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the EFTA Court from the Perspective
of the Homogeneity Principle

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The Dialogue between the ECJ and the EFTA Court from the Perspective of the Homogeneity Principle

by

Inga Kawka*

Abstract

(French version below)

The paper focuses on the legal solutions and factors that make the dialogue between the EFTA Court and the ECJ effective. One of them is the willingness of these two European courts to ensure the coherence and homogeneity of the EEA legal space. Apart from this decisive factor, the effective dialogue is also reinforced thanks to others legal solutions like the interventions and observations submitted by the European Commission and the EFTA Surveillance Authority.

As cooperation and mutual understanding between the ECJ and the EFTA Court are effective and ensure the coherence of their jurisprudence, the paper is also an attempt at answering the question whether making it possible for the European Commission and a body of an international organisation (the EFTA Surveillance Authority) to submit observations can be useful on a large scale. With the European legal space expanding and EU law having an impact as far as in third countries under the principle of integration without membership, the question arises whether the practice of intervening and submitting observations could be used as a factor which facilitates the dialogue between the ECJ and courts of EU neighbouring countries.

Keywords: EEA legal space, judicial dialogue, EEA Agreement

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Résumé

La visée de cet article est d'étudier des solutions juridiques et des facteurs qui aident à assurer un dialogue efficace entre la CJUE et la Cour AELE. L'un d'entre eux est la volonté de ces deux juridictions européennes de garantir la cohérence et l'homogénéité de l'espace juridique de l'EEE. En dehors de ce facteur décisif, l'efficacité du dialogue est également renforcée par d'autres solutions juridiques, par exemple des interventions et des observations présentées par la Commission et l'Autorité de surveillance de l'AELE.

Puisque la collaboration et l'entente mutuelle entre la CJUE et la Cour AELE sont efficaces et assurent la cohérence de la jurisprudence des deux juridictions, l'article tente également de répondre si le modèle de la collaboration dans le cadre de l'AELE, et notamment, la possibilité pour la Commission et pour l'Autorité de surveillance AELE de présenter leurs observations, peut s'avérer utile à plus grande échelle. Comme l'espace juridique européen continue de s'élargir, et puisque le droit communautaire exerce une influence grandissante sur les pays tiers en cours du processus de l'intégration sans adhésion, la question qui s'impose est de savoir si la pratique d'intervenir et de présenter des observations pourrait devenir un facteur facilitant le dialogue entre la CJUE et les juridictions des pays voisins de l'UE.

Mots-clés : Espace juridique européen, dialogue des juges, Accord EEE

The Dialogue between the ECJ and the EFTA Court from the Perspective of the Homogeneity Principle

I. Introduction

The European Economic Area comprises all 28 Member States of the European Union and three of the European Free Trade Association (EFTA): Iceland, Lichtenstein and Norway¹. It was established under the EEA Agreement² signed on 2 May 1990 by seven EFTA States, the Community and all EC Member States³. According to Article 1(1) of the EEA Agreement, the purpose of this legal text is “to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules”. To achieve this, EEA states have undertaken to ensure: the free movement of goods; the free movement of persons; the free movement of services; the free movement of capital; the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; as well as closer cooperation in other fields, such as research and development, the environment, education and social policy (Article 1(2) of the EEA Agreement). Thus, under the EEA Agreement, Iceland, Norway and Liechtenstein are now a part of the internal EU market. For this purpose, the EEA Agreement reiterates the majority of material provisions of EU treaties on the common market freedoms and basic EU policies (e.g. competition, environment)⁴.

The uniform application of the EEA Agreement in the legal orders of EEA-EFTA States and the Member States of the EU, as well as the indisputable success of this Agreement, consisting in achieving its objective, namely extending the EU internal market to EEA-EFTA States⁵, is also due to the active role of the EFTA Court as well as its cooperation and dialogue with the ECJ.

¹ On 6 December 1992, the citizens of Switzerland voted against joining the EEA in a referendum.

² Agreement on the European Economic Area, OJ No L 1, 3 January 1994, p. 3.

³ <http://www.EFTA.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Final%20Act/FinalAct.pdf> (04.08.2014).

⁴ SOZAŃSKI Jarosław, *Umowy międzynarodowe Unii Europejskiej po Traktacie z Lizbony*, Warszawa - Poznań, Polskie Wydawnictwo Prawnicze – Iuris, 2011, 278 p.

⁵ FREDRIKSEN Halvard Haukeland, FRANKLIN Christian N.K., “Of pragmatism and principles: The EEA Agreement 20 years on”, CMLRev 2015, pp. 629–684, p. 629.

The purpose of this article is to analyse the legal solutions that make dialogue between the EFTA Court and the ECJ possible. This is to ensure the coherence and homogeneity of the extending EU internal market and prevent a situation in which the citizens of the EU and third countries would have different rights and obligations because of the different interpretation of EEA Agreement provisions.

II. Judicial architecture of the EEA Agreement

EEA law is dynamic in nature: new EU legal texts regulating the internal market are constantly incorporated into the Agreement. Decisions on this matter are taken by the EEA Joint Committee made up of European External Action Service⁶ representatives and the ambassadors of the EEA-EFTA States. The discharge by the participating EFTA States - Iceland, Liechtenstein and Norway - of their obligations resulting from the EEA Agreement is monitored by the EFTA Surveillance Authority (ESA). In order to ensure the homogeneous interpretation and application of EEA Agreement provisions in EEA States, the EFTA Court was established. In the words of Adam Łazowski, this is now “the most advanced model of integration without membership in the European Union”⁷.

The effective operation of the administrative and judicial solutions established as part of the EEA have made it possible to create a uniform legal space in which EU Member States and third countries are subject to a common legal order. It was possible despite the fact that no common EEA Court for the EU and the EFTA has been established under the EEA Agreement. Such a solution was provided for by the original text of the Agreement. However, ECJ Opinion 1/91⁸ prohibited establishing a single institutional mechanism within the EEA that would ensure the enforcement and surveillance of this international Agreement. In Opinion 1/91, the ECJ pointed out that it was necessary to protect the autonomy of the EU law, which prevented establishing a judiciary body other than the ECJ that could interpret EU internal market legislation. In the final act of the Agreement, a pillar structure of the EEA was adopted, which was then accepted by the ECJ in its Opinion 1/92⁹ and called for the establishment of the EFTA Court (Article 108(2) of the EEA Agreement) whose decisions, as the ECJ emphasised, were binding only for the EFTA pillar.¹⁰

In the light of the lack of a single court, EEA uniformity was ensured using various solutions that guaranteed cooperation between the EU and EFTA pillars. Under Article 105 of

⁶ In accordance with the Treaty of Lisbon, the responsibility for coordinating EEA matters on the EU side was moved from the European Commission to the European External Action Service following its launch on 1 December 2010.

⁷ ŁAZOWSKI Adam, "Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union", CMLRev 2008, pp. 1433-1458, p.1437.

⁸ ECJ, opinion 1/91, [1991], ECR I-6079.

⁹ ECJ, opinion 1/92, [1992], ECR I-2821, para 19.

¹⁰ GRAVER Hans Petter, "The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States", in Baudenbacher Carl, Per Tresselt and Thorgerir Örylgsson (eds.), *The EFTA Court: Ten Years On*, Oxford and Portland, Oregon, Hart Publishing, 2005, pp. 79-99, p. 80-81.

the EEA Agreement, it is the EEA Joint Committee's remit to keep under constant review the development of the case law of the ECJ and the EFTA Court and to act so as to preserve the homogeneous interpretation of the Agreement. However, in accordance with the agreed minutes (*procès-verbal agréé* ad article 105), decisions of the Joint Committee have no impact on the case-law of the ECJ. These agreements also have an impact on the interpretation of Article 111 of the EEA Agreement, which establishes a mechanism for resolving disputes between EU and EEA-EFTA States. This provision grants the Joint Committee the right to resolve disputes on the interpretation of the EEA Agreement, and, as provided by Article 105(3) of the EEA Agreement, disputes that cannot be resolved pursuant to Article 105 of the Agreement about differences in the case-law of the ECJ and the EFTA Court. Hence decisions taken in this matter by the Joint Committee cannot, according to the agreed minutes, influence the case-law of the ECJ. In addition, as Article 111(3) provides, disputes concerning the interpretation of the provisions of the EEA Agreement identical to the provisions of the EU law may be submitted to the ECJ, which can then rule in a way binding for the contracting parties. In this situation, the ECJ does not resolve the dispute, but issues a judgement which has to be taken into account by the contracting parties in the proceedings before that Joint Committee. Another solution in a disputed situation is to adopt safeguard measures under Articles 112(2) and 113 of the EEA Agreement or suspend the disputed part of the agreement (Article 102 of the EEA Agreement). Such a procedural solution means that the ECJ is a superior authority for interpreting the provisions of the EEA agreement in the EU pillar¹¹.

As EFTA States did not want to submit to the jurisdiction of the ECJ, as this would have meant entrusting the interpretation of the provisions of the EEA Agreement to the court of the other contracting party, the EFTA Court was established in the EFTA pillar. Its remit is to carry authority within the EFTA pillar. It is competent, in particular, for: actions concerning the surveillance procedure regarding the EFTA States; appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority; the settlement of disputes between two or more EFTA States (Article 108(2) EEA Agreement). The EFTA Court also issues advisory opinions (formally nonbinding for national courts) by answering questions for preliminary rulings of the Iceland, Lichtenstein and Norway courts¹².

Pursuant to Article 105 of the EEA Agreement, the EFTA Court has the right not to accept the interpretation made by the ECJ and, following the dispute resolution procedure from Article 111 of the EEA Agreement, to block the transmission to the ECJ of the interpretation of the provisions of this Agreement in disputed cases. What is more, under Article 6 of the EEA, the EFTA Court is obliged to take into account only ECJ rulings published

¹¹ FREDRIKSEN Halvard Haukeland, "One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area", *Nordic Journal of International Law* 2010, pp. 481-499, p. 486.

¹² Article 34 of the EFTA Surveillance and Court Agreement.

before the EEA Agreement was signed, interpreting the provisions of this international agreement that are identical in substance with the provisions of the EU law “in conformity with the relevant rulings of the Court of Justice”. However, Article 3(2) of the EFTA Surveillance and Court Agreement (SCA) provides that the EFTA Court has a duty only “to pay due account” to ECJ rulings issued after the date. Consequently, in the literature of the subject¹³, the relationship between the ECJ and the EFTA Court is described as horizontal between equal judges and courts operating in different legal systems.

Some of the features of the judiciary structure in the EEA speak in favor of the dominant role of the ECJ. First of all, it does not have a legal obligation to take into account the EFTA Court decisions. Secondly, the position of the EFTA Court is weaker than the ECJ not from the formal and legal point of view, but practical. EFTA Court jurisdiction covers for now only three countries out of which two are very small. At the time of the ECJ Opinion 1/92 EFTA pillar counted 7 countries and pillar of the EU 12, while in 1995, this ratio is 3:15 and now 3:28¹⁴.

The above structure of the relationship between the ECJ and the EFTA Court is pluralistic in nature. Still, the Courts have managed to achieve homogeneity in the EEA legal space. This was made possible, in particular, due to the specific nature of the EEA Agreement but equally some aspects that strengthened and enriched the debate between the Courts, which include the ability of the institutions from both the EFTA and EU pillars to take part in proceedings before the judicial bodies of both pillars.

III. The homogeneity of the EEA Agreement and the dialogue between the ECJ and the EFTA Court

If we assume along with BENGOETXEA Joxerramon that the dialogue between courts consists in a situation in which “a court or a judge is sending a message with intention not only to address the dispute directly before her but also to address other judges potentially dealing with similar or related disputes”, the main intention of the EFTA Court was to introduce reciprocity into the interpretation of EEA law regardless of the dual legal systems of the EEA-EFTA States. Without introducing such reciprocity, the ECJ would not treat the citizens of EEA-EFTA States the same way as EU nationals in fields covered by the EEA Agreement, and they would not thus have the same rights and obligations as EU nationals, which would lead to a lack of effectiveness of the EEA Agreement.

This reciprocity requires the homogeneous interpretation of EEA provisions by the ECJ and the EFTA Court. Taking into account the contents of Opinion 1/91, in which the ECJ

¹³ ROSAS Allan, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, EJLS 2007, available at <http://www.ejls.eu/2/24UK.pdf> (consulted on 20 July 2015), p. 13-14.

¹⁴ FREDRIKSEN Halvard Haukeland, “The EFTA Court 15 Years on”, *International and Comparative Law Quarterly* 2010, pp. 731-760, p. 736.

stated that: “the fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives”¹⁵ and that the objectives of the Community legal order “go beyond that of the agreement”¹⁶, this was not obvious at the moment the EEA Agreement was signed.

In Opinion 1/91, the ECJ also underlined the differences between Community (now Union) law and EEA law. Above all, the Court pointed out to different objectives of the EEA Agreement and EU law, stressing that

the agreement is concerned with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties. In contrast, as far as the Community is concerned, the rules on free trade and competition, which the agreement seeks to extend to the whole territory of the Contracting Parties, have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement.

Additionally, the ECJ concluded that the differences included not just the objectives of those two legal orders but also the context in which they were put. In the case of the EEA, it is an international agreement making laws only between the state-parties to the accord and not resulting in a transfer of sovereign rights to intergovernmental institutions. In contrast, characterising EU law in its Opinion 1/91 (para 21), the ECJ points out that

EEC Treaty albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (see, in particular, the judgment in Case 26/62 Van Gend en Loos [1963] ECR 1). The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.

The Court of Justice is then of the opinion that EU law and international law are two different legal orders, with separate systems of law sources and methods of interpretation¹⁷. This is a result of the assumption made that in terms of structure EU law is different and separate. In the ECJ judgment in the case *Costa v ENEL* we read that Community law (now EU law) constitutes an integral part of the legal systems of the Member States, prevails over national provisions and makes an autonomous legal order. In the case of the EEA, “the divergences between the aims and context of the [EEA] agreement and those of Community law stood in the way of the achievement of the objective of homogeneity in the interpretation and application of the law in the EEA”¹⁸. The term “homogeneity” appears in recital 4 of the Preamble to the EEA Agreement. According to this provision, the essence of the EEA Agreement is “establishing a dynamic and homogeneous European Economic

¹⁵ Opinion 1/91, para 14; EVANS Andrew, *The Integration of the European Community and Third States in Europe: A Legal Analysis*, Oxford, Oxford University Press 1996, pp. 464, p. 74.

¹⁶ Opinion 1/91, para 16.

¹⁷ MIAŚIK Dawid, WRÓBEL Andrzej, “Europeizacja prawa administracyjnego – pojęcie i konteksty”, in Hauser Roman, Niewiadomski Zygmunt, Wróbel Andrzej (eds.), *System prawa administracyjnego. Europeizacja prawa administracyjnego*. Tom 3, Warszawa 2014, C.H. Beck, Instytut Nauk Prawnych PAN, pp. 1-120, p. 53, 54.

¹⁸ Opinion 1/92, para 17-18.

Area”. A reference to the homogeneity of the EEA is also found in recital 15 of the Preamble, which provides that “the objective of the Contracting Parties is, in full deference to the independence of the courts, to arrive at, and maintain, a uniform interpretation and application of the Agreement and those provisions of Community legislation which are substantially reproduced in the Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition”.

Within the European Economic Area, the homogeneity is to allow making the EEA-EFTA States and EU Member States equal in fields covered by the EEA Agreement and to make the exporting of EU internal market freedoms to EEA States as effective as possible. Hence this notion has two meanings in the context of the EEA. It is understood as the imperative to homogeneously interpret the EEA Agreement in the EU pillar and in the EFTA States’ pillar. However, it simultaneously means the “uniform interpretation of the EEA rules and those provisions of the internal market rules of the EU which are substantially reproduced in the EEA Agreement”¹⁹

As the EFTA Court declares “One of the main objectives of the [EEA] Agreement is to create a homogeneous European Economic Area²⁰.” What is of primary importance for maintaining this homogeneity in the two-pillar system of the EEA are two provisions: Article 6 of the EEA Agreement and Article 3(2) of the SCA which distinguish the judgements issued by the ECJ before the EEA Agreement was signed, which should be taken into account by the EFTA Court, from those issued after this date, to which of the EFTA Court must “pay due account”. In practice, in its case-law, the EFTA Court takes into account all the judgements of the ECJ without differentiating between those issued before and after the EEA Agreement was signed²¹.

The EFTA Court adopts an interpretation other than the ECJ only in exceptional cases. These are situations in which: new circumstances or scientific evidence comes to light; The ECJ case-law leaves certain issues open; There is relevant case law from the European Court of Human Rights; Following the rule of creative homogeneity which consists in the EFTA Court taking account of the outcome of a case and to a lesser degree to the reasoning²².

Although the EEA-EFTA States have frequently presented their position before the EFTA Court that, particularly after their number has fallen to three, this Court should make its

¹⁹ FREDRIKSEN Halvard Haukeland, “One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area”, *Nordic Journal of International Law* 2010, pp. 481-499, p. 483.

²⁰ EFTA Court, case E-1/04, *Fokus Bank* [2004], EFTA Court Report 11, at para. 22.

²¹ TATHAM Allan F., “Diffusing EU Law beyond the Borders of the Union: The Judicialization of the European Trading Area”, *Colombia International Law Journal* 2014, pp. 27-66, p. 49; BAUDENBACHER Carl, “The Judicial Dimension of the European Neighbourhood Policy”, *EU Diplomacy Paper*, n° 8/2013, available at https://www.coleurope.eu/system/files_force/research-paper/cdp-8-2013_baudenbacher.pdf?download=1, (consulted on 6 July 2015) p. 9; EFTA Court, case E 1/03, *EFTA Surveillance Authority v Iceland* [2003], EFTA Court Report 143, para 27.

²² BAUDENBACHER Carl, “The Judicial Dimension”, *idib.*, note 52 p. 11-12.

case-law more “State friendly”²³. Although the States have also evoked the ECJ Opinion 1/91 on the differences between the EU law and the EEA Agreement, the EFTA Court has clearly stated that “the principle of homogeneity enshrined in the EFTA Agreement leads to a presumption that provisions framed identically in the EEA Agreement and the EC Treaty are to be constructed in the same way”²⁴. In addition, in certain cases, the case law of the EFTA Court has turned out to be more “integration friendly” than subsequent case law of the ECJ²⁵. This is particularly obvious in the case of rulings concerning the effects of the EEA Agreement in the legal orders of EEA-EFTA States. Although the EEA Agreement may have initially been seen as an international agreement of a regional character, the dynamic case-law of the EFTA Court has meant that it has gained a more supranational²⁶. What is significant in this issue is the ruling of Sveinbjörnsdóttir²⁷, in which he stated that

EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own. The EEA Agreement does not establish a customs union but an enhanced free trade area, see the judgement in Case E-2/97 Maglite [1997] EFTA Court Report 127. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.

Then the rule of the liability of EEA-EFTA States for compensation for infringements of the EEA law was established by stating that “EFTA States must be obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive”²⁸. In this ruling, the EFTA Court has referred to the homogeneity principle and the objective of the EFTA Agreement, namely “the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities”²⁹. Decisions that strengthened the supranational nature of the EEA law also include the judgments in the Restamark³⁰ and Einarsson³¹ cases, in which it supported the quasi-direct effectiveness and the quasi-priority of EEA provisions while still maintaining a balance between the dual nature of the EEA-EFTA States and the effectiveness of the performance of obligations under the EEA Agreement³².

The ECJ’s response to the message coming from the case-law of the EFTA Court was to acknowledge the need to ensure that the rules of the EEA Agreement which are identical

²³ BAUDENBACHER Carl, “The EFTA Court and Court of Justice of the European Union: Coming in Parts But Winning Together”, in Court of Justice of the European Union (ed.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, The Hague, Springer, 2013, pp. 183-203, p. 189.

²⁴ EFTA Court, case E-2/06, EFTA Surveillance Authority v. Iceland [2003], EFTA Court Report 164, para 59.

²⁵ FREDRIKSEN Halvard Haukeland, “The EFTA Court 15 Years on”, *International and Comparative Law Quarterly* 2010, pp. 731-760, p. 744.

²⁶ FREDRIKSEN Halvard Haukeland, “The EFTA Court 15 Years on”, *ibid.* note 55, p.756; GRAVER Hans Peter, *ibid.*, note 10, p. 91.

²⁷ EFTA Court, case E-9/97, *Erla María Sveinbjörnsdóttir v Iceland* [1998], EFTA Court Report 95, para 59.

²⁸ *Ibid.*, para 60.

²⁹ *Ibid.*

³⁰ EFTA Court, E-1/94 - *Ravintoloitsijain Liiton Kustannus Oy Restamark*, [1994-1995] EFTA Court Report, 15.

³¹ EFTA Court, E-1/01 - *Hörður Einarsson v The Icelandic State*, [2002] EFTA Court Report, 1.

³² FREDRIKSEN Halvard Haukeland, “The EFTA Court 15 Years on”, *ibid.*, note 55, p. 737.

in substance to those of the Treaty are interpreted uniformly³³. Although the ECJ may not deem the judgements of the EFTA Court binding, the case-law of this Court contains numerous references to rulings by the judicial body of the EFTA pillar. This is mainly because the interpretation of the EEA law applied by the ECJ is functional in nature. In its rulings, it has taken into account that the objective of the EEA Agreement is to “provide for the fullest possible realization of the free movement of goods, person, services and capital within the whole EEA, so that the internal market established within European Union is extended to the EFTA States³⁴” and to ensure its uniform application³⁵. As a result, the citizens of EEA-EFTA States are not treated by the ECJ in fields covered by the EEA Agreement as third country nationals but as having the same rights and obligations as EU nationals³⁶.

This primarily concerns the identically worded provisions of the Treaties and the EEA Agreement, but it also applies to EU derivative law. An example of an ECJ decision to export an EU regulation to EEA-EFTA States is judgement C-431/11.

The homogeneous application of the EEA law is not absolute in nature. As Nicolas Rennuy and Peter Van Alswege³⁷ note, EU Treaties do not provide for a partial membership, which means that derivative legal texts and treaty law are not directly effective in EEA States, and the same wordings of the EEA Agreement and the Treaties do not always have to lead to the identical interpretation. The difficulty is due to the different legal nature of an international treaty - the EEA Agreement - and the internal market rules which constitute a part of the EU supranational legal order. The ECJ has already stressed this difference in Opinion 1/91 and judgement 270/80 *Polydor*³⁸. It is partially mitigated by the dynamic interpretation used by the EFTA Court, which does not apply the Vienna Convention on the law of treaties³⁹, but the ECJ’s methods⁴⁰, namely the systemic and purpose interpretation⁴¹. The partnership and common awareness of both Luxembourg courts that there is a

³³ECJ, case C-471/04, *Keller Holding* [2006], ECR I 2107, para. 48; ECJ, case C-345/05, *Commission v Portugal* [2006], ECR I-0000, para. 40; ECJ, case C-522/04, *Commission v Belgium* [2007], ECR I-05701, para. 44.

³⁴ ECJ, case C-431/11, *United Kingdom v Council* [2013], ECLI:EU:C:2013:589, para. 50.

³⁵ SKOURRIS Vassilios, “The ECJ and the EFTA Court under the EEA Agreement”, in Baudenbacher Carl, Per Tresselt and Thorgeir Örlygsson (eds.), *The EFTA Court: Ten Years On*, Oxford and Portland, Oregon, Hart Publishing, 2005, pp. 123-130, p. 125.

³⁶ RENNUY Nicolas, VAN ALSWEGE Peter, “Integration without membership and the dynamic development of EU law; *United Kingdom v. Council (EEA)*”, CMLRev. 2014, n° 51, pp. 935-954, p. 945.

³⁷ RENNUY Nicolas, VAN ALSWEGE Peter, *idib*, note 16, p. 945.

³⁸ ECJ, case 270/80, *Polydor and RSO*, [1982] ECR 329, paragraphs 15 to 19.

³⁹ Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969, United Nations — Treaty Series 1980, p. 331.

⁴⁰ BAUDENBACHER Carl, *Legal Framework and Case Law*, Luxembourg 2008, 3rd ed., available at http://www.eftacourt.int/fileadmin/user_upload/Files/OtherPublications/2008/Legal_Framework_Finalweb.pdf (consulted on 6 July 2015), p. 19; FREDRIKSEN Halvard Haukeland, “The EFTA Court 15 Years on”, *ibid.*, note 55, p. 744.

⁴¹ PETERSMANN Ernst-Ulrich, “Multilevel Judicial Governance in European and International Economic Law”, EUI Working Papers LAW, n° 2013/03, available at <http://ssrn.com/abstract=2244839> or <http://dx.doi.org/10.2139/ssrn.2244839> (consulted on 6 July 2015), p. 8.

need to mutually take account of each other's case-law is thus strengthened by the joint mission of both Luxembourg courts which is to protect and develop the EEA⁴².

The needs to ensure the homogeneity of the European Economic Area also consists in applying, in proceedings before the EFTA Court, procedural solutions similar to those applicable before the ECJ. Although there is no rule that would require the procedures within the EFTA pillar to be the same as those within the EU pillar, the requirement of homogeneity assumes the reciprocity of rights and obligations of entities operating within the EEA in both pillars, including process rights and obligations. The essence of the procedural homogeneity is reflected in the statement of the EFTA Court in its order of 24 April 2007⁴³:

In the interest of equal treatment and foreseeability for parties appearing before the ECJ, the CFI and the EFTA Court, the provisions should be interpreted and applied in the same way unless specific circumstances would justify different treatment.

Examples of decisions which adopt the procedural homogeneity rule are provided by decisions concerning the definition of the courts in the context of the right to ask questions for preliminary rulings to the EFTA Court⁴⁴ and *locus standi* of persons in proceedings against the decisions of the EFTA Surveillance Authority⁴⁵. As the EFTA Court demonstrates in its case-law, the application of this rule is not limited only to identically worded provisions of the EEA law and that EU law. Yet paradoxically, in some specific situations, the procedural homogeneity does not ensure the equal treatment of entities within the EEA, but on the contrary, it could have a negative impact on the cooperation between the EEA and the EU pillars and thus on the homogeneity of the EEA. Striving for procedural homogeneity is therefore justified only if it leads to the effectiveness of the EEA Agreement and the implementation of its essence that citizens and economic operators should be able to pursue their rights in a comparable way in both pillars⁴⁶. An example of such a situation in which the procedural homogeneity would not strengthen the effectiveness of the EEA Agreement was the ruling by the EFTA Court concerning the right of the Commission to intervene before this Court⁴⁷.

That homogeneity embodies also the need to ensure that the rules of the EEA Agreement, which, in substance, are identical to those of the Treaty, are interpreted uniformly not only by the ECJ and EFTA Court but also by national courts of two pillars. This is mainly ensured by the preliminary questions of national courts to the ECJ and EFTA Court. *Ipso facto* the homogeneity rule encompasses uniformity, which includes a vertical dimension.

⁴² KOKOTT Juliane, DITTERT Daniel, *ibid.*, note 15, p. 45.

⁴³ EFTA Court, order, case E-9/04, *European Banking Federation v EFTA Surveillance Authority* [2007], EFTA Court Report 74, para. 16.

⁴⁴ EFTA Court, case E-1/94, *Erla María Sveinbjörnsdóttir v Iceland* [1994], EFTA Court Report 15, para 59. 7-31.

⁴⁵ EFTA Court, case E-5/07, *Private Barnebagers Landsforbund v EFTA Surveillance Authority* [2008], EFTA Court Report 62, para. 45-53.

⁴⁶ BAUDENBACHER Carl uses the term "effect-related homogeneity", BAUDENBACHER Carl, "The EFTA Court and Court of Justice of the European Union", *ibid.*, note 53, p. 191.

⁴⁷ EFTA Court, Order of the President granting the European Commission leave to intervene, case E-16/11, *Iceland v. EFTA Surveillance Authority (Icesave)* [2013], EFTA Court Report 4.

IV. Interventions and observations as elements strengthening the judicial dialogue

In Europe, the notion of judicial dialogue pertains primarily to the relations between courts of the Member States and the ECJ where it is assumed that the courts listen to one another and take their respective jurisprudence into consideration in order to avoid normative conflicts between national and EU legal orders, in particular in terms of constitutional standards⁴⁸. The term judicial dialogue is also used in a much broader sense embracing also interactions between the ECJ and courts of third states and international organisations⁴⁹. According to Juliane Kokott and Daniel Dittert,⁵⁰

modern judicial institutions in Europe need to be careful observers of each other's jurisprudence and should recognise, wherever possible, the usefulness of the judgments pronounced by their respective counterparts as a source of inspiration and authority.

The concept of the dialogue between courts takes various forms: debates (a dialogue involving jurors and judges or expressed in the form of a separate opinion, e.g. of the Advocate-General at the ECJ), institutional cooperation in the form of judicial communication on how a case should be conducted with regard to its the procedure and organisation, citations (a practice according to which the judges and the courts take into account the rulings of other courts in similar or associated cases), or networks (links between the judges of various jurisdictions in the form of informal ties, e.g. meetings, exchanges of views)⁵¹. In the cooperation between the EFTA Court and the ECJ, the dialogue consists mainly in citations, informal network ties and a debate.

It is not surprising that ECJ rulings are cited by the EFTA Court as the basis for the rulings of the latter is earlier ECJ decisions in similar cases, if they have been considered by the ECJ⁵². Yet the rulings of the EFTA Court are frequently a source of inspiration for the ECJ and its Advocates-General, too. In its legal interpretation, the ECJ evokes EFTA Court jurisprudence as either the main⁵³ or an ancillary⁵⁴ argument⁵⁵.

⁴⁸ DEROSIER Jean-Philippe, "Le dialogue des juges : de l'inexistence d'un concept pourtant éprouvé", in Hess Burkhard, Ménétrey Séverine (eds.), *Les dialogues des Juges en Europe*, Bruxelles, Lanrcier 2014, pp. 51- 79, p. 56.

⁴⁹ ROSAS Allan, *idib.*, note 11.

⁵⁰ KOKOTT Juliane, DITTERT Daniel, "European Courts in Dialogue", in EFTA Court (ed.), *The EEA and the EFTA Court Decentred Integration*, Oxford - Portland, Hart Publishing, 2015, pp.43-52, p. 44.

⁵¹ BENGOTXEA Joxerramon, "Judicial and interdisciplinary dialogues in European Law", in Hess Burkhard, Ménétrey Séverine (eds.), *Les dialogues des Juges en Europe*, Bruxelles 2014, Lanrcier 2014, pp. 20- 49, p. 21.

⁵² MAGNÚSSON Skúli, "Judicial Homogeneity in the European Economic Area and the Authority of the EFTA Court. Some Remarks on an Article by Halvard Haukeland Fredriksen", *Nordic Journal of International Law* 2011, pp. 507 – 534, p. 515.

⁵³ For example cases: ECJ, joined cases C-34/95, C-35/95 and C-36/95 – De Agostini and TV-shop I Sverige [1007], ECR I-3843, para 62 (reference to joined cases E-8/94 and E-9/94 Mattel Scandinavia and Lego Norge, EFTA Court Report [1994/95], 113; ECJ, case C-452/04, Fidium Finanz AG, ECR [2006], I-9521, para 49 (reference to the case E-1/00 State Debt Management Agency v Íslandsbanki-FBA hf., EFTA Court Report [2000-2001] 8, para 32).

⁵⁴ For example case: ECJ, C-140/97, *Rechberger*, [1999], ECR I-3499, para 39 (reference to case EFTA Court, case E-9/97, *Erla María Sveinbjörnsdóttir v Iceland* [1998], EFTA Court Report 95).

⁵⁵ BAUDENBACHER Carl, "The goal of homogeneous interpretation of the law in the European Economic Area. Two courts and two separate legal orders, but law that is essentially identical in substance", *The European Legal Forum* 2008, pp. 22-31, p. 24-26.

The dialogue between the EFTA Court and the ECJ is also furthered by informal networking that consists in organising conferences, meetings and visits⁵⁶ as well as exchanges of views in the form of the publication of scholarly articles or in the context of networks and associations, i.e.: the Network of the Presidents of the Supreme Judicial Courts of the European Union, the Association of European Administrative Judges, and the Association of European Competition Law Judges⁵⁷.

Interventions and observations, in turn, take the form of a debate between the courts as part of judicial dialogue. In the case of the EFTA Court and the ECJ, the entities participating in the judicial debate and enriching the discussion include the intervening parties as well as entities presenting their oral or written observations as *amicus curiae*. This is because the court debate encompasses the courts and judges in particular, but other cooperating entities also have an impact on its effectiveness⁵⁸. As Joxerramon Bengoetxea and Heike Jung observed, judges can be seen as

providing a service to the citizens in a complex network where collaborators or other adjacent professional groups – clerks, procurators, forensic doctors, experts, lawyers, judicial officers, the administration ... - all, ideally, contributing to the quality of the service.

All these entities have an impact on the legal argumentation, which John Bell describes as “a conversation between members of the legal community (as well as with outsiders) about how the law is best formulated and applied in an individual situation”⁵⁹.

The impact of the EFTA Surveillance Authority on the case law of the ECJ, and of the European Commission on the case law of the EFTA Court, consists mainly in the strength of the legal arguments used, which are in no way binding for these courts. However, they can form an important factor leading to unifying the EEA, which is the condition for its effective application. This is because the purpose of both the Commission and the EFTA Surveillance Authority is to monitor and enforce the provisions of the EEA Agreement in, respectively, the Member States of the EU and of the EEA-EFTA.

⁵⁶ Report of the EFTA Court 2004, available at http://www.eftacourt.int/fileadmin/user_upload/Files/AnnualReports/efra-court-annual-report-2004.pdf p. V; Report of the EFTA Court 2014, available at http://www.eftacourt.int/fileadmin/user_upload/Files/AnnualReports/2014-EC-BOOK3-WEB-FINAL.pdf (consulted on 25 July 2015), p. 1413-1414.

⁵⁷ KOKOTT Juliane, DITTERT Daniel, *ibid.*, note 15, p. 44.

⁵⁸ BENGOETXEA Joxerramon, JUNG Heike, “Autonomy and Heteronomy of the Judiciary in Europe”, *Oñati Socio-Legal Series*, 2011, pp. 1-3, p. 2.

⁵⁹ BELL John, “The Argumentative Status of Foreign Legal Arguments”, *Utrecht Law Review*, 2012, pp. 8-19, p. 10.

V. Interventions and observations the European Commission before the EFTA Court and by the EFTA Surveillance Authority before the ECJ

A. The Commission's statements, written observations and interventions before the EFTA Court

Article 36 of the SCA provides that “Any EFTA State, the EFTA Surveillance Authority, the Community and the EC Commission may intervene in cases before the Court. (...) An application to intervene shall be limited to supporting the form of order sought by one of the parties”⁶⁰. That Statute of the EFTA Court, in turn, grants the European Commission the right to submit statements of case or written observations to the Court in any case pending before the EFTA Court⁶¹.

The Commission submitted observations in every case dealt with by the EFTA Court. Although the rulings of the EFTA Court are not numerous (e.g. in 2014 it issued 27 rulings), this bears witness to the importance which the Commission attaches to presenting opinions before the EFTA Court. The EFTA Court has also considered that the Commission's interventions and observations are making an important contribution to the homogeneous development of the case law in the EEA. In its order issued in the case of *Icesave*⁶², the EFTA Court, when granting the Commission leave to intervene, has stated 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”.

The Commission's comments are particularly important because it is an authority specialised in enforcing the EU law. Pursuant to Article 17. 1 of the TEU, the Commission “shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them”. Consequently, the Commission is referred to as the “guardian of the Treaties” as the provisions of the TFEU grant the Commission competences needed to ensure that the Member States respect EU law (Articles 258 and 260 of the TFEU). The Commission monitors such aspects as the implementation of directives in national laws as well as actions taken by legislative authorities, administrative bodies or even courts. Should infringements be found, the Commission may initiate proceedings against the Member States before the ECJ. The control function exercised by the Commission also includes prerogatives vis à vis

⁶⁰ Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).

⁶¹ Article 207 of the Protocol 5 to the Surveillance and Court Agreement on the Statute of the EFTA Court.

⁶² EFTA Court, Order of the President granting the European Commission leave to intervene, case E-16/11, *Iceland v. EFTA Surveillance Authority (Icesave)* [2013], EFTA Court Report 4.

individuals, mainly in the area of EU competition law⁶³. Statements of the Commission, in which this authority describes the existing case law of the EC Court of Justice and presents its opinion on the possible resolution of a case thus form a valuable source of information for the EFTA Court. According to Carl Baudenbacher⁶⁴, the observations and interventions by the European Commission are of importance since the EFTA Court has no Advocates-General. In their reasoned submissions, the Advocates point out to the key facts of the case, refer to the parties' reasoning, analyse the state of national and EU law and then present a suggested settlement⁶⁵. The Advocates' submissions are then supposed to assist the ECJ in delivering its judgement. A similar role might be played by the Commission's written statements before the EFTA Court. Importantly, however, the Commission is not a neutral actor and under the Treaty its role is to pursue the interests of the European Union⁶⁶, so one of the parties of the EEA Agreement. For their part, Advocates-General in their submissions, under Article 252 of the TFEU, present a case pending before the Court in an impartial and independent manner. Such wording means that the Advocate-General acts in public interest. Further, the observations made by the Commission are not as much proposals for a possible judgement as merely legal opinions in matters examined before the EFTA Court.

The importance of the Commission's observations and interventions varies depending on the nature of the case handled by the EFTA Court as such cases may concern issues and matters which have already been the object of EJC case law or those which have never been examined by the ECJ. In the former case, the analysis of the legal status quo and observations submitted by the European Commission are an important guideline for the EFTA Court. As an example, one can refer to the judgment *l'Oréal*⁶⁷, where the EFTA Court delivered verdicts in line with the EC's observations. In that case, the EFTA Court changed its previous judicature (the *Maglite* verdict) adapting it to the ECJ judgment in the *Silhouette* case.

Things are different in the case of matters which have not yet been examined by the ECJ. Here, the judgments of the EFTA Court do not always follow the line of the written statements of the European Commission. This is most visible in cases related to the definition of the nature of the EEA Agreement in the EFTA pillar. These are then cases where the ECJ could not express its view due to lack of jurisdiction. For instance, in case *Sveinbjörnsdóttir*

⁶³ GÓRKA Maciej, "System instytucjonalny Unii Europejskiej", in J. Barcz (ed.), *Ustrój Unii Europejskiej*, Warszawa, Instytut Wydawniczy EuroPrawo 2010, pp. II-1 – II-144, p. II-47.

⁶⁴ BAUDENBACHER Carl, "The goal of homogeneous interpretation of the law in the European Economic Area. Two courts and two separate legal orders, but law that is essentially identical in substance", *The European Legal Forum* 2008, pp. 22-31, p. 23.

⁶⁵ SZWARC-KUCZER Monika, "Komentarz do artykułu 252 TFUE", in A. Wróbel (ed.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom III*, Warszawa, Wolters Kluwer 2012, pp. 1231, p. 221.

⁶⁶ According to the article 17 of the TEU „The Commission shall promote the general interest of the Union and take appropriate initiatives to that end”.

⁶⁷EFTA Court, case E-10/07, *L'Oréal* [2008], EFTA Court Report 258 [2008] EFTA Ct. Rep. 259.

tir the Commission was against the compensation liability of the EFTA states for an incorrect implementation of the directive highlighting the differences between EU law and EEA law⁶⁸. The EFTA Court decided otherwise spelling out such liability on the part of the EFTA states. The EFTA Court then proved more integration-friendly than the Commission.

Things were different in the *Restamark* and *Einarsson* cases. In their statements concerning the direct effectiveness of EEA Agreement provisions in the *Restamark* case, the Commission concluded that “despite its differences with the EC Treaty, [they] are capable of producing direct effect and so may be relied upon by individuals before national courts in the legal orders of the EFTA States”⁶⁹. The Commission also proved very integration-minded in its written statements concerning the prevalence of EEA Agreement provisions. The EC noted that

the EEA Agreement does not entail a transfer of powers of the kind which is an important part of the EC Treaty. Protocol 35⁷⁰ provides that the EEA Agreement does not require any Contracting Party to transfer legislative powers to any institution of the EEA. However, it states that the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in case of conflict between implemented EEA rules and other statutory provisions. The protocol thus requires the EFTA States to give primacy to the provisions of the EEA Agreement (...) ⁷¹.

In the *Restamark* and *Einarsson* verdicts, the EFTA Court managed to keep the balance between the effective performance of the commitments of the EFTA pillar countries and the condition that the EEA Agreement not undermine the dualistic approach of those states to the relations between international and national laws⁷². Establishing a quasi direct effect in the *Restamark* verdict, the EFTA Court found that

individuals and economic operators in cases of conflict between implemented EEA rules and national statutory provisions must be entitled to invoke and to claim at the national level any rights that could be derived from provisions of the EEA Agreement, as being or having been made part of the respective national legal order, if they are unconditional and sufficiently precise⁷³.

In its *Einarsson* verdict, in turn, the EFTA Court answered the question whether, under EEA law, a provision of the main part of the EEA Agreement is to prevail over a conflicting provision of national legislation by stating that “EFTA States have undertaken to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in cases of possible conflict between implemented EEA rules and other statutory provisions”⁷⁴, thus establishing a quasi-primacy for implemented EEA provisions⁷⁵. In consequence the statements of the European Commission were certainly a factor that strengthened the EFTA Court’s dynamic interpretation of the EEA Agreement. The integration-friendly observations of

⁶⁸ Report of the EFTA Court 1998, Report for the Hearing in Case E-9/97, pp.115-133, p. 132.

⁶⁹ Report of the EFTA Court 1994-1995, Report for the Hearing, Report for the Hearing in Case E-1/94, pp. 35-57, p.55.

⁷⁰ Protocol 35 to the EEA Agreement provides direction for the resolution of conflicts between rules of EEA law and rules of national law.

⁷¹ Report of the EFTA Court 2002, Report for the Hearing in Case E-1/01, para 143.

⁷² FREDRIKSEN Halvard Haukeland, “The EFTA Court 15 Years on”, *ibid.*, note 55, p. 736-737.

⁷³ *Restamark*, para 77.

⁷⁴ *Einarsson*, para 51.

⁷⁵ BAUDENBACHER Carl, “The EFTA Court Ten Years On”, in Baudenbacher Carl, Per Tresselt and Thorgeir Örlygsson (eds.), *The EFTA Court: Ten Years On*, Oxford and Portland, Oregon, Hart Publishing, 2005, pp. 13-54, p. 30.

the Commission also helped the EFTA Court to define EEA Agreement not as a simple international treaty but one with certain supranational features such as quasi-primacy and quasi-direct effect, which leads to its constitutionalisation. Yet the Commission has not always contributed to the process. Its another manifestation is the recognition, on the part of the EFTA Court, that fundamental rights constitute a part of EEA law, although the EEA Agreement only mentions - in its recital 1 - that the European Economic Area will lead to the construction of a Europe based on peace, democracy and human rights⁷⁶. According to the EFTA Court's established case-law, "the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights. The provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights."⁷⁷ Moreover, although the EU's Charter of the Fundamental Rights does not make a part of EEA law, the EFTA Court indicates its provisions in its rulings. In cases concerning the protection of fundamental rights in EEA law, the Commission has not referred to it in its submissions nor has it invoked the Charter of Fundamental Rights. For example, in *Posten Norge*⁷⁸ the Commission focused on issues related to the interpretation of competition law, and in *Fred. Olsen and Others*⁷⁹ on the interpretation of the rules on freedom of establishment.

B. Intervention and observations of the EFTA Surveillance Authority before the ECJ

The result of a procedure before EU courts may affect natural and legal persons or EU agencies, even if they are not parties to the proceedings before the ECJ. An intervention allows one to voluntarily join the proceedings before the Court of Justice and the General Court on the side of one of the parties to it. The intervener must thus fully or partially support its demands (form of order). The purpose of this legal institution is to enable the ECJ to take into account the interests of the intervener⁸⁰. The decision to admit one to the case as an intervener is taken by the President of the ECJ by way of an order. The intervener is entitled to present comments containing:

- the intervener's demands to support the entirety or a part of the demands of one of the main parties;
- the charges and the arguments that the intervener is raising;
- evidence or evidence of requests, when appropriate.

⁷⁶ HREINSSON Páll, "General Principles", in Baudenbacher Carl (ed.), *The Handbook of EEA Law*, Springer 2015, p.374, 375, pp. 349-389.

⁷⁷ Case E-2/03 *Ásgeirsson* [2003] EFTA Court Report 185, paragraph 23, Case E-4/11 *Clauder* [2011] EFTA Court Report 216, paragraph 49; Case E-2/02 *Bellona* [2003] EFTA Court Report 52, paragraph 36 and Case E-3/11 *Sigmarsson*, [2011] EFTA Court Report 430, paragraph 29.

⁷⁸ Report of the EFTA Court 2014 in case E-15/10 *Posten Norge AS v EFTA Surveillance Authority*, pp. 569-614.

⁷⁹ Report of the EFTA Court in case *Fred. Olsen and Others* E-3/13 and case E-20/13, pp. 459-522.

⁸⁰ LENAERTS Koen, MASELIS Ignace, GUTMAN Kathleen, *EU Procedural Law*, Oxford, Oxford University Press, 2014, 827 p.

The main parties may respond to these comments.

The parties authorised to intervene in cases before the ECJ are specified by Article 40 of the Court's Statute⁸¹. EU institutions and Member States are privileged interveners, who do not have to establish an interest in the result of a case submitted to the Court⁸².

The right to intervene also accrues to "bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court". According to the second paragraph of Article 40 of the Court's Statute, this right does not apply to cases of an institutional nature: between Member States, between institutions of the Union or between Member States and institutions of the Union.

EEA-EFTA Member States and the EFTA Surveillance Authority may intervene in cases before the Court where one of the fields of application of that Agreement is concerned. Hence, these entities have to have not just any interest, but this interest must be to ensure the appropriate, in their opinion, application of the EEA Agreement⁸³.

However, the right to intervene may not breach the reservations expressed in the second paragraph of Article 40 of the Statute of the Court of Justice, pursuant to which it does not accrue to natural and legal persons in cases of an institutional nature. The EFTA Surveillance Authority filed the first application to be admitted as an intervener to a case of an institutional nature in 2010⁸⁴. The President of the ECJ rejected the application of the EFTA Surveillance Authority by their order of 15 July 2010. The Authority sought to intervene in two other infringement cases, Case C-10/10 *Commission v Austria* and Case C-38/10 *Commission v Portugal* but withdrew its applications because of this order⁸⁵. However, the ECJ did not uniformly define the reservation of Article 40 (3) of the Statute of the Court of Justice in relation to the EEA-EFTA Member States. In case C-542/09 *Commission v Netherlands*, the ECJ President issued an order by which it refused Norway the right to intervene⁸⁶. Earlier, however, in the combined cases C- 14/06 and C-295/06 *Parliament and Denmark v Commission* (intervention of Norway in support of Parliament and Den-

⁸¹ Consolidated Version of the Statute of the Court of Justice of the European Union contains the consolidated version of Protocol (No 3) on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 (OJ L 228, 23.8.2012, p. 1) and by Article 9 of the act concerning the conditions of accession to the European Union of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ L 112, 24.4.2012, p.21).

⁸² ECJ, case 138/79, *Roquette Frère v. Council* [1980]. ECR 3333, para 17-21.

⁸³ Order of the President of the Court of Justice of 15 July 2010 in Case C-493/09 *Commission v Portugal*, not published in the ECR, paragraph 11; ECJ, order of the President of 15 July 2010, case C-493/09, *Commission v Portugal*, not reported, para. 9; ECJ, order of the President of 16 April 2012, case 239/11 P, *Siemens v Commission*, not reported, para. 3-8; ECJ; LENAERTS Koen, MASELIS Ignace, GUTMAN Kathleen, *ibid.*, note 24, p. 827.

⁸⁴ ECJ, case C-493/09, *Commission v Portugal* [2011], ECR I-09247.

⁸⁵ EFTA Surveillance Authority, Annual Report 2010, available at <http://www.eftasurv.int/media/annual-reports/Annual-Report-2010-web-CHAPTER5.pdf> (consulted on 10 July 2015), p. 52.

⁸⁶ Order of the President of the Court of Justice of the 1 October 2010 in case C-542/09 *Commission v Netherlands*, not reported.

mark) and in the case C-377/98 *Netherlands v Parliament and Council* (Norway's intervention on the side of the Netherlands), that President of the ECJ permitted the intervention of this State.

Taking into account the linguistic interpretation of Articles 40(2) and (3) of the Statute of the ECJ, EFTA Member States and the EFTA Surveillance Authority are "legal persons" and thus may not intervene before the ECJ in institutional cases, but only in cases brought by individuals. However, the literature of the subject⁸⁷ includes criticism of the provisions which refuse the EFTA Surveillance Authority and Norway the right to intervene and "against a purely textual interpretation", as the latter would lead to excluding the ability to intervene in very many cases before the ECJ and would contravene the Declaration by the European Community on the rights for EFTA States before the EC Court of Justice⁸⁸, and in particular the achievement of its goal, namely ensuring the homogeneity within the EEA by "opening of intervention possibilities for EFTA States and the EFTA Surveillance Authority before the EC Court of Justice". In its stipulations, the ECJ, when refusing EFTA Surveillance Authority and Norway the right to intervene, has referred to only the literal wording of the reservation of Article 40(2) of the Court's Statute, but not to its context or the previous decisions which allowed Norway to intervene in institutional cases.

The ECJ's decision refusing the EFTA Surveillance Authority the right to intervene in institutional matters before the ECJ is a manifestation of the dominant position of the ECJ vis à vis the EFTA Court. It also reflects a lesser role played by the interventions and observations of the EFTA Surveillance Authority in comparison with the Commission's statements before the EFTA Court.

The EFTA Surveillance Authority mainly intervenes before the ECJ in cases concerning state aid⁸⁹ and competition law⁹⁰. As mentioned above, it does not have the ability to intervene in institutional cases, so it can intervene only in proceedings initiated by individuals. A major proportion of such motions concern the competition law. For instance, in 2014, the EFTA Surveillance Authority intervened before the General Court supporting the Commission in cases concerning German aid for the development of renewable energy⁹¹. Before the Court of Justice, the Authority intervened in support of the Commission in the

⁸⁷ MAGNÚSSON Skúli, "Procedural Homogeneity v. Inconsistency of European Courts - Comments on Order of the EFTA Court President of 15 June 2012 in Case E-16/11 *EFTA Surveillance Authority v. Iceland*", available at SSRN: <http://ssrn.com/abstract=2140717> or <http://dx.doi.org/10.2139/ssrn.2140717>, consulted on (consulted on 10 July 2015), p. 3.

⁸⁸ Declaration by the European Community on the rights for the EFTA States before the EC Court of Justice, Agreement on the European Economic Area, OJ No L 1, 3 January 1994, p. 3.

⁸⁹ For example order of the President of the Court of Justice of 2 September 2010, case C-124/10 P, *Commission v EDF*, ECLI:EU:C:2010:494.

⁹⁰ For example order of the President of the Court of Justice of 19. 1. 2012, case T-289/11, *Deutsche Bahn and Others v Commission*, ECLI:EU:T:2012:20.

⁹¹ For example cases: Case T-172/14 *Stahlwerk Bous v European Commission*; T-173/14 *WeserWind v Commission*, T-174/14 *Dieckhoff Guss v Commission*; T-175/14 *Walter Hundhausen v Commission*, T-176/14; *Georgsmarienhütte v Commission*, T-177/14 *Harz Guss Zorge v Commission*; T-178/14 *Friedrich Wilhelms-Hütte Eisenguss v Commission*, T-179/14 *Schriedewerke Gröditz v Commission*, and T-183/14 *Schmiedag v Commission*; EFTA Surveillance Authority, Annual Report 2014, available at http://www.efta-surv.int/media/annual-reports/Annual_Report_2014.pdf (consulted on 6 July 2015), p. 36.

appeal case, C-583/13 P *Deutsche Bahn AG and others v European Commission*⁹². This case concerned the legality of inspections carried out by competition authorities. In the above case, the EFTA Authority applied to intervene for the first time in 2011 before the General Court. In proceedings before the ECJ, the EFTA Surveillance Authority supports the Commission, with which it cooperates under the EEA Agreement and the protocols to it⁹³.

As part of the procedure of questions for a preliminary ruling, EFTA Surveillance Authority and EEA-EFTA States may present observations before the ECJ. The right is limited to the situation in which the question for a preliminary ruling applies to one of the areas covered by the EEA Agreement⁹⁴. This condition is fulfilled not only when the question for a preliminary ruling from the court of an EU Member State refers to the provisions of the EEA Agreement, but also when it concerns the interpretation of the validity of the EU regulations which are reflected in the EEA Agreement⁹⁵.

An analysis of the activity of the EFTA Surveillance Authority over the last four years (2010-2014) shows that it presents observations before the ECJ only in cases having special impact on the law of the EEA and its interpretation. For example, in 2010, out of over 300 cases referred to as part of a question for a preliminary ruling, the EFTA Surveillance Authority presented its observations in 13. These were mainly cases concerning the interpretation of the EU law governing the internal market⁹⁶, the competition law and state aid⁹⁷, and one case on effective redress in the national legal order for breaches of EU law committed by national authorities⁹⁸. Similarly, in subsequent years, the EFTA Surveillance Authority presented observations before the ECJ in proceedings selected due to the importance of the case for the EEA law.

⁹² ECJ, case, C-583/13 P *Deutsche Bahn AG and others v European Commission*, continuing its support of the Commission at first instance in the General Court in Joined Cases T-289/11, T-290/11 and T-521/11 *Deutsche Bahn a.o. v Commission*.

⁹³ Article 58 of the Agreement; Protocol 23 concerning the Cooperation between the Surveillance Authorities (Article 58); Protocol 24 on Cooperation in the Field of Control of Concentrations.

⁹⁴ Article 96 (1)(e) of Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013). See http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf.

⁹⁵ BROBERG Morten, FENGER Niels, *Preliminary References to the European Court of Justice*, Oxford, Oxford University Press, 2014, 350-351 p.

⁹⁶ For example: joined cases C-403/08 and C-429/08 FAPL on UK restrictions on the access to pay-TV satellite transmissions of live English Premier League football matches by service providers other than the one designated by the event organizer FAPL for the United Kingdom; Case C-515/08 Santos Palhota on Belgian rules on the posting of workers; Case C-378/10 VALE on Hungarian limitations on the registration in the commercial register of companies incorporated in another EU Member State wishing to convert into a company incorporated under Hungarian law.

⁹⁷ For example: case C-1/09 CELF on the obligation to repay state aid illegally granted by the French state; case C-360/09 Pfeiderer on the scope of access to the German competition authority's file regarding information received under a leniency application as sought by a cartel victim preparing a damages claim against the cartellists; case C-375/09 Tele 2 Polska on whether a national competition authority could find that an undertaking had not breached EU competition law.

⁹⁸ ECJ, Case C-279/09, *DEB* [2010], ECR I-13849.

VI. The dialogue between the ECJ and courts of EU neighbouring countries

The role of the EU as a global actor is growing, as exemplified by the EU initiatives and programmes forming part of the Stabilization and Association Process in the Balkans, the Union for the Mediterranean, the European Neighbourhood Policy (ENP) and Eastern Partnership⁹⁹. The nature of the EU governance in this regard is referred to as a “civilian power promoting universal norms in its neighbourhood and beyond”¹⁰⁰. The effectiveness of the dialogue between the ECJ and the EFTA Court consisting in the mutual accounting for and citing of decisions by these courts and in adopting a uniform interpretation of the EEA Agreement is a result of assuming the homogeneity of provisions of this international treaty and EU treaties. This homogeneity does not apply in the case of other international agreements made by the EU. In the *Polydor* decision of 1982¹⁰¹, the ECJ interpreted provisions of the free trade agreement with regards to and EFTA States (Portugal) differently than the identically worded provisions of the Treaty, justifying this by the different purposes of these two legal texts. Thus the homogeneity condition is difficult to fulfil in the case of other international treaties between the EU and third countries.

One example is Switzerland, a country whose relations with the EU are regulated by bilateral agreements¹⁰². The system of integration is then different than in the case of the EEA Agreement. Although the uniform implementation of these accords in the European Union and Switzerland is of key importance for their effective application, only some of them include provisions which ensure that Swiss court take into consideration ECJ jurisprudence. For instance, in the package of seven sectoral agreements signed in 1999 (known in Switzerland as “Bilaterals I” only the Agreement on the free movement of persons (Article 16(2)) and the Air Traffic Agreement (Article 1(2)) state that where the application of these international agreements pertains to the terms used in EU law, “account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature”. In the case of ECJ rulings delivered after that date, both agreements provide merely for a mechanism of notifying Switzerland and a possible decision to be made by the Joint Committee as to taking such later ECJ case-law into consideration¹⁰³. Additionally, the Swiss Federal Supreme Court has found both agreements directly effective

⁹⁹ PETROV Roman, KALINICHENKO Paul, “The Europeanization of Third Country Judiciaries Through the Application of the EU *Acquis*: The Cases of Russia And Ukraine”, *International and Comparative Law Quarterly* 2011, pp. 325-353, p.326; MIASIK Dawid, WRÓBEL Andrzej, “Europeizacja prawa administracyjnego – pojęcie i konteksty”, in Hauser Roman, Niewiadomski Zygmunt, Wróbel Andrzej (eds.), *System prawa administracyjnego. Europeizacja prawa administracyjnego*. Tom 3, Warszawa 2014, C.H. Beck, Instytut Nauk Prawnych PAN, pp. 1-120, p. 10-11;

¹⁰⁰ ZIELONKA Jan, “The EU as an International Actor: Unique or Ordinary?”, *European Foreign Affairs Review* 2011, p. 281-301, p. 281, 289.

¹⁰¹ ECJ, case 270/80, *Polydor and RSO*, [1982] ECR 329, paragraphs 15 to 19.

¹⁰² GOETSCHER Laurent, “Switzerland and European Integration: Change Through Distance”, *EFA Rev* 2003, pp. 313–330, p. 313; BREITENMOSER Stephan, “Sectoral Agreements between the EC and Switzerland: Contents and Context”, *CMLR* 2003, pp.1137-1186, p. 1137; SCHWOK René, *Suisse et Union européenne. L’adhésion impossible ?* Lausanne, Presses Polytechniques et Universitaires Romandes, 2010, 27 p.

¹⁰³ KADDOUS Christine, “Les accords sectoriels dans le système des relations extérieures de l’Union européenne”, in Kaddous Christine, Felder Daniel (eds.), *Accords bilatéraux Suisse - Union européenne (Commentaires)*, Basel, Helbing Lichtenhahn Verlag 2001, pp. 77-182, p. 93 and p.102-103.

and it takes into account earlier and later ECJ case-law which is of importance for their application. Still, in one of its rulings¹⁰⁴ concerning the Agreement on the free movement of persons¹⁰⁵ the ECJ stated that:

the interpretation given to the provisions of Community law concerning the internal market cannot be automatically applied by analogy to the interpretation of the Agreement, unless there are express provisions to that effect laid down by the Agreement itself (...).

The ECJ has expressed a similar view in the case of the Air Traffic Agreement¹⁰⁶. Such a stance on the part of the ECJ is bound to stem from the fact that the jurisprudence of Swiss courts is not uniform as they apply the pluralism principle and exercise autonomy when implementing the provisions of bilateral agreements, even if they overlap with the provisions of EU law¹⁰⁷. Consequently, the ECJ does not cite rulings of the Swiss Federal Supreme Court.

Only in some cases the ECJ assumes homogeneity of the EU law and the bilateral agreements provisions. For example, the ECJ argued in its decision *United Kingdom v. Council (Switzerland)*¹⁰⁸, that:

the EC-Switzerland Agreement on the Free Movement of Persons, (...) that for the purposes of the application of those regulations the Swiss Confederation is to be equated with a Member State of the European Union.

Other EU agreements with its neighbors, eg. the Euro-Mediterranean Association Agreements, the Stabilization, Association Agreements with the Balkan states and the Association Agreement with Turkey does not imply a homogeneous interpretation which might lead to the reciprocity in the treatment of the citizens of the EU neighboring countries and the citizens of the EU Member States in a common legal space¹⁰⁹.

Hence some other forms of broadly understood judicial cooperation other than citation, such as presenting observations and intervening, can be useful to achieve the coherence of the case-law of the ECJ and the courts of third countries. This is very well understood by the European Commission which actively works as an *amicus curie* in proceedings before

¹⁰⁴ ECJ, case C-351/08, *Grimme*, [2009] ECR, I-10777, para. 27-29 ; and more ECJ, case C-541/08 *Fokus Invest AG*, [2010] ECR, I-1025, para. 26-32; C-70/09 *Hengartner and Gasser*, [2010] ECR, I-7233, para. 41-43.

¹⁰⁵ Agreement of 21 June 1999 between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L114/ 6.

¹⁰⁶ ECJ, Case C-547/10 P, *Swiss Confederation v. European Commission* [2013], ECLI:EU:C:2013:139, para 80; similarly ECJ, case C-247/09, *Xhymshiti* [2010] ECR I-11845, para 31.

¹⁰⁷ BAUDENBACHER Carl, "The Judicial Dimension", *ibid*, note 52, p. 16-17.

¹⁰⁸ ECJ, case C-656/11, *United Kingdom v. Council (Switzerland)* [2014], ECLI:EU:C:2014:97, para 58.

¹⁰⁹ RENNUIY Nicolas, VAN ALSUWEGE Peter, *idib*, note 16, p. 947.

international tribunals and third country courts. One example here is provided by the involvement of the Commission in international arbitration proceedings¹¹⁰ or those before the United States Supreme Court¹¹¹.

VII. Conclusion

The mechanism of making the law of third countries European adopted as part of the EEA is considered to ensure the most effective export of the EU legislation¹¹². In this context, making the law European is external in nature (*ad extra*) and refers to the effect of the EU law on third country law. However, the institutional and judicial cooperation mechanisms detailed within the EEA can only be applied to the remaining relations between the EU and third countries due to the high specificity of the EEA and the relations between the courts of both pillars of this area. This specificity consists in the objective of the EEA Agreement presented in its preamble, namely the legal homogeneity of the EEA and the reciprocity in its application by the contracting parties, as well as the mutual intention of the EFTA Court and the ECJ to achieve this objective. These are factors without which the judicial dialogue of the current intensity and effectiveness would have been impossible. Moreover, the practice of intervening and presenting observations can be a factor which facilitates and enriches the dialogue between the ECJ and the EFTA Court, and can be treated in the same way in the case of the relationship between the ECJ and the courts of EU neighbouring countries. It does not, however, constitute a decisive element ensuring effective judicial dialogue. Still, the European Commission, in particular, supports the EFTA Court with specialist legal knowledge, which promotes the uniform interpretation of the EEA Agreement. This is a model to be emulated in the EU's relations with European third countries.

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¹¹⁰ NISSER Carl, BLANKE Gordon, "Reflections on the Role of the European Commission as Amicus Curiae in International Arbitration Proceedings", ECLR 2006, pp. 174-183; LEVINE Eugenia, "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation", Berkeley Journal of International Law, 2011, pp. 200-223, p.201.

¹¹¹ FAHEY Elaine, "Towards transatlantic community of law? The use of law between the EU and the US legal orders questions of legal form and characterisation", in FAHEY Elaine, CURTIN Deirdre, *A Transatlantic Community of Law. Legal Perspectives on the Relationship Between the EU and US Legal Orders*, Cambridge, Cambridge University Press 2014, pp. 131-157, p. 146.

¹¹² ŁAZOWSKI Adam, *ibid.*, note 7.; PETROV Roman, *Exporting the Acquis Communautaire through European Union External Agreements*, Nomos 2011, 103,104 p.

List of abbreviations

EC	European Community
EEA Agreement	Agreement on the European Economic Area
EEA-EFTA States	Iceland, Liechtenstein, Norway
EFTA	European Free Trade Association
ESA	EFTA Surveillance Authority
EU	European Union
SCA	EFTA Surveillance and Court Agreement
ECJ	Court of Justice of the European Union

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