurisdiction only towards EFTA States, followed the preliminary aversion or rather, decision of inadmissibility by the Court of Justice towards a system of courts as conceived by the first draft agreement under its scrutiny. The CJEU cannot accept to be bound by the decisions of an EEA Court, as originally envisaged by the agreement, called upon to interpret and apply essentially identical provisions, to which the Court of Justice could have attributed a different meaning. As a consequence, the Opinion 1/91 *relating to the creation of the European Economic Area* delivered by the Court in December 1991, asserted the autonomy of the EU legal in its external dimension, that is in relation with international law.

Furthermore, being the EEA Agreement an example of "mixed" agreement, the present analysis cannot refrain from examining the practice of this kind of agreements under EU law, and to draw some considerations on the CJEU's jurisdiction in this regard. This type of agreements is not regulated explicitly by the EU Treaties but they are widely used in practice since it is not always so easy to distinguish between EU and Member States' competences. Mixed agreements are considered in fact, useful devices in order to overcome the delicate issue of partition of competences between the Union and Member States and, their shared responsibility for the attainment of the duties originating from the agreement in question, represents a further guarantee for third parties[4]. To enter into force, mixed agreements required in fact both a decision (of the Council) at the EU level and a ratification by some Member States or by all, as in the case of 'association agreements', enshrined by Article 217 TFEU. It is worth noting that the EEA Agreement is the sole example of association agreement involving the European Union which compelled the

[4] LOCK (2015: 101 f.).

associated members to rely on a distinct court[5]. However, mixed agreements are feasible when dealing with subjects that fall outside the exclusive competence of the European Union and the internal market, underlying the EEA agreement is an example of "shared competence" between the European Union and its Member States as well as the fundamental scope of the Agreement, aiming at opening the EU single market to EEA/EFTA States, while excluding them from the whole EU membership status. Another problem belonging to this type of international agreements is connected to the CJEU's jurisdiction. In the light of the so-called principle "parallelism of competences", resulting from the CJEU jurisprudence, there exists a correlation between the internal and external allocation of competences among the Union and/or its Member States. It follows that the Court should have essentially the authority to interpret those provisions covering subjects in which the EU is entitled to conduct an external action, not also those which fall under the activities for which competent are the States[6]. Nevertheless, the Court's stance has not been overall so linear and obvious. As a consequence, the line circumscribing or better, defining its power in this regard is flexible and it is quite understandable that such an elasticity can be easily exploited to the advantage of the same Court.

Bearing in mind this background information as regards the practice of "mixed" agreement under EU law some considerations can be drawn with respect to the EEA Agreement itself. The EEA Agreement has been concluded as a 'mixed agreement' namely between EEA/EFTA States from one part, and the European Union then Community, and its Member States on the other. The Court of Justice has objected the creation of an EEA Court, in order to avoid potential conflicts of jurisdiction and interpretation. Nonetheless, it is right to observe that CJEU's interpretation over EEA Agreement's provisions can indirectly descend from those corresponding to EU law. Additionally, it seems that under the peculiar context of EEA law, the CJEU's dilemma on the interpretation over (EEA) mixed agreement has been solved *a priori* in its landmark Opinion 1/91, in which the Court negatively expressed on the system of courts architected by the first draft agreement. What is more, the CJEU's indisputable authority over EEA/EU norms is backed simultaneously by the peculiar nature of EEA Agreement, substantially reproducing the 'heart' of EU material law, by the general principle of homogeneity as well as homogeneity rules addressed to the EFTA Court. This latter in fact, has adopted a deferential behaviour by following its EEA judicial counterpart' s case-law and above all, by imitating its purposive method of interpretation. In such a way the CJEU's standpoint is formally preserved. Such a scenario is ultimately upheld by the practice and entente among EEA Courts, though, the general rule of uniformity and mutual correspondence are far from being absolutely perfect. It is not correct either, to assign to the EFTA Court an ancillary role, while disregarding completely that it may prove, by its own,

[5] BAUDENBACHER (2016: 139).
[6] LOCK (2015: 102 ff.).

able to exercise a bearing upon its EEA judicial counterpart. This happens *inter alia*, thanks to the EFTA Court's possibility to express first on some particular matters, where no CJEU precedent exists, or still by means of its judicial authority 'as such', corroborated by the strength of its judgements, defined in a way which ends up persuading its EEA judicial counterpart. Be that as it may, the EFTA Court has without any doubt reduced the self-referential nature of the CJEU jurisprudence. The EU Courts in fact, whilst not compelled to do so, have repeatedly made reference to EFTA Court case-law. Although the EEA Agreement formally prescribes a unilateral responsibility towards the EFTA Court, considering those homogeneity rules weighting on it,in order to follow the CJEU relevant case-law, in general both EEA Courts have collaborated to the progress of EEA law and the EEA internal market. As a consequence, if one excludes the existence of the CJEU's monologue in the interpretation of EU relevant provisions and/or corresponding EEA ones, silently and unequivocally followed by the EFTA Court, it means that the EEA Courts' relation results rather in a 'dialogue'. Moreover, if one intends the 'dialogue' in its neutral connotation that is, as a mere confrontation in terms of ideas and viewpoints, such a rapport could result either in a positive correspondence or in an interpretative disagreement.

Dialectical relations and eventually if any, outcomes, are not inherently negative for the homogeneity goal presiding EEA law, since they may reveal useful in two regards. First of all, they demonstrate an autonomy of thought on the part of both EEA Courts. Secondly, interpretative disputes in their turn, can strengthen the strategy of cross-communication, so as to encourage adjustments in both Courts' case-law in the light of their reciprocal convincing arguments. Differences in the Courts' viewpoints, are mainly justifiable in the light of concrete reasons, deep-rooted for instance, in the less extensive scope of the EEA integration, which seems to exclude the possibility to refer to a real 'inhomogeneity' in those specific circumstances. Nonetheless, interpretative disagreements, if any, have turned out temporary, since they have eventually been redressed.

Against this backdrop, a more in-depth analysis on the CJEU and EFTA Court case-law will follow, focusing on some specific subject-matters, where the Courts have engaged in a "dialectic" and/or "dialogical" relation, namely in an affirmative, or rather conflictual interaction. However, what is certain is that both Courts have proved to be very responsive to each other's jurisprudence. This means that the EFTA Court rulings as well, have a bearing upon the CJEU.

Within the wide string of subject areas in which the EFTA Court and the CJEU has entered into dialogue, the present study focuses especially on three main sectors, that is food safety law (and the precautionary principle), State monopoly and trade mark rights. The choice is rather 'arbitrary', but justified in the light of the significance the related judgements in these fields have had

in promoting the EEA Courts' judicial dialogue. As far as the food safety law is concerned it should be remarked that sooner or later, all EEA judicial institutions have confronted with the issue of marketing of enriched or fortified foodstuffs, and the potential side effects they could have for human health. The legal question dealt with the necessity to strike a balance between the free circulation of goods and public health concerns, in order to assess to which extent one of the fundamental freedoms of the EEA Agreement could be limited. With respect to such a dilemma – or better mediating activity – measured both the EFTA Court and the CJEU, with reference both to the Court of Justice and the General Court. The mutual exchange in such a sphere of law among these EEA judicial institutions, based on systematic cross-referencing and reciprocal understanding, has fostered the refinement of precautionary principle in food law, outlining its field of application, boundaries and *ratio*. The precautionary principle in fact, at the EU and EEA level alike, was originally acknowledged only with respect to environmental policy. The deepening of such a subject-matter is perfectly consistent and noteworthy for the present analysis, considering the role played by the EFTA Court "*Kellogg's*" judgement of April 2001. The Court ruling has been welcomed as the first clear example in which a regional tribunal has handled the issue of fortification policy and practice relying *explicitly* on the precautionary principle, as a sufficient legal instrument at the disposal of Member States so as to curb the free circulation and marketing of foodstuffs, for reasons of public health[7]. The CJEU followed and embraced in the later judgements the approach adopted by the EFTA Court.

With respect to the other two topics what is important to emphasise is that the EFTA Court distanced itself from the CJEU case-law, providing its own and slightly different meaning of EEA law. Such an outcome was mainly legitimized by virtue of the less far-reaching scope of the EEA Agreement. However, more interesting is the case of trade mark rights and the related principle of international exhaustion, since in this matter the EFTA Court eventually fulfilled a 'U-turn', overruling its own previous case-law. This to uphold the ECJ's position precluding EEA States from the unilateral and *ad hoc* application of international exhaustion of rights conferred by a trade mark, irrespective of the origin of the goods in question. The EFTA Court eventually dismissed the applicability of international exhaustion principle at the EEA level for goods originating from outside the EEA internal market acknowledged in *Maglite* case, *before* the ECJ clearly expressed on the matter. This example emblematically testifies how the EFTA Court takes seriously the homogeneity goal, without rejecting differences in scope and purpose between EU and EEA law, but downsizing their influence in order to preserve a homogenous European Economic Area.

As anticipated earlier, the EFTA Court and CJEU constructive dialogue is a peculiar example within the wider international and regional sphere.

[7] GALLO (2007: 167).

Broadening the perspective beyond the EEA system, still remaining in the European continent, another court could intersect with the CJEU and EFTA Court's settled relation. That is to say, the European Court of Human Rights. Not surprisingly, the subject connecting these three European courts will shift from internal market rules' interpretation to turn to fundamental rights' protection, which have been 'incorporated' into EEA law only by means of the EFTA Court judicial 'activism'. No provision exists in the Agreement referring to it. However, the "cross-fertilization" in this field is particularly worthwhile to look at, since it entails a multi-level judicial dialogue amongst national, international and supranational courts. What is more, it will be interesting to note how the EFTA Court will manage fundamental rights' issues under EEA law, by drawing from the CJEU and/or European Court of Human rights case-law. Within this 'tripartite' judicial dialogue, the EFTA Court has to cope with the principle of homogeneity as a "thread" which binds it to the CJEU jurisprudence, but also with the common standard of human rights' protection provided for by the European Convention on Human Rights and last but not least, with the limited scope of the EEA Agreement. This last part, dealing with the legal significance of fundamental rights under EEA law cannot provide exhaustive responses, due to the limited practice and legal doctrine on the matter. However, the main objective is to rise questions, to describe which may be the possible scenarios arising before the EFTA Court, relying on hypotheses and actual cases alike.

Before deepening the issue of fundamental rights in EEA law, it is fair to provide a more general framework on this European inter-courts ('layered') dialogue. First of all, it should be clarified that this spontaneous or rather, required judicial interrelationship is due to the existence of overlapping as well as autonomous bodies of law, triggering at the international level, parallel and intertwined legal orders, interacting amongst them and which coexist with national systems of rules. Thus, it goes without saying that the European Convention on Human Rights ("Convention"), together with the EEA Agreement and EU Treaties, constitute independent legal orders, entailing their own normative basis, with which their respective judicial institutions operate. A way to cope with such a compound scenario is a multi-level judicial dialogue among national, international and supranational courts so as to guarantee a minimum level of coherence, which can develop in a formal or informal manner, but also through a vertical or horizontal interaction, according to the dimension involved. Nonetheless, if the ECJ and ECtHR's judicial exchange is based on reciprocity, being a two-sided relationship, by contrast, the same cannot be said with respect to the EFTA Court and the Strasbourg Court. Though EFTA Court refers to the European Convention on Human Rights as well as to the ECtHR case-law, this latter Court simply disregard EEA Agreement's provisions in its own jurisprudence as well as

EFTA Court judgements. By bringing the ECtHR into play, the EEA inter-courts' interaction gets difficult. It is true that the EFTA Court above all in its recent jurisprudence, makes reference to the ECtHR case law, but differently from what happens with respect to the CJEU, this kind of relation is not framed by any procedural framework. Worse, neither the Charter nor the ECHR have been made part of the EEA Agreement, that is why fundamental rights' protection is ensured on the basis of general principles of law. General and unwritten principles of law are indeed, other legal expedients to ensure a cross-cutting level of congruence amongst overlapping systems of norms, lacking a formalised hierarchy among them. The issue of fundamental rights in EEA law however, cannot leave out of consideration the topic of multilevel constitutionalism within the EU pillar of EEA. This is necessary to understand the legal significance of fundamental rights under EU law by means of a dialogue between the CJEU from one part and constitutional courts of Member States on the other. This interaction eventually increased human rights' protection at the EU level so as to appease national courts' pleas as well as to diminish their control at domestic level. Afterwards, the same approach will be adopted as to the multi-level normative framework in the EFTA pillar of EEA, to grasp how fundamental rights' protection may be relevant for the interpretation and application of the Agreement. In this respect, it is worth clarifying that whilst neither the Charter nor the European Convention have been incorporated in EEA law, EEA/EFTA States' duty to comply with the ECHR-related rights flows from an international obligation, since all EEA States have acceded the Convention even prior the entry into force of the EEA Agreement. Be that as it may, the EFTA Court is committed to the observance of the CJEU case-law, which in its turn has even more referred to fundamental rights' issues and Charter's provisions, also when interpreting secondary EU legislation, which by contrast could be an integral part of the EEA law, once considered 'relevant' for the Agreement.

From the foregoing analysis it follows that while being independent the CJEU and the EFTA Court, whose interaction could end up including also another international judicial body just like domestic courts of EEA states, are finally closely interdependent, as regards the fundamental subject areas covered by the EEA Agreement. But if the autonomous character of the EU legal order and equally of the CJEU's jurisdiction is indisputable, the same does not hold true as to the EFTA Court and the EEA legal system. Their autonomous dimension is lessened due to the principle of homogeneity, underpinning the EEA structure and subjecting the EFTA Court to the CJEU jurisprudence. That said, more than a full-fledged autonomy, the EFTA Court seems to enjoyed rather an undisputed authority, which downgrades its independence to a lower level, compared to that vested to the CJEU.