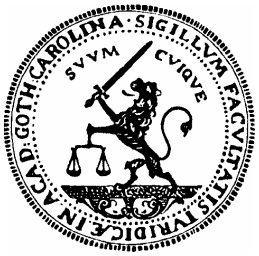

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Direct Effect, Supremacy and State Liability – A Comparison between EC Law and the EEA Agreement

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Contents

Summary

The aim of the paper is to discuss some of the basic elements of the legal system in EC law in comparison with the EEA Agreement. The conclusions will have special reference to Icelandic law.

The reason for this approach is that the EEA Agreement is closely linked with EC law. Therefore it is necessary to begin approaching the basic rules within the EC in order to better understand the EEA system and avoid perplexity. The doctrines of direct effect and supremacy are firmly embodied as foundations of EC law, and renders the Treaty as a constitution for the Member States, which undoubtedly makes EC law so special in the history of legal integration between nations. The development of the doctrine of direct effect will be addressed with special reference to the doctrine of supremacy. The conditions an EC rule must fulfil in order to have direct effect will be deliberated and explained by case law. The different scope of these two doctrines in regard to the Treaty provisions and the secondary legislation will also be addressed.

The European Economic Area, consists of the European Community and its Member States and the participating EFTA States, Norway, Iceland and Liechtenstein. The EEA Agreement was meant to retain its nature as an agreement made under public international law. It also had, however, the purpose of the creating and maintaining a homogeneous and dynamic economic area, based on common rules and equal conditions of competition and providing for adequate means of enforcement including at the judicial level. Therefore the participating EFTA States adopted the Community acquis communautaire to a very large extent. The EEA Agreement extends the internal market beyond Community boundaries, by providing the participating states of EFTA with free access to the single European market. Even though the Agreement relates mainly to the adoption of EC rules on Free movement and Competition, the Agreement also deals with integration in various fields other than these economic ones. Therefore the Agreement is

undoubtedly more than an ordinary international agreement. This special nature of the Agreement will be discussed from the viewpoint whether direct effect and supremacy are somehow inherent in the ”EEA law” with citation to EC law.

The situation regarding direct effect in EEA law seems at first sight to be quite different from that prevailing in EC law, because the depth of integration less is far-reaching than under the EC Treaty. This paper will cover the main provisions of the EEA Agreement and findings of the EFTA Court along the line that the EEA Agreement does not have direct effect, neither horizontally nor vertically, and that the question of such effects depends therefore on the substance of the national law of the EFTA States.

But the questions encountered are not so easily answered, as will be discussed in the paper. The Agreement is a result of complicated and difficult negotiations, which had the aim of reaching common conclusions in matters, which were probably impossible to unify. On the one hand by establishing an international treaty under public international law, but on the other hand to be interpreted parallel with and producing similar results as the corresponding provision of Community law. It will be shown that some provisions under EEA Law can in fact have direct effect in some circumstances, in spite of statements from the EFTA States and regardless of provisions in the Agreement stating the opposite.

This analysis is elementary and closely linked to the further discussion in the paper on comparison of State liability within EC law and EEA law. First the doctrine of State liability in EC law will be discussed, and explained why the establishment of that doctrine is considered to have been unthinkable if it were not for the doctrines of direct effect and supremacy. The establishment of that “same” doctrine within the EEA law will be covered in continuation. It will be explained why the findings of the EFTA Court lacks the same firm ground as exists in the EC law. It will also be argued that legal certainty calls for amendments of the unclear scope of the EEA Agreement and drastic decisions by the EFTA Court. Some remarks will as well be made about the possibility of EEA law

enjoying some kind of supremacy through the EEA implementing Acts of Norway and Iceland.

These findings will be addressed in the light of the internationalisation of law and the judicialization of politics. The serious conflicts between the national courts in the Union and the ECJ seem to be over and the doctrine of supremacy of community law prevails regardless of the fact that some Member States still adhere to the doctrine of dualism. In comparison the debate in the EFTA States of conflicts between EEA law with the constitutions of the participating EFTA States has not yet reached any equilibrium. It will be argued that in the light of the legal integration following the EEA Agreement that the doctrine of dualism is retreating. That finding will take place with special focus on Icelandic legal system. It will be argued that in spite of this development the necessary changes on the Icelandic constitution has to be made.

The main conclusion of this discussion is described by a practical example: If a client ask a lawyer in Iceland about some subject, that is covered by the EEA Agreement it is necessary for lawyer to look into the EC rules, because if they are not (correctly) implemented into Icelandic law a question of state liability rises, or sometimes the possibility of direct effect. So it is not longer a question for the lawyer of interpreting the Icelandic law, but also a question of "finding" the law, which could possible be unpublished and "alien" to the Iceland legal system. And the methods of interpretation of EEA (EC) law is in many ways different from the general interpretation methods the Icelanders got from Denmark, and have used for the last 100 years or so.

Preface

One can imagine that few -if any- subjects have been more discussed by legal commentators than the doctrines of direct effect, supremacy and State liability. Therefore it may seem a bit bold to write a thesis about the subject. But I have to admit that this paper is written for a selfish reason, because if one does not have fairly good knowledge about the fundamental base of the relevant legal system one will always be hesitant in applying the law of that system, and the best way to learn about the subject is to write about it.[1] The same applies to the EEA legal system. One has to try to understand fully the basic grounds behind the EEA system to have the possibilities to use the relevant rules in the future with reasonable confidence. Because the EEA Agreement is closely linked with EC law it is necessary to begin discussing the basic rules within the EC in order to understand better the EEA system and avoid confusion.

In this paper I will occasionally refrain from making a distinction between the ECJ and the CFI because such distinction is not necessary in relation to this subject. In these instances I will simply talk about *the Court*. In my coverage I will when possible use the new numbering of Treaty Articles even in cases before ToA, because in my opinion stating both the new and the old numbers of Treaty Articles can be confusing, and render the text more incoherent. When necessary, the old numbers will be mentioned along with the new ones. For the same reasons I will sometimes talk about EC when it was still the EEC. Reference to ECJ-judgements and Advocate General opinions are usually made using the Internet version accessible at http://curia.eu.int/en/jurisp/index.htm

Finally I want to express my gratitude to my supervisor, Peter Gjörtler, for his patience and good guidance.

[1] In this connection one can mention that the Van Gend en Loos case is said to be "probably more frequently referred to than read." Sevón and Johansson, 1999, p. 379. Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.

Abbreviation

AG	Advocate General
CFI	Court of First Instance
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Committee
ECR	European Court Reports
ECSC	European Coal and Steel Community
EC	European Community
EC Treaty	European Community Treaty
EEA	European Economic Area
EEA A	The Agreement on the European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EP	European Parliament
ESA	EFTA Surveillance Authority
Euratom	European Atomic Energy Community
EU	European Union
FTA	Free Trade Agreements between the Community and each EFTA State.
GATT	General Agreement on Tariffs and Trade
OJ	Official Journal of the European Communities
Para(s)	Paragraph(s)
Rep. EFTA Ct.	Report of the EFTA Court.
SCA	Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/Court Agreement)
SEA	Single European Act
ToA	Treaty of Amsterdam
WTO	World Trade Organization

1 Introduction

The aim of this paper is to analyse[2] the concept of direct effect in EC Law with special reference to the doctrine of supremacy. An analysis of these doctrines is basic to any discussion on State liability within EC Law, a topic that is widely addressed today. The scope of this paper however, does not allow detailed discussion on the supremacy of Community law from the perspective of the EC Member States, specially regarding the different approach of the monist countries versus the dualism countries.[3]

Instead the focus will be on problems of somewhat special nature that present themselves when the question is posed, whether direct effect and supremacy are somehow inherent in the ”EEA law” meaning the law according to the EEA Agreement which obtain on the EEA Area, which consists of the European Community and its Member States and the EFTA States.[4] This paper will seek some answers to such questions and it will also be discussed, on what grounds the doctrine of State liability can find application in EEA law, and if those grounds are sound enough. By comparing these basic elements of the two legal systems and specially by looking at the development in EC law through the years, some remarks regarding the future development of ”EEA law” will be made, with special comments regarding my homeland, Iceland.

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[2] Because this paper is restricted in volume it will primarily deal with the main features of these doctrines, and the most relevant points regarding the EEA Agreement.

[3] For further reading see for example Craig and de Búrca, 1998, p. 264-295, Hartley, 1998, p. 233-257, and Kapteyn and VerLoren vanThemaat, 1998, p. 499-525. The basic thesis of the monist approach is that international law and national law are both part of the one world system. They operate under different spheres but are part of the same legal structure. The dualism approach adopts the view that international law and national laws are two fundamentally different things, and do not fit together into a single world system. See Hartley, 1998, p. 189-190. International agreements are either incorporated or transformed into national law. Pálsson, 1998, p. 125-126. That clear difference between these two poles of approaching international law, has in the opinion of some diminished, see discussion in chapter 4.

[4] Norway, Iceland and Liechtenstein (but not Switzerland) are the EFTA States which are contracting parties to the EEA A. These three countries will be referred to as the “EFTA States.”

The EEC[5] Treaty, signed in Rome on March 25 1957, was mainly aimed at economic progress. Expression of other aims was, however, in its preambles, which posted economic integration as a means to a better end, rather than as the sole end in itself. The Treaty also had extensive provisions regarding the unique supranational authority of the Community's institutions.[6] The material limits of the Community jurisdiction were not precisely defined by the Treaty, nor did it include specific "supremacy clauses". Nevertheless, the relatively open provisions and the aims stated in the preambles of the Treaty gave the European Court of Justice extensive possibilities for a broad and instrumentalist interpretation of Community Law.[7] Later the "policymaking" role of the ECJ became evident, as it took into consideration the underlying and evolving aims of the Community as a whole.[8] Direct effect and supremacy have been considered to be the special features, which make the Community's legal order unique.[9] It should be noted at the outset that the

[5] Because the EEA A is an agreement between EC and ECSC (but not Euratom) on the one hand and the EFTA States on the other, this paper will not focus on the EU which is a purely intergovernmental organisation which does not even possess legal personality. See discussion in Craig and de Búrca, 1998, p. 179-185. See also Kapteyn and VerLoren vanThemaat, 1998, p. 174-176. The present paper focuses on EC law, and it is worth mentioning that the ECSC will expire in July 2002. See Hancher, Ottervanger and Slot, 1999, p. 186.

[6] See discussion in Kapteyn and VerLoren vanThemaat, 1998, p. 8-9, and 15-17, and Craig and de Búrca, 1998, p. 9-11.

[7] Regarding this point one should bear in mind, that one of the results of the Second World War was that the altered legal environment in Western Europe. The totalitarian systems and the politicised legal cultures in Italy and Germany had collapsed, and these countries are good examples of the development in several western European countries where the courts and the judiciaries acquired sufficiently strong and independent positions, Modéer, 1998, p. 124. See also discussion in chapter 4.

[8] See discussion in Weiler, 1991, p. 2414, and 2433-2434, Rasmussen, 1998, p. 521-533, and Craig and de Búrca, 1998, p. 9-11, 163-166, and 297. Craig and de Búrca mention that the preamble to the EEC Treaty contains the following recitals: "*Resolved* to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe, […]
Resolved by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts;"

[9] Prechal, 2000, p. 1047. He talks about direct effect and supremacy as the twin pillars providing Community law with the mechanism making it the "law of the Land." See in comparison that Mancini, 1989, p. 603, mentions that the doctrines of are direct effect, supremacy and the doctrine of implied powers encapsulates the judicial constitutionalisation of the Treaty. Weiler, 1991, p. 2413-2419, refers to a series of landmark decisions and adds the doctrine of human rights to this list. These doctrines has in his view has fixed the relationship between Community law and Member States laws and rendered that relationship indistinguishable from analogous legal relationship in constitutional federal states.

doctrine of direct effect has been relevant primarily to the Community legal system rather than that of the European Union as a whole. The main reason is that the ECJ lacks jurisdiction over all the three pillars.[10]

The idea of creating an economic area made up of both Community and EFTA States is almost as old as the EEC itself.[11] This idea became reality when the EEA Agreement was signed in Oporto on May 2, 1992, and then came into force on January 1, 1994. The agreement extends the internal market beyond Community boundaries, by providing the participating states of EFTA with free access to the single European market. Even though the Agreement relates mainly to the adoption of EC rules on Free movements and Competition, the Agreement deals with integration in various fields other than these economic ones.[12] The EEA A repeatedly highlights its goal of creating and maintaining a homogeneous and dynamic European Economic Area, based on common rules and equal conditions of competition and providing for adequate means of enforcement including at the judicial level.[13] In order to do so, the EFTA States adopted EC law to a very large extent.[14] The Agreement was, however, also meant to retain its nature as an agreement made under public international law: It was neither intended to have the supranational character of the EC Treaty nor was it meant to force the EFTA States to surrender sovereignty rights or impinge on the autonomy of Community

[10] Craig and de Búrca, 1998, p. 163.

[11] It is impossible in this short paper to go into the development of the EC and the history of the EEA The general picture of the development is however needed in order to understand the present situation better. In this relation one can cite the saying in English, which goes as follows: "If you don't know from where you're coming you'll certainly end up elsewhere." See further discussion in Baudenbacher, 1997, p. 171-173, and Norberg, 2000, p. 376-371

[12] Such as research and development, the environment, education and social policy, see Article 1(2) EEA.

[13] See in this relation for example the fourth paragraph of the preamble of the EEA A, and Article 1 EEA. Articles 1(1) and 2(c) EEA, which defines the Agreement as an Agreement of association. This makes it clear that the Agreement is considerably more far-reaching than the less ambitious bilateral FTA concluded between the Community and each EFTA State. This is thought to be the closest form of co-operation with EC and the legal basis on which it was concluded on the EC side was Article 310 and not Article 133 EC which is used for trade Agreements. Norberg, 2000, p. 371-372.

[14] Some talk about "relevant acquis" in this connection which is to cover all internal legislation, see discussion in Forman, 1999, p. 755-761, where he mentions that the notion of relevance is not defined in the EEA A.

law.[15] It was a tall order to reconcile these different aims as later development shows.

[15] See further discussion Baudenbacher, 1997, p. 175-180. Baudenbacher cites for example Sevón regarding the current institutional structure of the EEA A as ”the result of compromises and of compromises on compromises”. See also Sevón, 1994, p. 350-351, and Friðfinnsson, 2001, p. 51-70, specially 51-55, where he mentions that SEA had much influence of the development by making the EFTA States realise the necessity to build up relations with a changed Community. Reference is also made to the significance of the Jacques Delors speech in the EP 17 January 1989. Regarding the earlier development of the European integration process see also for example Kapteyn and VerLoren vanThemaat, 1998, p. 1-44.

2 Direct Effect and Supremacy

2.1 EC-Law

2.1.1 General

As an introductory remark it should be noted that the question of direct applicability deals with whether action by national bodies (in effect by parliament, regional bodies, or the administration under delegated powers) is necessary to give effect to a provision of Community law. A provision of Community law is however directly effective if it grants individuals rights which they can rely on and therefore must be upheld in the national courts.[16] Primacy or supremacy of Community law means that Community law takes precedence over internal law of the Member States.[17]

[16] Sevón, 1994, p. 341. The main objective behind the doctrine of direct effect is to provide Community legislation with greatest possible "effect utile", Lackhoff and Nyssens, 1998, p. 408. Three main factors are mentioned again and again in relation to direct effect: That the Community rules is supposed to apply within the legal system of the Member States, that they are supposed to confer rights –and impose obligations- upon individuals, and that the national courts are bound to apply those rules, Guðmundsdóttir, 2000, p. 114-116. See also Kapteyn and VerLoren vanThemaat, 1998, p. 526-527. Hartley, 1998, p. 196-197, points out that Articles 249 EC and 161 Euratom (but not the ECSC Treaty) state that a regulation is "directly applicable in all Member States", and the authors of the Treaty probably intended "directly applicable" to mean the same thing as "directly effective", and that only regulations would be directly effective. This given the Court went counter to the intention of the authors of the Treaty when it ruled that other Community instruments are also capable of having direct effect. This gave rise to the problem of reconciling the Court's ruling with the wording of the treaties, a problem that has caused legal writers much concern, but seemingly not the Court itself. Hartley points out that if one interprets "directly applicable" to mean the same thing as "directly effective" it would seem to follow that only regulations can be directly effective. But if not, then one has to find a suitable meaning for "directly applicable", a meaning that refers to some quality possessed by regulations but not by other instruments of Community law. This turn causes other problems because, though such features undoubtedly exists they are neither clear cut nor important enough to warrant a special term to describe them. Craig and de Búrca, 1998, p. 175 argue that it is unimportant to speculate to much whether the exercise is worthwhile, since the Court does not appear to pay much attention to the wording of the Treaties on this point, and uses the two expressions as meaning the same thing. Pescatore, 1983, p. 164, discusses the arguments from J.A. Winter that a reason for a distinction between "direct applicability" and "direct effect" in so far as some rules may be directly applicable without having all the characteristics necessary to permit their judicial application. Thus direct applicability would mean only that the Treaty has done away. In respect of regulations, with the requirement of incorporation by the Member States, but that would leave open the question whether a particular provision of a regulation has direct effect or not. He wonders whether this distinction is not too subtle to be carried out systematically, and

Some provisions of international law that are directly applicable are not capable of having direct effect. Such provisions can be regarded as binding on and enforceable by States alone. Other provisions are to vague to form a basis of rights and obligations for individuals, and still other provisions are to incomplete and require extended measures of implementation before they can be fully effective in law.[18]

It should also be noted that direct effect is linked to the rights and duties of individuals and economic operators. Pescatore points out that most of the cases in which the Court was called upon to examine the question of direct effect involved litigation between private parties and public administration, especially in matters of taxation and commerce. However direct effect has also extended to relations between private parties. Article 81 and 82 of the Treaty is a good example of provisions applying in mutual relations between traders.[19] A ”vertical” direct effect reflects the relationship between an individual and the State, but ”horizontal” effect reflects the relationship between individual and individual.[20]

The general principle which must be upheld for a legal provision to be directly effective, is that it is a part of the ”law of the land“ (it must be recognised as a valid and binding law), and the provision must be

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points out like many others that in practice this problem seems not to have aroused any difficulties. See also Steiner and Woods, 1996, p. 38-39.

[17] Sevón, 1994, p. 342. The development of direct effect and supremacy will be discussed together.

[18] Steiner and Woods, 1996, p. 38.

[19] Pescatore, 1983, p. 163, where he also mentions that it applies in other fields as well. Thus the Court had for example occasion to underscore the applicability of the rules on free circulation of labour and the freedom to provide services in cases relating professional sporting activities. In that relation he mentions two cases. First Case 36/74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo [1974] ECR 1405, and secondly Case 58/80 Dansk Supermarked A/S v A/S Imerco [1981] ECR 181. In the former case, the Court recalled that (para 19),”…the working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons,…” and then ruled (in para 25) that Articles (old Article 7), and 39 and 49 ”…may be taken into account by national Court in judging the validity or the effects of a provision inserted in the rules of sporting organization.” In the latter case the Court stated (in para 17) that ”…it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on free movement of goods…”

[20] Steiner and Woods, 1996, p. 41.

appropriate to provide rights to individuals. In this relation the issue of jurisdiction is also valid, that is, which court should decide the matter, the national courts or the European Court.[21] The test of whether a provision in Community law has direct effect is more readily fulfilled than probably was initially expected and it seems that it is rather a rule than the exception.[22]

2.1.2 The Development of Direct Effect and Supremacy

The question regarding direct effect first arose in 1956 in relation to the ECSC Treaty,[23] but was later posed on a much larger scale within the framework on the EEC Treaty, when the Court passed its ground breaking judgement **Van Gend en Loos.**[24] There a private firm sought to invoke Community law against the Dutch customs authorities. The question was raised in a preliminary ruling if Article 25 [old Article 12[25]] EC has ”direct application in national law in the sense that nationals of Member States may on basis of this Article lay claim to rights which the national court

[21] Which can be considered as one of the conditions for direct effect of EC law. See discussion in Hartley, 1998, p.189. National courts are now considered also to be the courts of the communities, Prechal in Guðmundsdóttir, 2000, p. 114-112. See further discussion in Hartley, 1998, p. 187-190, and Prechal, 2000, p. 1047-1048, which adds that ”non-directly effective” provisions cannot be ignored and treated as being non-existent. Prechal defines the concept direct effect as follows: ”direct effect is the obligation of a court or another authority to apply relevant provisions of Community law, either as a norm which governs the case or as a standard for legal review.”

[22] Weatherill, 2000, p. 93, and Hartley, 1998, p. 195. As an example of that general development one can mention that Article 28 EC which has been regarded as not having horizontal direct effect can be considered to having in fact such effect, see inter alia Case 261/81 Walter Rau Lebensmittelwerke v De Smedt PVBA [1982] ECR 3961. See also Hartley, 1998, p. 206-211.

[23] Joined cases 7 and 9/54 Groupment des Industries Sidérurgiques Luxembourgeoises v High Authority [1956] ECR 175, see Pescatore 1983, p.156, and Sevón and Johansson. 1999, p. 378-379.

[24] Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.

[25] Article 12 stated: ”Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.” Hartley points out that this provision was addressed to and imposed an obligation on Member States, but did not expressly grant any corresponding right to individuals, nor did it state explicitly that mentioned duties would be invalid. But the Court laid down a different test, see Hartley 1998, p. 191.

must protect."[26] The Court began by stating that it had the jurisdiction in deciding to determine the issue. Then the Court stated:

"To ascertain whether the provisions of an International Treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty, which refers not only to governments but also to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights. […]

In addition the task assigned to the Court of Justice under Article …[234], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon Member States and upon the Institutions of the Community…"[27]

Then the Court set up four conditions for the direct effect of Treaty provisions. It must be clear, negative, unconditional, containing no

[26] Para II B.
[27] Para II B.

reservation on the part of the Member State, and not dependent on any national implementing measure. [28]

One year later, in the Case **Costa v ENEL**[29] the Court affirmed and developed its constitutional theory of the Community where the national law was in conflict with a provision of EC law. In this case the Court concluded that Community law had to be given primacy by national Courts over any incompatible national law. The Court had before used similar reasoning in the Van Gend en Loos case regarding the aim and the spirit of the Treaty, and then stated that this new legal order immediately became "…an integral part of the legal systems of the Member States and which their courts are bound to apply."[30] Then the Court came to the conclusion that:

"By creating a Community of unlimited duration,[31] having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves…."[32]

That integration was considered to make it impossible for the states to accord primacy to domestic laws, the obligations undertaken by the Member States were unconditional, and finally the language of direct applicability in Article 249 demanded this conclusion.[33]

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[28] Para II B. "The wording of Article …[25] contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of the states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects. …"

[29] Case 6/64, Flamino Costa v ENEL [1964] ECR 585. Costa was a shareholder of a power company nationalised by the Italian government and its assets were transferred to ENEL. Costa refused to pay an electricity bill (just over 10 Swedish kronor) and was sued by ENEL. Costa argued that the law of nationalisation were contrary to various provisions of the Treaty.

[30] Para 3.

[31] That can not apply that argument to ECSC, which has limited duration.

[32] Para 3. Regarding argument against these findings and comparison with the laws of the United States of America see Mancini, 1989, p. 568-602.

[33] The Court stated: "The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the

In **Internationale Handelsgesellschaft**[34] the Court went further by ruling that the legal status of a conflicting national measure was not relevant to the question whether Community law should take precedence, thus not even a fundamental rule of national constitutional law could be invoked to challenge the supremacy of directly applicable Community law. It held as well that it was only for ECJ to set EC measures aside and that the national courts had no power to do so.[35]

In the **Simmenthal**[36] case the Court declared strongly that all national courts must directly and immediately enforce a clear and unconditional provision of Community law, even where there is a directly

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Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty set out in Article …[10(2)] and giving rise to the discrimination prohibited by Article …[12].
The obligation undertaken under the Treaty […]would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories […]
The precedence of Community law is confirmed by Article… [249]… This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.
It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. …"

[34] Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125. A German exporter questioned the validity of a deposit system established by a Council regulation whereby deposit for export licences could be forfeited if the goods were not exported on time. The German thought that the system went against the German Constitutional principles.
Later the German constitutional Court came to the conclusion that the EC measure violated the principle of proportionality and this was the start of the so-called Solange crisis between ECJ and German courts. For further reading regarding supremacy of Community law from the perspective of the Member States, see for example Craig and de Búrca, 1998, p. 264-294.

[35] See discussion in Craig and de Búrca, 1998, p. 260-262, and Kapteyn and VerLoren vanThemaat, 1998, p. 85.

[36] Case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA[1978] ECR 629, [1978] 3. There the question was about claim of repayment of fees charged because of veterinary inspection of imported beef. Italian authorities claimed that the national court could not just simply refuse to apply a national law conflicted with Community law, but must first bring the matter for the Italian Constitutional Court which could declare the Italian law unconstitutional.

conflicting national law, and it did not matter how the national system worked the effect should be immediate.[37]

The Court has since the instances cited modified and refined the test of direct effect. The test as it is currently formulated contains three conditions: [38]

1. The provision must be clear and unambiguous.
2. It must be unconditional.
3. Its operation must not be dependent on further action being taken by Community or national authorities.

2.1.2.1 Clear and Precise

Legal rules are often unclear and ambiguous. However, this do not in itself, prevent the relevant provision from being directly effective. After the interpretation of a court the ambiguities will be resolved and the resulting difficulty will not so much be ambiguity, as generality and lack of precision.[39] The ECJ has applied the criteria with a wide margin, so many provisions that are not particularly clear or precise have been found to produce direct effect.[40] In the **Firma Fink-Frucht** case,[41] the Court had

[37] Case C-213/89 The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others [1990] ECR I-2433, is also a good example of the development of supremacy of Community law, see also footnote 169. Some have argued that to wide conclusions has been drawn from Simmenthal, especially regarding that the courts must with all possible means see to that the Community law is used so it will reach its purpose. See Guðmundsdóttir, 2000, p. 118 were she cites Prechal in "Community Law in National Courts: The Lessons from Van Schijndel", page 658 and onwards, and states that the rule of supremacy consist in primarily that when there is a conflict between the national rule and Community rule, the latter prevails.

[38] See discussion in Hartley, 1998, p. 191. These three conditions for direct effect are closely linked or intertwined, Guðmundsdóttir, 2000, p. 114. Therefore most of the cases used to explain one condition can also be called upon to explain another. These conditions will not be discussed in smallest details, so it must suffice to state the main aspects. These conditions are also discussed by examples in this paper illustrating secondary legislation. Not all scholars make this threefold division of the conditions for direct effect. Some just divide the conditions into two main parts (but then also talk about the necessity of completeness) that is if the relevant provision are unconditional and sufficiently precise, see for example Pescatore, 1983, p. 174.
It can also be mentioned that it is not only Member States or EU citizens who can invoke direct effect. Craig and de Búrca, 1998, p. 256.

[39] Hartley, 1998, p. 192. One can also mention that already in the Van Gend en Loos case AG Romer suggested that Article 25 was too complex to be enforced by national courts; if such courts were to enforce Article 25 directly there would be no uniformity of application. See Steiner and Woods, 1996, p. 40.

[40] Steiner and Woods, 1996, p. 41.

[41] Case 27/67 Firma Fink-Frucht GmbH v Hauptzollamt München-Landsbergerstrasse [1968] ECR 223.

to consider indefinite legal concepts such as ”similar products” and ”indirect protection” in interpreting Article 90 EC, and found out that Article 90(2) had direct effect.[42] A provision will not have direct effect, on the other hand, if the concepts contained in a provision leave the Member States certain discretion in their application. An example of that is the **SpA Salgoil**[43] case where the Court concluded that the concepts ”national production” and ”total value” used in the relevant Treaty Article contained a margin of discretion, because the Treaty gave no indication of the data to be used in calculating these concepts or of the methods to be applied in regard of which several solutions could be envisaged.[44]

The requirement of sufficient clarity is really a common condition to all provisions if they are to be suitable for application by a Court of law and in accordance with the maxim that any legal rule has to be devised so, that it can operate effectively (”effect utile”).[45] It therefore does not matter whether the provisions are a part of Community law or national legislation.[46] As a matter of course the degree of necessary precision varies according to the situation. It is recognised that a provision imposing

[42] See paras 3-4.
[43] Case 13/68, SpA Salgoil v Italian Ministry of Foreign Trade, Rome [1968] ECR 453.
[44] Para II (d) :”… Some discretion does fall to be exercised by the Member States from the obligation to ´convert any bilateral quotas …into global quotas´ and from the concepts of ´total value´ and ´national production´. In fact, since the Treaty gives no indication as to the data on which these figures must be calculated or as to the methods applicable, several solutions may be envisaged. Therefore the last sentence of Article 32 and Article 33 does not apply in sufficiently precise way for it to be acknowledged that they have the above-mentioned direct effect.” See also Kapteyn and VerLoren vanThemaat, 1998, p. 530, where they mention that the national court is able to examine whether the margin of discretion has been exceeded, as in Case 51/76 Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen [1977] ECR 113, paras 16-17 and 30.
[45] Pescatore, 1983, p. 155, takes medical comparison and states that direct effect ”is the normal state of health of the law; it is only the absence of direct effect which causes concern and calls for the attention of legal doctors.” See further discussion in chapter 2.1.4.
[46] Hartley, 1998, p. 192, where he takes Article 10 of the Treaty as a good example of such provision, which only lays down general objectives or a policy to be pursued, without specifying the appropriate means to attain it. In such cases further legislation is necessary before the provision in question can become operative. See also for example the Case 126/86, Zaera v Instituto Nacionale de la Seguridad Social [1987] ECR 3697. In Zaera the Court stated that Article 2 describes in general terms the tasks of the Community, but could not per se impose legal obligations on Member States or confer rights on individuals. See further discussion Craig and de Búrca, 1998, p. 174, where they quote AG Mancini´s opinion that the Treaty provision in question ”contains expressions of intent, purpose and motive rather than rules that are of direct operative effect.”

obligations on private citizens should attain a higher degree of precision than a provision granting them rights against national authorities. [47]

2.1.2.2 Unconditional

Unconditional means that the provision must not depend on something within the control of some independent authority, such as a Community institution, or a single Member State. It must not, in particular, be dependent on the judgement or discretion of such body.[48] Articles 87-89, concerning State Aid, are an example of a judgement or discretion[49] of the Commission.[50] The **Von Colson**[51] case is an example of circumstances

[47] See Hartley 1998, p. 191-192. Regarding examples of a question if a Community provision is not designed to confer rights on individuals, see discussion in Craig and de Búrca 1998, p. 174-175, where they mention in this regard Case C-194/94 CIA Security International v Signalson SA and Securitel [1996] ECR I-2201 paras 42-44 (directive sufficiently precise), and Case C-72/95, Aannemersbedriif Kraaijeveld P.K. Kraaijeveld v Gedeputeerde Staten van Zuid-Holland [1996] ECR I- 5043, paras 55-56, that were a Community measures imposes a clear obligation on a Member State, a national court must not be prevented "from taking into consideration as an element of Community law" e.g. in reviewing the compliance by that Member State with the obligation. They also mention Case C- 431/92 Commission v Germany [1995] ECR-I2189 (Grosskrotzenburg case), where the Court ruled that the question whether a sufficiently clear and precise obligation has been imposed by a Community provision was different from the question whether an individual can derive rights from those provisions. See also footnotes 92 and 118.

[48] Hartley, 1998, p. 192. See also Pescatore, 1983, p. 161, and Kapteyn and VerLoren vanThemaat, 1998, p. 530, but they uses in this relation the phrase of the "unconditional and unqualified" wording of the provision. Craig and de Búrca, 1998, p. 169, point out that right away in Costa v ENEL, were Treaty provisions have seemed too broad or general, the Court has found ways of severing or considering separately the less precise parts. The Court was among other things interpreting Article 31 of the EC Treaty. Both paragraph 1 and 2 of that Article imposes an obligation on the Member States. However the obligation in the latter paragraph is unconditional and not dependent on any implementing national act. It is thus eligible, unlike the first paragraph, to have direct effect and creating individual rights that the national courts must protect.

[49] Kapteyn and VerLoren vanThemaat, 1998, p. 532, point out that theoretically it is correct to speak of "indefinite legal concepts if several views on interpretation are possible but only one is right. Discretion, on the other hand, only exists if not only is a choice of different views possible but also it is lawful to follow any of them." They add however that the application of this distinction will in praxis present difficulties of interpretation.

[50] Hartley, 1998, p. 193. The main principle is that State aid is incompatible with the Common Market, where it affects trade between Member States. Exceptions from this principle are provided for. But the prohibition is conditional on the decisions of the Commission. It decides whether aid in concrete circumstances is unlawful according to the Treaty, and to order the offending Member State to terminate it within a period of time laid down by the Commission. (For the sake of good order it should be mentioned that the Council can authorise an aid which would otherwise be regarded unlawful, and that Article 88(3) has considered having direct effect). See also footnote 115.

[51] Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, paras 18-19. That case regarded a provision in a directive, but that does not matter in this context. See discussion Hartley, 1998, p. 193-195, where he

where the discretionary powers of the Member States prevented an obligation from having direct effect. A woman who had been refused a job because of her gender argued that Community law gave her directly effective right to demand that the court order the employer to appoint her to the post. The Court however pointed out that there were several ways in which Member States could comply with the obligation of providing legal remedies, for example by providing right to claim damages.[52]

The **Reyners**[53] case has been used as an example regarding how a provision is tested for conditional elements. In that case the Court was interpreting Article 43 which provides for the abolition of restrictions on freedom of establishment, within the framework set out in Articles 44(2), and 47(1). Few of the acquired measures had been adopted at the time the case arose. The Court built on the principle of non-discrimination, which is considered having direct effect, even though the conditions for genuine freedom of establishment were far from being achieved. In spite of slow harmonalization of national laws in this field, the Treaty itself could be invoked by affected individuals from other Member States in order to claim equal treatment and stop discrimination between them and nationals of the relevant Member State.[54]

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compares this case to the Case 41/74 Yvonne van Duyn v Home Office [1974] ECR 1337. In the latter case the Court found Article 39(1) and (2) (free movement of workers) were directly effective by the end of transitional period, and stated in para 6: ”These provisions impose on Member States a precise obligation which does not require the adoption of any further measure on the part either of the Community institutions of the Member States and which leaves them, in relation to its implementation, no discretionary power.” The limitations in paragraph 3 in the Article did not change this result, because the right of the Member State to invoke them is subject to judicial control. Hartley points out that in the Von Colson case the Member States had discretion as to how they would give effect to the right, but in the Van Duyn case the right was provided by Community law and the Member States were merely given limited power to restrict it in certain circumstances. That is, in the former case the right was incomplete until the Member State had acted, but in the latter case not.

[52] For further discussion regarding the Van Duyn case and Von Colson case, see chapter 2.1.3.2, and also footnotes 104 and 169.

[53] Case 2/74, Jean Reyners v Belgium [1974] ECR 631. There are many examples of when a relevant provision ceases to be conditional at the end of a transitional period, inter alia Case 33/74, Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid [1974] ECR 1299, see para 23 and especially para 24: ” The provisions of Article …[49], the application of which was to be prepared by directives issued during the transitional period, therefore became unconditional on the expiry of that period.”

[54] Para 24: ”The rule on equal treatment with nationals is one of the fundamental legal provisions of the Community.” Para 25: ”As a reference to a set of legislative provisions

The **second Defrenne**[55] case has also been seen to illustrate further the criteria of conditional elements in a provision. Amongst other things the case was about the interpretation of Article 141,[56] which at that time only required the Member States to ensure the application of equal pay for men and women for equal work, but did not have clear precise and negative straightforward obligation on the Member States. For example the term ”principle” in the Article was not specific, nor were the terms ”equal work” and ”equal pay” defined. The Court, however, isolated what was the principle of Article 141 (equal pay for equal work) and ignored the fact that there could be cases involving complex questions regarding ”work of equal value” in the context that jobs can be very different in nature. Therefore the Article simultaneously had and had not direct effect. A distinction was drawn between the core and the fringe of the provision, in so far as it covered simultaneously ”direct and overt discrimination” which was identified in the light of the criteria based on the above-mentioned principle in Article 141 and ”indirect and disguised” discrimination, which can only be identified by reference to more explicit implementing provisions of Community or national character.[57]

2.1.2.3 Not Dependent on Further Action

If a provision states that the rights it grants will come into effect when further action of a legislative or executive nature has been taken by the Community or the Member States, it seems reasonable that such a

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effectively applied by the country of establishment to its own nationals, this rule is, by its essence, capable of being directly invoked by nationals of all the other Member States.” In comparison to van Gend en Loos the Reyners case was about insufficient activity on the part of the Community legislative institutions, but not the failure of a Member State to act promptly. See Hartley, 1998, p. 161.

[55] 43/75 Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena [1976] ECR 455.

[56] Former Article 119, but the legislation in that field has changed much since then, see for example Craig and de Búrca, 1998, p. 801-865.

[57] See further discussion in Craig and de Búrca, 1998, p. 171-173, Kapteyn and VerLoren vanThemaat, 1998, p.531, and Pescatore, 1983, p. 162-163, where he states that this distinction allowed the Court to single out in Article 141 a sort of ”inner circle” covering on the one hand discrimination which may have its origin in legislative provisions or collective agreements and which may as such detected on the basis of a purely legal analysis of the situation, and on the other hand, discrimination which may be established in the light of facts which by their nature may be asserted by any judge. See also paras 7,18 – 19, 28 and 30-31 of the judgement.

incomplete provision cannot have direct effect until that action is taken.[58] However the Court has sought to narrow this requirement down to its very minimum, by laying down a rule that if the Community provision gives a time-limit for its implementation, it can become directly effective if it is not implemented by the deadline.[59] The above-mentioned Defrenne case is an example of when the Court held that Article 141[60] could find direct effect after the deadline laid down, which demarcated the first stage according to the Article. Hartley points out, that in practice this modification of the original rule to a large extent nullifies it, since almost all Community provisions requiring further action contain a time limit, and therefore one is usually just talking about the postponement of direct effect until the deadline has passed.[61]

2.1.3 Secondary Legislation

2.1.3.1 Regulations

The explanation for the direct effect of regulations in comparison with Treaty provisions is less teleological and more straightforwardly textual. The reason for that is that there has always been a provision in the Treaty, now Article 249, stating that a regulation "shall have general application. It shall be binding in its entirety and directly applicable in all Member States."[62] In spite of this provision regulations are not always directly effective, and general conditions must be fulfilled.[63]

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[58] See Van Gend en Loos: "The implementation of Article …[25] does not require any legislative intervention on the part of the States."

[59] Hartley. 1998, p. 195. See also examples regarding the circumstance of unconditionality, for example the cited Reyners case, para 30.

[60] Old Article 119 (but amended by ToA), stated: "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."

[61] Hartley, 1998, p. 195.

[62] In comparison see Article 161 Euratom which state the same, but there is no similar provision in the ECSC Treaty as regard general decisions (equivalent to EC regulations). Hartley, 1998, p. 196.

[63] See Hartley, 1998, p. 197 where he takes Article 21(1) in regulation 1463/70 as an example of a far to vague provision to creating a criminal offence, although it states that: "Member States shall, in good time and after consulting the Commission, adopt such laws, regulations or administrative provisions as may be necessary for the implementation of this regulation.
Such measures shall cover, inter alia, the reorganization of , procedure for, and means of carrying out, checks on compliance and penalties to be imposed in case of breach."

In the Case **Commission v Italy**[64] the Court laid down for the first time the doctrine that national implementing measures can be considered improper,[65] because the Community nature of the provision is thereby obscured.[66] These comments from the Court do however not necessarily imply that any national measure enacted with the intention of giving effect to a regulation is invalid, and there are some obvious exceptions to this as

[64] Case 39/72 Commission v Italian Republic [1973] ECR 101. According to the Court the Italian government infringed Community law, firstly, by delaying in putting into effect a system provided for in the regulation regarding paying farmer for slaughtering cows, and secondly, of the manner of giving effect to it provided by a national degree.

[65] Para 17: "…According to the terms of Article …[249] and …[254] of the Treaty, Regulations are, as such, directly applicable in all Member States and come into force solely by virtue of their publication in the Official Journal of the Communities, as from the date specified in them, or in absence thereof, as from the date provided in the Treaty. Consequently, all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Community Regulations and of jepoardizing their simultaneous and uniform application in the whole of the Community."
Para 20: "…Under the terms of Article …[249], the Regulation is binding "in its entirety" for Member States. In consequence, it cannot be accepted that a Member State should apply in an incomplete or selective manner provisions of a Community Regulation so as to render abortive certain aspects of Community legislation which has opposed or which it considers contrary to its national interests."

[66] Hartley, 1998, p. 198. See also Pescatore, 1983, p. 164-167. Pescatore mentions that the Case 93/71 Orsolina Leonesio v Ministero dell'agricoltura e Foreste [1972] ECR 1039, was the background for the Case 39/72 Commission v Italy. Mrs. Leonesio an Italian farmer had slaughtered her cows in order to get bonus provided for in regulation, but could not because the Italian Government had not made appropriate budgetary provisions. The Court stated that the relevant regulations lay down exhaustively the conditions on which creation of the individual rights in question depends and they do not include considerations of a budgetary nature. Para 22:"So as to apply with equal force with regard to nationals of all the Member States, Community regulations become part of the legal system applicable with the national territory, which must permit the direct effect provided for in Article …[249] to operate in such a way that reliance thereon by individuals may not be frustrated by domestic provisions or practices."
Para 23: "Budgetary provisions of a Member State cannot therefore hinder the direct applicability of a Community provision and consequently the exercise of individual rights created by such a provision."
Pescatore also points out that it emerges from series of judgements in cases, which show that Member States either by inappropriate legislative action, or sometimes by lack of action put obstacles in the way of proper implementation of regulations. Thus in case 43/71 Politi s.a.s. v Ministry for Finance of the Italian Republic[1971] ECR 1039, the Court recalled that the effect of a regulation as provided for in Article 249, is to "…prevent the implementation of any legislative measure, even if it is enacted subsequently, which is incompatible with its provisions." (Para 9). Pescatore also covers cases 55/77 Marguerite Maris, wife of Roger Reboulet v Rijksdienst voor Werknemerspensioenen [1977] ECR 2327, Case 34/73 Fratelli Variola S.p.A. v Administration des finances Italienne [1973] ECR 981, Case 50/76 Amsterdam Bulb BV v Produktschap voor Siergewassen [1977] ECR 137, and Case 94/77 Fratelli Zerbone Snc v Amministrazione delle finanze dello Stato [1977] ECR 137. Pescatore states that all these cases show that regulations are not only "self executing", but that they are in addition "self-contained and self sufficient" Member States may therefore in no way hamper or deflect the application of regulation by implementing measures of their own.

a main rule. Thus a regulation can itself either expressly require, or impliedly permit, that Member States take action to implement the regulation.[67]

An example of the former exception is to be found in the Case **UK v Commission.**[68] There the Court began to cite to the above-mentioned Case Commission v Italy, and then came to the conclusion that UK had failed to fulfil its obligation under the Treaty by failing to adopt in good time the measures "…which remain to be taken to implement Regulation No 1463/70 of the Council … on the Introduction of Recording Equipment in Road Transport ..." [69]

Example of the latter is the **Bussone**[70] Case, where the Court stated: "The direct applicability of a regulation requires that its entry into force and its application in favour of or against those subject to it must be independent of any measure of reception into national law. …

Proper compliance with that duty precludes the application of any legislative measure, even one adopted subsequently, which is incompatible with the provisions of that regulation. …

That prohibition is, however, relaxed to the extent to which the regulation in question leave to the Member States themselves to adopt the

[67] See further discussion Craig and de Búrca 1998, p. 176-177, and Hartley 1998, p. 198-199, where he mentions in relation to the doctrine of improper national measures, that the Court seems concerned about three matters: First, to prevent confusion on from what date the measure comes into force, it must be the same date in all the Member States. Secondly, to keep uniformity by hindering the Member States to make changes when transferring the relevant regulation into national law. Thirdly, national implementation could prejudice the European Court's jurisdiction to give a ruling on interpretation and validity of the measure under the procedure for a preliminary ruling. In that regard he points out Case 34/73 Fratelli Variola S.p.A. v Administration des finances italienne [1973] ECR 981 at para 11 of the judgement: "More particularly, Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law or the validity of an act of the institutions of the Community, which means that no procedure is permissible whereby the Community nature of legal rule is concealed from those subject to it. Under Article …[234] of the Treaty in particular, the jurisdiction of the Court is unaffected by any provisions of national legislation which purport to convert a rule of Community law into national law."
Hartley also points out that it is conceivable that some national courts might be less ready to make a reference to the Court if regulations were incorporated in a national measure.

[68] Case 128/78 [1979] ECR 419.

[69] Para 1.

[70] Case 31/78 Francesco Bussone v Ministère italien de l'agriculture [1978] ECR 2429.

necessary legislative regulatory, administrative and financial measures to ensure the effective application of the provisions of that regulation."[71]

Hartley mentions that there is uncertainty whether national measures are permissible in other circumstances. In his opinion such measures would however serve a useful function where national rules purport to codify the law in a particular area and thus give a complete statement of all the relevant legal rules. If a regulation impinges on that area, so that in certain cases rights may be derived from it, it might be desirable in the interests of clarity, certainty, and "legislative tidiness" for those aspects of the issue governed by the regulation to be repeated in the national provision.[72]

2.1.3.2 Directives

Article 249 of the Treaty states that a directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."[73] From the wording of the provision it would appear that they do not have direct effect.[74] A directive may not be sufficiently precise to allow for a proper national enforcement, since it might only set out its aim

[71] Paras 30-32.
[72] Hartley, 1998, p. 199.
[73] Hartley states that there is little doubt that the authors of the Treaty did not intend directives to be directly effective. This view was generally accepted in the early days of the EC, and it follows from the concept of directive as laid down in Article 249 EC and 161 Euratom which pointedly refrain from declaring directives directly applicable. Hartley, 1998, p. 199-200. Craig and de Búrca, 1998, p. 186, point out that the idea of effectiveness and legal integration were equally strong here as in making Treaty provisions have direct effect.
[74] See Pescatore, 1983, p. 167-171, where he approaches the subject differently by beginning his coverage on directives by stating: "In spite of what has been written by several commentators, the Court has never said that directives have "direct effect" and it has never tried to blurr the difference which is made by Article …[249] between regulations on the one hand, or directives on the other hand." He goes on to explaining the early part of the case law in this relation, and then records the reaction of some national courts which he says may have been open to misunderstanding. Finally he comments on a Judgement in the Becker case which he claims to show clearly that there is no question of assimilating the effect of directives to the effects on regulations. He points out that the Court makes it quite clear that a problem arises only in those exceptional cases where a directive has not been properly implemented by the Member States, and that this limited effect of the directive may come into play only with a view to claiming right of individuals vis-à-vis the State, but in those situations a directive cannot impose obligations on individuals or have an incidence on mutual relations between them.

in general terms. However that did not deter the Court from considering whether directives might have direct effect.

The first step towards granting directives direct effect is said to be have taken in the **Grad** case[75] where the question was if various Council decisions on turnover taxes and VAT, in conjunction with a Council directive governing the date from which the tax systems were to apply, could be directly effective. The Court held that the fact that the directive had limited role did not prevent the decisions from being directly effective.[76] However the ruling in this case is considered to have foreshadowed that of the **Van Duyn** case.[77] The Court confirmed its view from the Grad case that directives can by directly effective. In this case it was in the context of provision of Directive 64/221,[78] which particularised the powers laid down in Article 39(3) EC (free movement of workers), which is directly effective.[79] The arguments of the Court have been

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See Case 8/81 Ursula Becker v Finanzamt Münster-Innenstadt [1982] ECR 53. His conclusion seems to be, that it is a question of State liability and nothing else.

[75] Case 9/70 Franz Grad v Finanzamt Traunstein [1970] ECR 825. This case has more relevance regarding direct effect of Community decisions, see discussion in chapter 2.1.3.3. In this case the German government in defended the view, that by distinguishing between the effects of regulations on the one hand and the effects of decisions and directives on the other, Article 249 precludes the possibilities of decisions and directives producing direct effect, which are reserved to regulations, (para 4). The Court answered (para 5) that "…it does not follow from this that other categories of legal measures mentioned in that article can never produce similar effects. …" Then the Court went into the effects of decisions, and then stated (in para 10): "The date on which this obligation becomes effective was laid down by the Council directives […]. The fact that this date was fixed by a directive does not deprive this provision of any of its binding force. …" And in para 13: "…The aim of the directives is to ensure that the system of value-added tax is applied throughout the Common market from a certain date onwards. As long as this date has not been reached the Member States retain their freedom of action in this respect."

[76] It was therefore only in a limited sense that the directives in this case were themselves directly effective. See also Case 33/70 SpA SACE v Finance Minister of the Italian Republic [1982] ECR 1213, were the situation was similar but in that instance the provision was contained in the Treaty.

[77] Case 41/74 Yvonne van Duyn v Home Office [1974] ECR 1337.

[78] OJ. English Special Edition 1963-64, p. 117.

[79] There the British Government had reached the conclusion that the Church of Scientology was harmful to the mental health of those involved and adopted a policy of discouraging it, though it was not declared illegal. One consequence of this was that immigration permission was as a rule refused to known Scientologists. On the basis of this public policy a Dutch woman, Miss Van Duyn, was refused entry to the UK. The Court was amongst other things asked if Directive 64/221was directly effective. The purpose of this Directive was to limit the discretion of Member States when they invoked the public policy provision under Article 39 of the Treaty and Article 3(1) of the Directive lays down that such measures must be "based exclusively on the personal conduct of the individual concerned." The UK Government had done nothing to implement Article 3(1)

classified into four points:[80] First that Article 249 does not preclude other Acts than regulations to have direct effect. Secondly that "…It would be incompatible with the binding effect attributed to a directive by Article …[249] to exclude in principle, the possibility that the obligation which it imposes may be invoked by those concerned. …" The Court based its third argument on the principle of *effect utile*, by saying that the "…useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. …" The fourth argument was based on Article 234, where the Court stated that Article 234 "…which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. …"[81] The Court stated the Directive imposed a clear, precise, and complete obligation, and restricted the exercise of the Member States of the discretion in deciding what is public policy.[82] As can be seen from these arguments for direct

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of the Directive, and the time limit had expired. Therefore was no British provision stating that entry could be refused on the ground of personal conduct, so the British Government was in reality trying to profit from its own wrongdoing. and Ms van Duyn membership in the Scientology communion did not constitute "personal conduct." See also footnotes 51, and 104.

[80] All in para 12. See discussion Kapteyn and VerLoren vanThemaat, 1998, p. 535-536.

[81] See also discussion, Craig and de Búrca, 1998, p. 187-188, and Hartley, 1998, p. 200-203, which divides the arguments into three parts by combining the first two together emphasizing on the argument no two. He argues that the first (second) argument is unsound because it is quite possible for a measure to by fully binding at the interstate level without its being enforceable in national courts by private individuals. In such a case it could be enforced by means of an action brought in the ECJ by the Commission, or by another Member State, under Articles 226-228 of the Treaty. Hartley states that the second (third) argument is much stronger, even though it is a "policy argument, not a legal one." Regarding the third (fourth) argument Hartley points out that it assumes that a national court might require a preliminary ruling only in the case of directly effective provision. However a national court may well require a preliminary ruling on the validity and interpretation of a Community provision which is not directly effective. It may also be required as a matter of Community law by a virtue of the doctrine "indirect effect." Therefore no inference can be drawn from the terms of Article 234.

[82] Craig and de Búrca, 1998, p. 188, mention that some Member States felt that the Court had gone too far in advancing its conception of Community law at the expense of the clear language of the Treaty, and the obvious form of limitations on directives as a form of legislation. It was felt that directives were specifically intended to leave it to the Member States to choose how to enact a particular Community obligation, and the Court should not allow this to be overridden by individuals pleading the provisions of the directive itself.

effect given by the Court the conclusion is not specifically based on the ground that Member States should be prevented from taking advantages of their own wrongdoing.[83] That doctrine was later adopted by the Court in the **Ratti**[84] case where the Court repeated much of what it said in the Van Duyn case, but went on and established the so-called Estopel argument,[85] which prevents a Member State, which has not adopted the implementing measures required by a Directive in the prescribed period, to rely, as against individuals, on its own failure to perform the obligations which the directive entails. Therefore a directive had direct effect if its obligation in question is unconditional and sufficiently precise. The Court also gave a negative answer to the question, if an individual could directly rely upon the Directive, on the ground of the principle of legitimate expectations, before the time limit given to the Member States for its implementation had expired.[86]

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[83] Hartley points out that the idea that a direct effect of directives can be justified on that ground was first put to the Court by AG Warner in 1977, three years after the Van Duyn case was decided, and in the case C-38/77 Enka BV v Inspecteur der Invoerrechten en Accijnzen Arnhem [1977] ECR 2203, at 2226. Mancini, 1989, p. 602, mentions that given the fact of the possibilities for the Member States not to compliance with directives has lead to the conclusion that the "van Duyn doctrine" was essentially concerned with assuring respect for the rule of law.

[84] Case 148/78 Publicio Ministero v Tulio Ratti [1979] ECR 1629, see paras 22-23.

[85] See discussion in Coppel, 1994, p. 860-861.

[86] See paras 43-44, and 46 regarding the latter question. Hartley, 1998, p. 203-204, discuss the possibility whether a directive can have some effect before the time limits have expired. He takes the example if a Member State purports to implement the directive before the deadline, but does so improperly, it could be argued that though the Member State is not obliged to implement it before the expire of the time limit- if it chooses to do so, it must comply with the terms of the directive: by purporting to implement the directive, it is voluntarily assuming the obligation at an earlier time. In that regard Hartley mentions Case C-129/96 Inter-Environnement Wallonie ASBL v Région Wallonne, [1997] ECR I 7411. There the Court stated that during the period between the adoption of the directive and the expire of the deadline Member States must refrain from adopting any measures liable to compromise seriously the result prescribed by the directive. Hartley states that although the Court did not say that the directive would be directly effective before the expire of the deadline, it is possible that a body with the requisite standing under national law might then be able to start annulment proceedings in the national courts against the implementing measure.
For the position where, after the deadline has expired, it has been postponed, see Case 70/83 Gerda Kloppenburg v Finanzamt Leer [1984] ECR 1075. The facts of the case is somewhat complex, but (in paras 11-12) the Court build on the principle that Community legislation must be "unequivocal and its application must be predictable for those who are subject to it. Postponement of the date of entry into force of a measure of general application, although the date initially specified has already passed, is in itself liable to undermine that principle. If the purpose of an extension is to deprive individuals of the legal remedies which the first measure has already conferred upon them, such an effect in practice raises the question of the validity of the amending measure.

The conclusion of this coverage is that the Court has shown itself to be is very flexible in treatment of the criteria of precision, unconditionality, and absence of discretion.[87] The Court has, however, continued to emphasise the distinction between regulations and directives; that direct effect is not provided under Article 249, and that a directive can only have such an effect when a Member State fails to comply with the obligation of implementation in relation with "the period prescribed or where it fails to implement the directive correctly", as stated in the **Marshall**[88] case.

We have seen from the discussion above, that a directive can have vertical direct effect. But in the **Marshall**[89] case he Court firmly stated that directives can not have horizontal effects.[90] Even though the Court in the made this restriction on directives not having horizontal effect, it found out

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However, such a question of validity could arise only if the intention to produce the above-mentioned effect were expressly stated in the amending measure. …" In this case the relevant directive was interpreted as not having retroactive effect. See discussion in Kapteyn and VerLoren vanThemaat, 1998, p. 540 and 327 were they mention that case in relation to the fact that that directive unlike regulation can impose obligation only to Member States, but that does not exclude a directive addressed to all Member States being found to be an act of general application.

[87] See discussion in Craig and de Búrca, 1998, p. 190.

[88] Case 152/84 M. H. Marshall v Southampton and South-West Hampshire Area Health Authority [1986] ECR 723.

[89] The main facts in that case were that Ms Marshall, a senior dietician, was dismissed from her work for the Health Authority because under the written policy of the Authority all women were to retire at the age of 60, but men no until the age of 65. Under national legislation men became eligible for state pension at the age of 65, but women at the age 60, but payment of state pensions or occupational pension would be deferred until actual retirement. Ms Marshall sued the Health Authority and argued that her dismissal violated the provisions of the Equal Treatment Directive from 1976, but the national legislation on equal treatment exempted matters regarding retirement from its scope.

[90] The Court stated in para 48: "With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article …[249] of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to ´each Member State to which it is addressed´. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. …"

About the alleged difference between the Court arguments and AG Slynn, see Craig and de Búrca 1998, p.191-192. The AG points out that to give horizontal effect to directives would "totally blur the distinction between regulations and directives… ." See also discussion in footnotes 164.

Craig and de Búrca mention one ruling which "has the effect of undermining some of the force of the Court's textual argument in Marshall", see discussion in Craig and de Búrca 1998, p. 193, about the case C-43/75 Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena [1976] ECR 455. I will leave that question open, but only mention in that regard that the Defrenne Judgement is 10 years older than the Marshall Judgement.

that the sued Health Authority was liable according to the provisions of the directive, since it could be considered as an organ of the State.[91]

That development of broad definition of the Community concept public body continued, probably in order to harmonise application of non-implemented directive. In that regard see for example the **Constanzo**[92] case, where the Court held that provisions of a directive could be relied on against local or regional authorities (Municipality of Milan), and the Case **Johnston v Chief Constable of the RUC**[93] which involved constitutionally independent authorities responsible for maintenance of public order and safety. See also the **British Gas**[94] Case where the defendant was a nationalised industry, with responsibility for and a monopoly of the gas-supply system in UK (privatised in 1986).[95]

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[91] See para 49 where the Court once again used the Estopel argument and stated: "In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law." And para 51: "The argument submitted by the United Kingdom that the possibility of relying on provisions of the directive against the respondent qua organ of the State would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the directive into national law."
In this regard see also the above-mentioned Becker case from 1982, where the Court held that provisions could be relied on against tax authorities.

[92] Case 103/88 Fratelli Costanzo SpA v Comune di Milano [1989] ECR 1839. See further discussion in Prechal, 2000, p. 1049. He also mentions the Case C-431/92 Commission v Germany [1995] ECR I-2189 (the Grosskrotzenburg case), and calls this form of direct effect an "administrative direct effect." These cases will be discussed later in chapter 2.1.4 in relation of applying EC law ex officio, see also footnote 47.

[93] Case 222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651.

[94] Case C-188/89, A. Foster and others v British Gas plc. [1990] ECR I-3313, see especially para 20: " It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon."

[95] See discussion Craig and de Búrca, 1998, p. 193-198. There they mention for example the lack of indication as to what kind of control over the body the State must have in order for it to be an entity which constitutionally speaking represents the power of the State. They argue that the Estopel argument seems weak, since the British Gas could hardly have affected the State's decision on how and when to implement the relevant directive. They cite the AG Opinion in the British Gas case, and interpretation of E. Szyszczak on that Opinion regarding that it is not possible to formulate an exhaustive set of criteria to be applied uniformly across Community law within the various legal systems of the Member States. See also case C-419/92 Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda [1994] ECR I-505. That case was not concerning directives,

Even though a directive does not have horizontal direct effect[96], and just vertical direct effect under some circumstances, as shown before, the Court has attempted to ensure that national law should be interpreted in the light of Community law so to give effect to the aims of the latter. In order to secure that conclusion, the Court applies the principle of loyalty in Article 10 of the Treaty. That requirement of harmonious or friendly interpretation is not restricted to directives or to non-directly effective law,[97] but because of that principle of interpretation directives gained so-called indirect effect.[98]

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but Craig and de Búrca, 1998, p. 197, point out that the case "proceeded on the ´common ground´ that the University of Cagliari was an emanation of the State." In continuance Craig and de Búrca cite R. White where he points out that much will depend on the organisation and funding of various universities.

[96] Craig and de Búrca, 1998, p. 199-201, and 206, talk about "horizontal" effects of directives in quotation mark. Regarding so-called "Identical horizontal direct effect" of directives Craig and de Búrca mentions three examples of that phenomena, which is regarding the possibilities "to give some effect to a non-implemented directive in a case between private parties." It should also be mentioned in this regard that Lenz, Tynes and Young, 2000, p. 513-515, seem to interpret the following two cases regarding directives in the way that directives can have horizontal effects. See cases C-441/93, Panagis Pafitis and others v Trapeza Kentrikis Ellados A.E. and others [1996] ECR I-1347, and C-129/94, Criminal proceedings against Rafael Ruiz Bernáldez [1996] ECR I-1829. In the former case the Court ruled that a Directive precluded the application of the relevant Greek legislation, and the result was an increase in new shareholders share capital was rendered invalid by virtue of the original shareholders reliance on the provision of the Directive. In the latter case the detrimental effects was also born by a private party. Under Spanish law the damage caused by an intoxicated driver was excluded from insurance cover, whereas the Court interpreted the Insurance Directive as meaning that an insurer could not refuse to compensate the victim of a road accident caused by such a driver. See in comparison later discussion in chapter 2.2.3 on the EFTA Court Case E-1/99 from 17 November 1999, Storebrand Skadeforsikring AS v Veronika Finanger.

[97] Craig and de Búrca, 1998, p. 198, where they mention in that relation Case 165/91 Simon J. M. van Munster v Rijksdienst voor Pensioenen [1994] ECR I-4661 There the Court stated in para 32: " Where such a difference in legislation exists, the principle of cooperation in good faith laid down in Article [10 of the EC] Treaty requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of Article …[39] of the Treaty." And in para 34 the Court cites to other cases: " When applying domestic law, the national court must, as far as is at all possible, interpret it in a way which accords with the requirements of Community law (see the judgement in Case 157/86 Murphy v Bord Telecom Eireann [1988] ECR 673, paragraph 11, and to the same effect the judgements in Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, and Case C-91/92 Faccini Dori [1994] ECR I-0000, paragraph 26)."

[98] It is not the aim of this paper to discuss in detail the indirect effect of directives. That topic is for example discussed in Craig and de Búrca, 1998, p. 198-206, and 211, and in Craig, 1997, p. 524-528. The first case regarding indirect effect of directives is the Colson Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen [1984] ECR 1891. There the applicants, two women, were not appointed to two posts at a German prison, as the appointments were given to two men. They sought by way of remedy to be appointed to a post in the prison or to be awarded six months salary in the alternative. They argued that the quantum relief provided in German law was too small, and relied therefore on the provision in the Directive. The Court ruled that these provision

2.1.3.3 Decisions.

According to Article 249 EC a decision is "binding in its entirety upon those to whom it is addressed",[99] but the Article make no reference to their direct effect. However the Court has shown little hesitation in holding that decisions can be directly effective.[100]

The nature of a decision is that it is an executive act, and the rights created by such an act would only rarely be invoked in the national courts. However some decisions are of legislative character, by laying down general rules like regulations, and other decisions require Member States to take action in order to achieve a stated objective, in a fashion similar to directives. Most of that which has been commented with regard to directives applies also to decisions,[101] but heeding what the Court said in the Marshall case it would seem that a decision can impose directly effective obligation only on the addressee. Where a decision is addressed to a Member State, it cannot be horizontally directly effective.[102] In the above-mentioned **Grad** case[103] the Court stated: "… it does not follow

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of the Directive were not sufficiently precise to have direct effect. However it held that national courts had an obligation to interpreted national law so as to be in conformity with the directive. The purpose of the Directive was considered to require national law to provide real and effective remedy in cases of discrimination, and if states chose to fulfil this aim through the provision of compensation then this should be adequate in relation to the damage which had been suffered (see paras 26 and 28 in the Judgement). The defendant was a state organ, but the problem was that the remedial provisions of the Directive were insufficiently precise to give rise to a directly effective remedy. That interpretative obligation, or principle of construction, was applied and extended in Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135, where the action was between private operators. The Court reiterated that directive can not impose obligations on individuals. However the Court qualified this by using the judgement in Von Colson as a foundation for the arguments that the authorities of the Member States have an obligation to effectuate the ends stipulated in a directive, and this obligation is binding on all authorities in the state, including the courts. Therefore when applying national law, whether passed before or after the directive, a national court is required to interpret national law as far as possible so as to be in conformity with the directive. See further discussion, Craig, 1997, p. 525-526, where he talks about "indirect direct effect" in this relation. Regarding the Von Colson case see also footnotes 51 and 169.

[99] Recommendations and opinions have no binding force according to Article 249 and will not be discussed in this paper.

[100] Craig and de Búrca, 1998, p. 178. See also discussion in Hartley, 1998, p. 215-216, but it is not the aim of the paper to go in details into direct effects of decisions.

[101] See discussion in Kapteyn and VerLoren vanThemaat, 1998, 535.

[102] Hartley, 1998, p. 215-216. See also discussion in Craig and de Búrca, 1998, p. 467-468 regarding the possibility that a regulation can be looked upon as a decision in fact, if one look behind the form of the measure and at the substance.

[103] Case 9/70 Franz Grad v Finanzamt Traunstein [1970] ECR 825 (para 5). See also discussion in chapter 2.1.3.2.

from this that other categories of legal measures mentioned in that article can never produce similar effects. ...”[104]

2.1.3.4 International Agreements

By virtue of Articles 133, 281, 300 and 310 of the Treaty the Community has legal personality and is empowered to enter into contractual relations with other persons, organisations and other countries in- or outside the Community.[105] In order to make the actions and agreements of the Community more effective and harmonious the Court has held that international agreements can, in certain circumstances, be directly effective. An international agreement can have direct effect when it is legally complete, has a clear and binding aim and does not involve the exercise of broad discretionary powers. That can be seen from the **International Fruit Company**[106] case, were the GATT[107] Agreement came under scrutiny, and the in the **Polydor**[108] case, where it was a question of an international free trade agreement between the Community and Portugal.[109] In the **Hauptzollamt Mainz**[110] the Court held that a

[104] Hartley 1998, p. 215, points out that this case was decided four years before the van Duyn case, and the reasons given for direct effect were the same.

[105] See discussion in Craig and de Búrca, 1998, p. 179-185. There they mention the ERTA case where the Court held, that apart from the express powers given in the Treaty, the Community also had the power, whenever this was necessary to fulfil one of the aims of the Treaty, to enter into international agreements across the entire field of internal competence’s accorded to it by the Treaty. Case 22/70 Commission v Council [1971] ECR 263. See also Kapteyn and VerLoren vanThemaat, 1998, p. 174-176.

[106] Cases 21-24/72 International Fruit Company NV and others v Produktschap voor Groenten en Fruit [1972] ECR 1219. In that case it was a question of relevant article in the GATT agreement. There the Court stated in paras 7-8: ” Before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision …[and]… that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts.”

[107] Prechal, 2000, p. 1052-1053, uses the GATT and WTO to recall the distinction between what he calls the direct effect in the ”conferring right sense” and the so-called ”mitigated form of direct effect”, but he states that the latter works only in certain circumstances: where the Community acts either explicitly refer to the GATT/WTO rules or where the former have been adopted in order to implement the latter.

[108] Case 270/80 Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited [1982] ECR 329. That case was about parallel trade of records from Portugal (which then was not in the Union) to UK. Polydor held an exclusive licence to sell and distribute the relevant records, and sought to restrain the firms Harlequin and Simons from importing them from Portugal to UK, but the latter unsuccessfully referred to a provision in the international agreement similar to Articles 28 and 30 of the Treaty on free movements of goods.

[109] In neither of those cases the Court found that the relevant international agreement had direct effect. In the International Fruit case it was because of the great flexibility of its

different provision of the same free trade agreement with Portugal was directly effective, since the provision was unconditional, sufficiently precise, and its direct application was within the purpose of the agreement.[111] Finally it should be mentioned that certain provisions of the EEA A is considered to have direct effect in EC law, and the EEA A is considered to be a part of Community law, which recognise direct effect and primacy of international agreements. [112]

2.1.4 Concluding Remarks - A Somewhat Different Approach

In this paper I have approached the subjects of direct effect and supremacy much in the traditional way, and reached the obvious conclusions, namely that the Court has broadened considerably the scope of direct effect, and that the Community law functions as the (superior) law of the Member States. Pescatore[113] approaches the subject in a somewhat different and more logical way than other commentators.[114] Pescatore[115] states that it is

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provisions, the possibilities of derogation, and the power of unilateral withdrawal from its obligations, and in the Polydor case the difference between the free trade agreement and the single market system set up by the Community, with its special legislative and executive institutions and its integrated legal system, that led the Court to the conclusion that even similarly worded provisions in two such different agreements could not be given the same effect.

[110] Case C 104/81 Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A. [1982] ECR 3641.

[111] It is not the aim of this paper to cover in details all the aspects of direct effect of international agreements, but for further discussion, see for example Craig and de Búrca, p. 179-185. There they mention several examples of agreement provisions having direct effect. They also mention the arguments from several Member States that the principle of reciprocity which applies to international agreements would be breached if Member States were required directly to enforce the provisions of such an agreement in national courts when other party to the agreement need not to do so. And also the criticism of the Court apparent readiness to extend direct effect to the realm of international law.

[112] Kapteyn and VerLoren vanThemaat, 1998, p. 554, where they refer to CFI T-115/94 Opel Austria GmbH v Council of the European Union [1997] ECRII-0039 (discussed in chapter 2.2.2), and mention that the meaning of a term free trade agreement and the identically phrased term in the EC Treaty is not necessarily the same, see above-mentioned Polydor case. See also Sevón and Johansson, 1999, p. 374.

[113] Pescatore, 1983, p. 155-177.

[114] He talks about that the discussion on direct effect has been a sort of “infant disease” of Community law. He states that throughout the case law one finds invariably the same criteria allowing to determine whether a given Community law can have direct effect. He accepts the Courts' criteria, but adds that it is a matter of legal analysis to answer the question whether there may be some reservation, inherent in the provision itself or in the system of which it is a part, with a view to further implementing measures implying some

interesting to see how the Court has tried to cope with this problem in the cases brought before it. He argues that the question of direct effect ”boil down to the question of justiciability” He concludes that a rule will have direct effect ”whenever its characteristics are such that it is capable of judicial adjudication, account being taken both of its legal characteristics and of the ascertainment of the facts on which the application of each particular rule has to rely.”[116] He adds that case law shows the Court to

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discretion, to be taken either by the Community institutions or by Member States. That decision can be conducted without any major difficulties, since a discretion can exists only by virtue of some express provision in the Treaty or in secondary legislation of the Community. In this regard he refer to Case 8/81 Ursula Becker v Finanzamt Münster-Innenstadt [1982] ECR 53.
He argues that the difficulties is inherent in the criterion regarding a sufficient degree of precision. He states that a rule of Community law may be considered to have direct effect only if its content is sufficiently precise to ”furnish workable indications to the national court.”

[115] Pescatore 1983, p. 160-162, talks about direct effect as ”a two-way doctrine.” He makes two lists, a ”positive list” and a ”negative list.” He also makes a list of the most important judgements were direct effect was approved, and a list denying direct effect of specific Treaty provisions. The positive list of provisions which typically have direct effect, contains for example those provisions of the Treaty which relate to elimination of customs duties and taxes having equivalent effect, the elimination of quantitative restrictions and measures having equivalent effect, and elimination of fiscal discrimination as provided for in Article 90. He mentions this context that Article 31, relating to State monopolies, has also been declared having direct effect as from the end of the transitional period. Articles 81 and 82 have not only to be administered by the Commission but also applied by national Courts by and large. There are also many cases, which the direct effect of a relevant Treaty Article is so obvious that the question of direct effect has not formally been raised (the silent majority).
The negative list of the provisions, which the Court has recognised as not having direct effect is shorter than the first, but Pescatore points out that the latter range of cases is the most instructive from the legal point of view, because they allow us to gain a better insight into the criteria on which the recognition of direct effect depends. Examples of that are Article 10, which embodies the rule of goodwill and loyalty on the part of the Member States, Articles 87-89 relating State Aid. See also discussion in footnote 50. Pescatore states that analyses of those Judgements shows that in each one of these cases the relevant Treaty clauses have either made provisions for implementing measures by the Community itself or reserved a margin of political discretion to the Member States. Therefore it was the conditional character of the relevant provisions rather than the lack of precision which cave the conclusion that a direct effect could not in those circumstances be admitted.
Pescatore also mentions that Article 86 on public undertakings has given rise to contradictory attitudes of the Court. In one the so-called Port de Mertret case the Court ruled that this Article did not have direct effect, but the Court has come to a different conclusion in other cases regarding this Article, in so far as Article 86 contains a reference to other Treaty provisions, for example the rules of competition in Article 81 and 82. Case 10/71, Ministère public luxembourgeois v Madeleine Muller, Veuve J.P. Hein and others [1971] ECR 723.

[116] In this relation one can mention that each Member State can render directives to have horizontally direct effect, even though the ECJ does not do so. This shows that the doctrine of direct effect do not have the same meaning in all the Member States. See Mastroianni in Björgvinsson, 2001, p. 92. In the so-called Metten case, judged before a Dutch court: Afdeling Bestuurechrspraak, Raad van State, 7 July 1995, no. R01.93.0067;

have been primarily preoccupied with ensuring the operative character of Community law in all circumstances. The Court has tried to go to the extreme limits of the ”operability” of the provisions of Community law by a detailed analysis of the relevant provisions in various circumstances. Therefore the Court has discovered elements of effectiveness even within provisions which at first sight would seem to be too vague or imply too wide a margin of discretion. He finishes his observations by saying:

”The purpose of any legal rule […] is to achieve some practical aim and it would be running counter to its essential purpose if one handled it in such a way as to render it practically meaningless. Effectiveness is the very soul of legal rules and therefore […] it is not excessive to say that any legal rule must be at first sight presumed to be operative in view of its object and purpose. […] direct effect is nothing but an ordinary state of law. […]”[117]

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for an English translation of the judgement, see Maastricht Journal of European and Comparative Law, 1996, pp. 179-183. There the Dutch Court interpreted the case law of ECJ, without referring the question for a preliminary ruling, and ruled that the doctrine of primacy applied even though the relevant internal Council rules of Procedure have no direct effect, and therefore denied access to requested Council minutes held by the Dutch Government, see discussion Öberg, 1998, p. 2. In this relation it is also worth mentioning that the Dutch have an especially liberal approach towards monism, see Pescatore, 1983, p. 156.

[117] Pescatore, 1983, p. 176-177. Prechal, 2000, p. 1047-1064, approaches the subject in similar way as Pescatore. Prechal comes to the conclusion that the conditions for direct effect cannot be separated from the context of the concrete case. Therefore the answer to the question whether they are satisfied will vary accordingly. He states that testing the conditions is obsolete. The problem, which faces the national court when parties rely on Community law provisions, may equally occur in relation to national law. Some legal norms may for example need further elaboration by subordinate legislation before the court can apply them, or the norms can leave a very broad margin of discretion to administration, it all depends on the circumstances.
Prechal also mentions that a second concept has emerged in case law, namely ”the broader concept of invocability.” He argues that that concept is broader because it allows those provisions to be successfully relied upon which do not as such create rights or do not have the objective to do so, but may be invoked for other purposes, for example a defence in a criminal proceedings or as a standard for review for legality of Member State’s action in administrative proceedings. See also Björgvinsson, 2001, p. 107. Prechal states that deployment of a Community provision depends on the character and subject matters of the proceedings before the national court. Thus equating direct effect with the creation of rights does not do justice to the diversity of the effects which directly effective provisions may produce. He also goes into interesting discussion of direct effects in relation to locus standi, and different approaches in legal tradition towards direct effect, for example if a lawyer comes from a Common Law country or not.

Following this line of thought a Member State can be liable for not giving the rules in a directive the inherent direct effect by implementing them into national law as will be discussed below.

Finally it must be mentioned that direct effect is no longer just linked to the idea that it comes into operation only where an individual has relied on the allegedly directly effective provisions of Community law. Prechal argues that national court, and maybe also national administrations[118] may[119] and are, under certain circumstances, obliged to apply directly effective Community law provisions ex officio.[120]

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[118] Prechal, 2000, p. 1049, were he cites para 10 in the so-called Grosskrotzenburg case 431/92 Commission v Germany [1995] ECR I 2189. See also footnotes 47, and 92.

[119] See case C-87, 88 and 89/90 A. Verholen and others v Sociale Verzekeringsbank Amsterdam [1991] ECR I-3757. The Court mentioned for example that a national court can put question at its own motion before ECJ according to Article 234, and concluded in para 15: " Accordingly, the recognized right of an individual to rely, in certain conditions, before a national court […] does not preclude the power for the national court to take that directive into consideration even if the individual has not relied on it." See discussion in Guðmundsdóttir, 2000, p. 126.

[120] Prechal, 2000, p. 1049, were he cites joined cases 430 and 431/93 Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten [1995] ECR I-4705. This case was a question about if a compulsory membership of a pension scheme in the Netherlands was contrary to Community law, that is Articles 3, 10(2) (which embodies the rule of goodwill and loyalty on the part of the Member States), 81, 82, and 86 (Competition rules), (and also Articles 43-58 (Right of establishment), and 49-51 (Free movement of services). The Court stated that competition rules mentioned are binding and directly effective, and added in para 13: "…Where, by virtue of domestic law, courts or tribunals must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned (see, in particular, the judgement in Case 33/76 Rewe v Landwirtschaftskammer fuer das Saarland [1976] ECR 1989, paragraph 5)."
Then in para 14: "The position is the same if domestic law confers on courts and tribunals a discretion to apply of their own motion binding rules of law. Indeed, pursuant to the principle of cooperation laid down in Article …[10] of the Treaty, it is for national courts to ensure the legal protection which persons derive from the direct effect of provisions of Community law. ..."
Prechal also cites Case C 312/93, Peterbroeck, Van Campenhout & Cie SCS v Belgian State [1995] ECR I-4599, para 19: "…it seems that no other national court or tribunal in subsequent proceedings may of its own motion consider the question of the compatibility of a national measure with Community law."
Finally Prechal cites C-72/95, Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland [1996] ECR I-5403 (Examination of court' s own motion whether the national authorities have remained within the limits of their discretion). See also discussion in Björgvinsson, 2001, p. 77, and especially also in Guðmundsdóttir, 2000, p. 126-128. Guðmundsdóttir states that the "rule of reason" is ever increasingly used, specially in the field of the Four freedoms and in Competition law, but seemingly also regarding procedural rules, as can be seen in para 19 of the said van Schijndel judgement: "For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a

Guðmundsdóttir argues that it seems that the national courts are obliged to use Community law ex officio if national laws requires that, especially when it's a question of peremptory rules or rules regarding public policy (ordre public).[121] Prechal points out that this development regarding using Community law ex officio will change the analysis of direct effect in the way that it will not be so much a question what an individual can do with the provision, the ultimate analysis will be if a national court can apply it or not.[122]

2.2 EEA-Law

2.2.1 General

The EFTA States was not ready, for various political and constitutional reasons, to limit their sovereignty in their negotiation with the EC on EEA. Therefore the reconciliation of a homogenous EEA and the sovereignty of the EFTA States turned out to be one of the many difficult issues of the EEA negotiations.[123] The questions regarding the institutions, which were to be founded by the agreement, were not the only difficult issues of the negotiations. The incorporation into the EEA A of the principles of direct effect and supremacy also proved to be a problem. The solution to these problems is inter alia embodied in Protocol 35 of the EEA A in which the EFTA States refrain from accepting those principles but undertake instead to achieve the same results through national procedures.[124] The final

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whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration."

[121] Guðmundsdóttir, 2000, p. 127-128. In this relation she mentions Case C-126/97, Eco Swiss China Time Ltd v Benetton International NV [1999] ECR-I 3055.

[122] Prechal, 2000, p. 1050.

[123] Eyjólfsson, 2000, p. 191. According to Article 7 EEA A acts, referred to or contained in the Annexes to the 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 [EC] regulation shall as such be made part of the internal legal order of the Contracting Parties; (b) an act corresponding to an [EC] directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation." In comparison see Article 249 of the EC Treaty.

[124] A sole article in Protocol 35 states: "For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to

version of the Agreement changed from the version concluded in October 1991, because the ECJ gave an **Opinion**[125] declaring that the judicial system, envisaged by parties to the agreement, was incompatible with Community law. The Court concluded that the EEA Agreement constitutes a normal treaty under public international law that unlike EC Treaty does not entail a creation of a new legal order.[126]

The institutional chapter of the EEA Agreement was therefore renegotiated, and the idea abandoned of setting up an EEA Court. Instead of EEA Court came an EFTA Court, through a separate agreement among the EFTA states, the so-called Surveillance and Court Agreement (SCA). The provision in the EEA A whereby ECJ had to take into consideration the case law of the EEA was repealed, and there are not functional or personal connections between the ECJ and the EFTA Court.[127]

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introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases."

[125] Opinion 1/91 on the EEA Agreement [1991] ECR I-6079.

[126] It seems that the ECJ´s opinion was essentially based on four main arguments: 1. Comparing the goals of the EC Treaty with those of the EEA Agreement and the context surrounding the two agreements, the ECJ concluded that the identical wording was no guarantee of homogeneity. The Court specially assumed (in para 1) that the principles of direct effect and supremacy were "…irreconcilable with the characteristics of the agreement." ECJ judges sitting in EEA Court would not preserve their full independence if they would have to interpret identical provisions in accordance with different procedures, methods and concepts, depending on if they were in EEA Court or ECJ. 2. The Court was also concerned that in it's function as settler of disputes the EEA Court might have to interpret terms such as "contracting party." Because of the mixed nature of the EEA Agreement in which depending on internal divisions of competence, both the Community and individual Member States participate as contracting parties, the EEA Court would have to give rulings about the respective authority of the Community and its Member States in such procedures. This might derogate from the order of competence of the EC Treaty. 3. Because agreements under public international law concluded under the Community becomes part and parcel of Community law, and thus be binding, rulings given by the EEA Court might prejudice the future jurisdiction of the ECJ in the area concerned. Article 220 would be impaired by a system adopting a substantial part of the provisions of EC legal order, and the goal of homogeneity did not only determine the interpretation of the provisions of EEA but also the EC law. The integration of the EEA Court into the ECJ was looked upon as an aggravation, but not alleviation as were the purpose. 4. The ECJ also rejected the preliminary ruling provisions on the basis that its answers would have been purely advisory, and change the nature of the function of the ECJ, namely that of a Court whose judgements are binding. See for example discussion in Baudenbacher, 1997, p. 177-179.

[127] It should be mentioned that According to Article 108(2)(c) EEA and Article 32 SCA, the EFTA Court is competent for the settlement of disputes between two ore more EFTA States regarding the interpretation or application of the EEA agreement, the Agreement on a Standing Committee of the EFTA Sates or the SCA. Article 108(2)(a) states that the EFTA Court is competent to hear "actions concerning the surveillance procedure regarding the EFTA States". Article 31 SCA reproduces the wording for agreement infringement procedures pursuant to Article 226 EC, and lays down similar procedure.

The Agreement provides for its institutional basis by means of a two-pillar structure: First the EFTA Surveillance Authority (ESA) which monitor the implementation and application of the EEA A on the EFTA side, whereas the Commission carries out the same task within the Community.[128] Secondly the EFTA Court,[129] who can give preliminary rulings on the interpretation of the EEA Agreement under Article 34 SCA. The procedure is largely analogous to the procedure under 234 EC. The main difference is that those rulings are not formally binding upon the requesting national court. It is however thought to be clear that, should the referring national court disregard an opinion of the EFTA Court that finds parts of an EFTA State's law incompatible with EEA law, this would amount to a violation of the EEA Agreement by the EFTA State concerned.[130] The final version of the EEA Agreement has also new homogeneity guarantees, and it retained some of the older ones.[131] Article 106 EEA stipulates a system of information exchange concerning judgements between the two Courts and the Court of last resort of the EFTA Countries. Article 6 EEA states that the Agreement must be interpreted in conformity with the relevant ruling of the ECJ. According to Article 3(2) SCA the EFTA Court has the duty to "pay due account to the principles laid down by the relevant rulings" of the ECJ given after the date of signature of the EEA Agreement as far as they concern provisions

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The EFTA Court has also competence to rule in matters concerning decisions taken by ESA, see Articles 35-41, which are in similar to EC rules regarding the Commissions decisions. In action for failure to act in accordance with Article 37 SCA, EFTA States as well as private individuals and legal entities may proceed against the ESA if in infringement of the SCA or the EEA Agreement, the ESA fails to make a decision or act. Article 39 SCA gives the Court competence to hear actions concerning non-contractual liability against the ESA.

[128] In order to ensure a uniform surveillance throughout the EEA, the two bodies must co-operate, exchange information and consult each other on surveillance policy issues and individual cases. Norberg, 2000, p. 372-373.

[129] There is no EFTA Court of First Instance. Baudenbacher, 1997, p. 171.

[130] See further discussion regarding the competences of the EFTA Court in Baudenbacher, 1997, 179-189, and Baudenbacher, 2000, p. 45-47. There he mentions that Article 34 SCA has given the EFTA Court substantial competence, and experience shows that the vast majority of EFTA Court cases concern preliminary rulings. He cites Sevón and Johansson, and states that with respect to the protection of individual rights, this procedure confers on the EFTA Court a function within the EFTA pillar of competence of equal importance to that of the ECJ within the Union.

identical in substance to EEA law provisions.[132] A new fifteenth paragraph was introduced into the preamble of the EEA A, affirming the necessity of uniform application within the EEA Area.[133] Lastly one should mention the intervention rights of the Commission and the EC Member States before the EFTA Court and the corresponding rights of the ESA and EFTA Member States before ECJ.[134]

2.2.2 Case Law

It is enough to look at the above-mentioned structure and provisions of the EEA A to conclude that the EEA A is far from being a standard international Agreement under public international law. But The EEA A left many open questions unanswered, specially regarding the protection

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[131] See the second Opinion on the EEA Agreement 1/92 [1992] ECR I-2821. It should be noted that there the ECJ also discussed other parts of the Agreement, which will not be addressed specially in this paper.

[132] Article 6 of the EEA A states: "Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the …[EC] and the Treaty establishing the …[ECSC] and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the … [ECJ] given prior to the date of signature of this Agreement." Sevón, 1994, p. 345, mentions that the reference to "relevant" rulings was never discussed extensively during the negotiations.
Article 3(2) of the SCA states: "In the interpretation and application of the EEA Agreement and this Agreement, the …[ESA] and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the … [ECJ] given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the [EC] and the Treaty establishing the …[ECSC] in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement." Article 3(2) seems not to be quite as firm on the commitment to future ECJ case law as Article 6 EEA with regard to ECJ judgements rendered prior to the signature of the EEA A. One can mention in this relation that the EFTA Court has decided that the notion of "Court of Justice of the European Communities" covers both the EJC and the CFI, see para 13 in the Case E-2/94, Scottish Salmon Growers, 1994/1995 REP. EFTA CT. 59.

[133] The fifteenth paragraph of the Preamble states: "…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."

[134] See discussion in Baudenbacher, 2000, p. 47-49. An ultimate guarantee of homogeneity was created in the EEA Joint Committee, see Articles 105 and 111 regarding a political settlement of disputes procedure. Norberg, 2000, p. 372, mentions as an example of the intensity in the legislative activities that the EAA A during 1999 was amended by 192 decisions of the EEA Joint Committee. However without any joint supranational institution above the parties and only weak dispute settlement mechanism,

the right of individuals in the EFTA States, and the question of the very legal nature of the EEA A arose in the EFTA Court's first case, **Restamark**.[135] The Tullilautakunta, an appeals body of the Finish customs administration, had referred to the EFTA Court inter alia the question whether Article 16 EEA is so "unconditional and sufficiently precise as to have direct legal effect."[136] The EFTA Court avoided answering directly that question but discussed the Finnish Act implementing the EEA A.[137] The EFTA Court made no reference to Opinion 1/91[138] but stated:

"Protocol 35 EEA on the Implementation of EEA Rules stipulates that the EFTA States are under an obligation to ensure, if necessary by a separate statutory provision, that in cases of conflict between implemented EEA rules and other statutory provisions the implemented EEA rules prevail. It is inherent in the nature of such a provision 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 precise. …"[139]

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the construction seems in fact very vulnerable construction entirely depending on the good will of all involved. See also discussion in Sevón, 1994, p. 343-344.

[135] Case 1/94 Ravintoloitsijain Liiton Kustannus Oy Restamark Rep. EFTA Ct., 1 January 1994 - 30 June 1995. The case regarded whether a requirement to obtain an authorisation from a statutory State monopoly in order to be allowed to import alcoholic beverages and to put them into free circulation for commercial purposes to be sold to restaurants constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 11 EEA, see para 44.

[136] Para 5.

[137] Para 75: "[The Act] states that the Agreement, its Protocols and Annexes as well as the acts referred to in the Annexes are part of Finnish law. [It also] states that a Finnish Act or Decree must not be applied if it is contrary to an unconditional and sufficiently precise provision of the Agreement."

[138] Nor did the Commission, which took the view that "the Contracting Parties have emphasized the importance of the role played by individuals in the EEA through the exercise of the rights conferred upon them by the Agreement and through the judicial defence of these rights (eight recital of the Preamble to the Agreement). This indicates that the provisions of the EEA Agreement, despite its differences with the EC Treaty, are capable of producing direct effect and so may be relied upon individuals before national courts in the legal orders of the EFTA States." Report for the Hearing, 1994/94, Rep. EFTA Ct., 15 para 96, see Baudenbacher, 2000, p. 51-52.

[139] Para 77.

Because the Court cannot express itself on the interpretation of national law, it answered the question if Article 16 EEA fulfils the implicit criteria of Protocol 35 of being unconditional and sufficiently precise, in the following way: ”In comparing Article 16 EEA with Article …[31(1)] EC, it is clear that the two Articles lay down the same precise obligation as to the prohibition of discrimination regarding the conditions under which goods are procured and marketed and that Article 16, like Article …[31(1)] after the end of the transitional period, does not make this obligation subject to any condition. In view of the homogeneity objective […] and in order to ensure equal treatment of individuals throughout the EEA, Article 16 must also be interpreted as fulfilling the criteria of being unconditional and sufficiently precise.”[140]

The Court is maybe not talking about direct effect as in Community law, but the conditions and the result as far as homogeneity and individual rights are concerned are largely the same. This case revolves around the point when the main agreement has been implemented into national law, and therefore it is not the EEA A that is viewed as the starting point. This approach of the EFTA Court is a dualistic one, but compared to classical dualism there is a difference. In normal international law there is no superior court, but under the EEA A the EFTA Court is competent to interpret EEA law (by the same rationale as the ECJ) and thereby influence the interpretation of national law. But what is left open in the Restamark-case is whether a provision of a regulation or directive that has not yet been implemented, or misimplemented, into national law takes priority over conflicting national law.[141]

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[140] Para 80.

[141] See discussion about this case in Baudenbacher 2000, 51-53. See also Eyjólfsson, 2000, p.201, where he mentions that in the Restamark case the EFTA Court interpreted the expression ”court or tribunal” in Article 34 SCA by referring to the ECJ case law although it was not obliged to do so.
One can mention that in this case the EFTA Court ruled that under Article 11 EEA quantitative restrictions on imports and all measures having equivalent effect are prohibited between the Contracting Parties. That Article is identical in substance to Article 28 EC. Thus Article 6 EEA and Article 3(2) of the SCA are applicable when interpreting Article 11 EEA. Therefore the Dassonville and Cassis de Dijon criteria’s applies and this result is a good example of the homogeneity in the whole EEA in important matters, see also for example Order of the Court of 27 June 1997 in Case E-6/96 Tore Wilhelmsen AS v Oslo kommune.

In **Opel Austria**[142] the CFI ruled that agreements which are concluded in accordance with the conditions provided for in Article 300 of the Treaty form an integral part of the Community legal order and may have direct effect if their provisions are unconditional and sufficiently precise. Article 10 EEA, which prohibits customs duties on imports and exports and any charges having equivalent effect between the contracting parties, corresponds to Article 25 of the Treaty, was considered to fulfil the conditions of direct effect.[143] The Court held[144] that "…the EEA Agreement involves a high degree of integration, with objectives which exceed those of a mere free-trade agreement. …"[145]

[142] T-115/94 Opel Austria GmbH v Council of the European Union [1997] ECR II-39, see chapter 2.1.4. Opel Austria brought an action for annulment of a Council regulation withdrawing tariff concessions by imposing 4,9% duty on certain F-15 car gearboxes produced by General Motors Austria, originating in Austria within the meaning of the 1972 Free Trade Agreement between the Community and Austria. After that the Council and the Commission approved on behalf of the EC and ECSC the EEA A and protocol adjusting the EEA A.

[143] Para 110: "…Article 6 of the EEA Agreement must be interpreted as meaning that where a provision of the EEA Agreement is identical in substance to corresponding rules of the EC and ECSC Treaties and to the acts adopted in application of those two treaties it must be interpreted in conformity with the relevant rulings of the Court of Justice and of the Court of First Instance given prior to the date of signature of the agreement." See also discussion in Pálsson, 1999, p. 120.

[144] It seems that the Court is here narrowing the holding of the ECJ Opinion 1/91. Its wording is different from the wording in Opinion 1/91 were the ECJ found the EEA A to be an international treaty merely creating "rights and obligations between the Contracting Parties" para 20). See discussion in Baudenbacher, 2000, p. 53-55, and in Eyjólfsson, 2000, p. 207. The Court annulled the relevant Council regulation, which was incompatible with Article 10 EEA and a violation of legitimate expectations as well of the legal certainty and foreseeability, see para 107.

[145] Para 107. One can mention in this relation the EFTA Court Case E-9/97, Erla María Sveinbjörnsdóttir v the Government of Iceland 1998 Rep. EFTA Ct., 95, discussed in chapter 3.1. That case dealt with the question of the possibility of State liability, but the EFTA Court based its results mainly on the homogeneity objective of the EEA A, the necessity of protecting the right of individuals and economic operators in the EEA Area as a whole, and the similarities between the two legal systems. From this the Court concluded that "the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own", even though the legal integration were less far-reaching than under the EC Treaty. However the Court stated that it follows from Article 7 and Protocol 35 EEA that it does not entail a transfer of legislative powers. This case will be discussed later regarding State liability, but it is here that the Court uses for the first time the term "EEA integration" in its reasoning. See discussion in Eyjólfsson, 2000, p. 205 where he mentions that in spite of the absence of any definite legal meaning of the term "EC integration" it is normally linked with supranational cooperation among Member States. Baudenbacher 2000, p. 47-49, mentions that experience shows that the EFTA Court has in almost every single case been faced with legal problems that have not been (fully) decided by the ECJ. Since ECJ is not under explicit obligation to take EFTA Court precedence into account this situation poses certain risk for homogeneity. But homogeneity has not been considered to be totally a one way street, because of certain perceptiveness and caution on the EFTA Court and the fact that ECJ and CFI have made

2.2.3 Concluding Remarks – Different Views

From the coverage it can definitely be argued that several points in the EEA A goes beyond what is usually found in an international agreements. As discussed above, the premise of the dynamic and legal integration of the EFTA A has not been developed as far as its counterparts in EC law. From the relatively few currently existing conclusions of the EFTA Court one can therefore not predict with certainty how encompassing the legal integration will turn out to be. Some argue that the principles of direct effect and supremacy are readily derivable from the Agreement itself, that application of the principles is merely a matter of recognition.

Sevón and Johansson submit that if the homogeneity objective of the EEA A is not to be jeopardised, and the balance of these rights and obligations under the Agreement is to be maintained, the principles of direct effect and supremacy also have to find application within the EEA, possibly though in a slightly modified form.[146]

First they recall the homogeneity elements of the EEA A and examine both the national implementing legislation and the protection of

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it clear in number of instances, for example in the said Opel Austria case, see para 108, where the CFI cites Case E-1/94 Restamark, Report of the EFTA Court, 1 January 1994 - 30 June 1995 and in Scottish Salmon Growers Association, E-2/94, Report of the EFTA Court, 1 January 1994 - 30 June 1995. Regarding the ECJ see for example Case C-13/95 Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice [1997] ECR I-1259, para 10, referring to of 19 December 1996 in Case E-2/96 Ulstein and Røiseng.

[146] Sevón and Johansson, 1999, p. 385. They cover the main arguments for direct effect and supremacy in EEA law. This part of the paper will therefore focus on their coverage and discuss their findings. However some of their arguments seems also to be of a more political nature than legal, for example the argument that direct effect and supremacy are necessary because the EU would otherwise loose interest in this co-operation. Norberg, 2000, p. 374, shares entirely the views of Sevón and Johansson. See also discussion Björgvinsson, 2001, p. 92-93, which has a different view. But one can mention that Baudenbacher has assumed that the doctrines of direct effect and supremacy were inherent in the EEA A, but more difficulties are presented by the question of supremacy. He stated for example that Protocol 35 do not constitute proof that supremacy is not applicable in EEA law, because of other definite elements of supranationality in the EEA A. Later, however, he seems to have changed his views, and stated that because of the Sveinbjörnsdóttir case, discussed later, the need for direct effect is not as necessary. See Baucenbacher, 1997, p. 194-202, and Baudenbacher "Sind die allgemeinen Prinzipien des EU-Rechts für der EWR relevant" the latter in Björgvinsson, 2001, p. 79 (2000, p. 5. Liechtensteiner Vaterland from 13 December). Björgvinsson also cites Gerven, which has stated that Article 6 is an adequate basis for introducing the general principles of Community law such as the doctrines of direct effect, supremacy and Francovich liability into the EEA A.

the rights of individuals and economic operators; which should be treated in the same way regardless of whether Community rules or EEA rules are applied. They point out that the agreement should be dynamic in the sense that the homogeneity should be maintained also after the entry into force of the Agreement, and the vehicle to achieve this objective is the decision making procedure provided for in the Agreement.[147] They argue that in order to overcome the risk posed to the homogeneity of the agreement, by the lack of a common court after Opinion 1/91, some of the existing homogeneity elements were strengthened, and some new added.[148] Sevón and Johansson admit that this emphasis on homogeneity and the changes following the Opinion 1/91 do not necessarily lead to the conclusion that the EFTA States have taken over the principles of direct effect and supremacy, but rather entail that the EFTA States are under an obligation to ensure that individuals and economic operators have, in practice, the same rights and the same possibilities in enforcing those rights before their national courts as the corresponding parties in the Community.[149]

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[147] In this relation they state that the drafting technique is used to effect that whenever possible the wording of the provisions of the EEA As in all the language versions of the Agreement, identical to the corresponding provisions of Community law. Secondly they point out the wording of the preamble regarding a "dynamic and homogeneous" EEA based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial levels" and the wording of homogeneity in Article 1 EEA. Thirdly they mention Articles 6 EEA, regarding the obligated interpretation methods of the EFTA Court, and also the distinction made in Article 7 EEA regarding those acts corresponding to Community regulation and those corresponding to directives. Then they cite Protocol 35 EEA where the EFTA States undertook to introduce in their law a statutory provision to the effect that EEA rules should prevail in cases of possible conflicts between EEA rules and national rules. They point out the role of the independent ESA parallel with the Commission with similar powers and procedures according to Article 108(1) EEA. Finally they mention that the initial version of the Agreement with a special EEA Court as a final guarantor, functionally integrated with the ECJ.

[148] See also Forman, 1999, p. 754.

[149] In this relation Sevón and Johansson, 1999, p. 375-376, mention the following: The fifteenth recital of the Preamble of arriving and maintaining an uniform interpretation and application of the EEA A and regarding arrive at an equal treatment of individuals and economic operators as regards to the Four freedoms and Competition. The establishment of the EFTA Court with similar competence's as the ECJ. The SCA and the insertion into the SCA to pay due account to the principles laid down by ECJ after the signature of the EEA A in the interpretation and application of EEA A as well as of the SCA. The rules of mutual rights to intervene before the Courts. The creation of a mechanism for political settlement in the EEA Joint Committee, and the possibilities for the ECJ to give a ruling if the Committee does not find a conclusion in accordance with homogeneity. See in this relation coverage of the assignment of the EEA Joint Committee and the EEA Council (Article 91(2) EEA), Forman, 1999, p. 761-766.

Secondly Sevón and Johansson mention that both Iceland and Norway have implemented the main part of the EEA A by incorporation, and the Protocol 35 of the Agreement has in both countries been implemented through a separate provision.[150] Thus no problems should arise regarding the main part of the EEA A nor any conflict of the main part of the EEA A with provisions of national law should arise. They point out that the situation is somewhat different regarding the acts conferred to the Annexes of the EEA A if some mistakes are made regarding their implementation in national law, in particular when the Joint Committee amends an Annex by inserting a reference to a new Community act. They argue that in the case of implementation finding place too late or not at all, the implemented Protocol 35 would provide same rights and the same possibilities of enforcing those acts as the individual would have in the EU. Different questions would arise concerning misimplementation of an act, but those could be solved by "friendly" interpretation assuming that the national legislator, when adopting new legislation, intends to fulfill the State's obligations.[151] Nevertheless, in certain situations there is in their opinion a risk that an individual would not be able to protect fully his rights under the EEA A**,** that is if an act corresponding to a Community regulation or directive is not implemented at all, to late or wrongly.

Thirdly they argue that the elements on which the case law of the ECJ on direct effect and supremacy is based, must be seen in the context of the EEA A. Therefore it is not such a big step to declare that the EEA A has direct effect. The natural conclusion would be that the EEA A has created its own legal order, and that the Agreement is quite far from being a standard agreement under public international law.[152]

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[150] Liechtenstein is a monistic country and the questions arising in relation to Liechtenstein will not be addressed specially. But one can mention that due to its monist approach to international obligations the Supreme Court of Liechtenstein has, however, expressly affirmed the direct effect of the EEA A, see Graver, 2000, 12.

[151] Sevón and Johansson, 1999, p. 377.

[152] Sevón and Johansson, 1999, p. 379-380, argue that if the line of reasoning used in Van Gend en Loos were transposed to the EEA Agreement, the following analysis may be advanced: "The objective of the Agreement is to establish a dynamic and homogeneous European Economic Area, the functioning of which is of direct concern to interested parties in the EEA, implying that the Agreement does not merely create mutual obligations between the Contracting parties. This is confirmed by the Preamble, referring

Next they examine how the reasoning in Costa v ENEL would apply in converted circumstances of the EEA A, and find out that the elements in the EEA A allows the same results regarding supremacy.[153] Lastly they examine the van Duyn case in comparison to EEA A, and find out that the results would be the same.[154]

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not only to governments but also to individuals and the exercise of the rights conferred upon them by the Agreement. It is further stressed by the establishment of the institutions, in particular the EFTA institutions corresponding those of the Community, namely the ESA and the EFTA Court, endowed with certain independent powers, the exercise of which affect not only the Contracting Parties but also their nationals. Even though to a much lesser degree than in the Community the nationals of the Contracting Parties are involved in the functioning of the EEA through the EEA Joint Parliamentary Committee and the co-operation between economic and social partners carried out notably in the EEA Consultative Committee. The procedure provided for by Article 34 of the Surveillance and Court Agreement in the EFTA pillar and that provided by Article …[234] in the Community pillar, clearly have as their object to secure the homogeneous interpretation of the EEA Agreement by the national courts. These elements would thus seem to confirm that the Contracting Parties have acknowledged that the EEA Agreement has an authority that can be invoked, at least indirectly before those courts." They also state that the answers given by the ECJ to counter arguments raised by the Member States which intervened in Van Gend en Loos seems to apply perfectly to the EEA.
One can not agree with Sevón and Johansson that Article 127 EEA, which allows each Contracting Party to withdraw from the Agreement with 12 months notice, means the same as the EEA A is not of unlimited duration in the sense as an argument against direct effect and supremacy, because a country can also withdraw its membership from the EC. But on the other hand the arguments that EEA has not, as the EC, its own legal personality and the lack of legal capacity and representation at the international level are fully valid arguments.

[153] The main points they make are in short: The integration into the law of each contracting party of provisions deriving from the EEA legal order, and the reciprocity, makes it impossible to make national legislation incompatible with that legal order. The effects of EEA A cannot vary from one Contracting Party to another, specially in the light of Articles 3(2) (to abstain measures jeopardising the objectives of the EEA) and Article 4 EEA (prohibition of discrimination on grounds of nationality). The EEA A lay down unconditional obligations on the Contracting Parties, and the EEA A contains special and precise provisions regarding when a Contracting party can pass "incompatible" national legislation, e.g. Article 123 EEA. Special procedures providing derogation's (e.g. Article 113 EEA) would be unnecessary. They also point out that the difference between Article 249 EC and / EEA regarding regulations is in fact not so decisive and the ECJ used that difference only as a side fact in its Opinion 1/91.
See also the discussion of primacy of EEA rules in Sevón, 1994, p. 352, were he states for example that protocol 35 lays down an obligation on the EFTA States to ensure, either through the retention of their present legal system or through amendment to it, that the EEA rules are given priority over other statutory provisions. He states that this obligation is not limited to supremacy for laws implementing the EEA A in cases of misimplementation. It is the EEA rules which are given primacy not an internal or possibly distorted version of them, that can be seen from the 8th recital. The obligation to give supremacy is clear in respect of implemented rules, but it is less clear in his opinion what effects are to be attributed to rules which have been unanimously adopted by the EEA Joint Committee, but which a Contracting party has not made part of his legal order.

[154] Here they cite Article 7 EEA regarding the binding effects to acts referred in the Annexes with correspond to EC directives. They also refer to the principle of "useful effect", and lastly to Article 234 in comparison with Article 34 SCA, and also Article 249 EC versus Article 7 EEA in the regard that directives in EC law and acts referred or

As mentioned do Sevón and Johansson acknowledge the difference between the EC and EEA legal systems, and therefore suggest the possibility of a slightly modified form of these doctrines regarding EEA law. But their main arguments seem to consider the concepts of direct effect and supremacy as defined in Van Gend en Loos and Costa v ENEL with later developments as discussed in previous chapters.

In spite of these arguments from Sevón and Johansson one cannot draw the definite conclusion, that direct effect is inherent in EEA law in similar way to EC law, based on the similarities between these two legal systems. One cannot ignore the fact, that there exists a basic difference between these two legal systems, and these differences were the main problems in the negotiations on the EEA A as discussed before. The changes made on the Agreement after the Opinion 1/91[155] cannot be indisputable regarded so far reaching that it leads to this conclusion of Sevón and Johansson.[156] In this relation it is sufficient to mention that the characteristic features of Community law is the transfer to the Community of sovereign rights and legislative powers from the Member States. Such transfer of legislative powers and sovereign rights from the EFTA States has always been deliberately and explicitly excluded from the EEA A. It follows from Article 7 EEA that both directives and regulations have to be

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contained in the Annexes to EEA A are not dependent on national implementing legislation.
Sevón and Johansson also emphasize the importance of protecting the rights of individuals in the EFTA States. See discussion Sevón and Johansson, 1999, p. 383-385.

[155] In this regard one can bear in mind that ECJ came to the conclusion in its Opinion 1/91 "…merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up." Hartley, 1998, p. 190, talks about that in its Opinion the ECJ reaffirmed once again the specific new legal order of Community law for the benefits of which the States have limited their sovereign rights not "albeit within limited fields" (as stated in van Gend en Loos) but "in ever wider fields." Given that fact one can assume that the Court is not just pointing out the different scope but also different speed of integration within these two legal systems. The Court also reaffirmed the primacy of Community law in comparison with the EEA A. It can not be seen from the second Opinion 1/92 of the ECJ, given after the changes on the original EEA A drafts, that the EEA A are anything other than an international agreement.

[156] See discussion regarding the supranational powers of the EEA institutions, for example is the jurisdiction of the EFTA Court different because it can not give binding opinions according to Article 34 SCA and the national courts are not obliged to seek an opinion, even though the practice can be different. The reason for this is that during the negotiations, a rule similar to 234 EC was considered to be incompatible with the constitutions of some EFTA States. See discussion in Björgvinsson, 2001, p. 85.

implemented into the national legal order of an EEA/EFTA State.[157] Article 7 and Protocol 35 to the Agreement led the EFTA Court to the conclusion in the Sveinbjörnsdóttir case that the EEA A ”does not entail a transfer of legislative powers.”[158] The principle of homogeneity in the Agreement is based upon the dualistic approach of the contracting EFTA States, and one has to look at the EEA A established mechanism for homogeneity in Article 6 EEA and Article 3 SCA in that light, and the ECJ case law must be considered ”relevant”[159] in order be applicable when interpreting the EEA A. Finally one must look at the above-mentioned difference between the limited Article 3 EEA and Article 10 EC which has been the cornerstone in establishing supremacy and direct effect within the Community and thus serves to transfer legislative power to Community institutions.[160]

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[157] This difference regards specially regulations because as discussed in chapter 2.1.3.1 it is generally not expected that national implementing measures by EC Member States are usually improper, because such behaviour can endanger a homogeneous Community.

[158] Para 63 in Case E-9/97, Erla María Sveinbjörnsdóttir v the Government of Iceland 1998 Rep. EFTA Ct., 95.

[159] See footnote 132.

[160] See also the observation from the Norwegian Government in a case pending before the EFTA Court. Case E-4/04, Karl Karlsson v The Government of Iceland. In its observation the Norwegian Government argues that the general homogeneity objective must be understood in the light of the limitations in Articles 6, 7 and 102 EEA, and Article 3 SCA. The Government also argues that the Protocol 35 is too vague to be in itself the basis for rights which are not directly conferred on them by the Agreement and contrary to the express understanding and intent of the Contracting parties. In addition to what been mentioned the Government points out inter alia that the findings of that the EEA A does not include direct effect, the Nordic EFTA States (Norway, Sweden, Finland and Iceland) expressed in connection with ratification of the EEA A their suppositions that the EEA A would not entail any transfer of legislative powers, nor the relinquishment of the dualistic principle as regards the relationship between treaty obligations and national law. It is also mentioned that a the Norwegian Government made it clear in its proposal to the national Parliament of Norway on ratification of the EEA A that EEA rules would not have the force of law until they were made part of Norwegian law by a decision of the Parliament, or by another competent national authority. See especially paras 27-28 of the observations.
In comparison the Icelandic government made the same statement relating to its proposals to the Icelandic Parliament, see preparatory document with Act No 2/1993, regarding EEA. There it is stated that some provisions in the EEA A will have direct effect, but depending on interpretation, “as always when international agreements are legalised.” But I could not find statement regarding liability of the State as a consequence when EEA (EC) rule is not implemented or misimplementated, and not assumed in the discussion in the Parliament regarding the Agreement, see
http://www.althingi.is/altext/116/s/0001.html 13 May 2002.
In that regard one has to add that following the Nordic governments account for the Francovich case it was stated that the judgment can be seen as a “reflection of the EC law principle of direct effect, which shall not be applicable under the EEA Agreement.” See para 30 in the Observation from the Norwegian Government in the said Karlsson case.

Sevón and Johansson acknowledge that their arguments, based on the principle of reciprocity, are in some cases more theoretical than practical, because the incorporation acts in Norway and Iceland of the main Agreement, gives it both vertical and horizontal direct effect.[161] In this relation on can also bear in mind that these questions are not new in relation to international agreements as discussed in chapter 2.1.3.4, and have not changed anything in this regard.[162] However the question of misimplementation of secondary Community law made after the implementations Acts can be a question according to the rule that lex posterior derogat legi priori.

It is interesting to see that in the judgement from The Norwegian Supreme Court in the **Finanger**[163] case the Court specially stated that unimplemented directives and regulations do not have direct effect in Norway. It is worth a note the Norwegian Supreme Court reaches very far in order to reach a homogeneous conclusion based on the interpretation methods, but still comes to the conclusion that the Norwegian law should not diverge because then the directive would have direct effect.[164] In Iceland the "principle of presumption" according to the national law must be interpreted as possible in concord with international treaties, under some kind of "lex specialis" rule.[165] The Judgement of the Icelandic Supreme Court in the Sveinbjörnsdóttir case relates to the interpretation of the EEA A as implemented into national law through Act No 2/1993. In

[161] See also discussion in Björgvinsson, 2001, p. 89, and 90 where he cites Norberg regarding that it does not matter so much if EC law and EEA law do not follow the same road, the question is if "the practical" results are similar or the same. Björgvinsson also Cites report from ESA regarding "Single market Scoreboard EFTA States and Interim Report on Transpositions Status of Directives" that figures shows the EFTA States are not doing worse than EC States in implementing directives. See also Forman, 1999, p. 766-767.

[162] The conclusion regarding State liability in EEA law is also a contribution towards mere equivalence between EEA law and EC law, see discussion in chapter 3.

[163] Case E-1/99 from 17 November 1999, Storebrand Skadeforsikring AS v Veronika Finanger.

[164] Storebrand Skadeforsikring AS mot Veronika Finanger 16.11.2000, Sivilsak nr. 55/1999, lnr. 49B/2000. The Supreme Court of Norway. A different conclusion would have gone further than within EC, because here it was a question of horizontal direct effect of a directive. See discussion in, Björnsson, 2001, p. 17-20, Björgvinsson, 2001, p. 87, and Sevón and Johansson, 1999, p. 377-378. See discussion in chapter 2.1.3.2.

[165] Sevón and Johansson, 1999, p. 377. See further discussion later on the changes of the legal status of international agreements and the possibility of different approach towards the doctrine of dualism.

this context the Supreme Court ”takes notice of the opinion” of the EFTA Court.[166]

If one does not accept that the arguments in favour direct effect of EEA law the question of supremacy needs hardly to be answered.[167] But if one accepts that direct effect exists in such a way as Sevón and Johansson argue, it is obvious that such conclusion of supremacy in continuance would be logical but inconsistent with the Icelandic and the Norwegian constitutions, and could signal the beginning of a crisis, similar to the Solange crisis which EC law underwent at one time. But one can hardly assume that the EFTA Court is willing to instigate such a crisis, but on the other hand one can question the political capacity of the EFTA States to disobey the Court findings and therefore not abide by the EEA A.

As has been discussed before, one can hardly state that the EEA A contains direct effect and supremacy in similar way as in EC law. One can not, however, state that it can under no circumstances be so, and the question posed by Sevón and Johansson regarding the mitigated direct effect is highly relevant. It can for example be imagined that some kind of Estopel reasoning can lead to such a conclusion in cases before national courts, and also that it is highly possible for an individual to use an unimplemented EC Act in his favour for defence in criminal

[166] One judge wanted to use “indirect effect method” that is by interpreting the Icelandic law, in a “friendly” way according to the light of the wording and purpose of the directive, so far that they were in harmony with the directive. See further discussion in chapter 4 on the changes of the legal status of international agreements and the possibility of different approaches towards the doctrine of dualism.

[167] The status of the EEA implementation Acts in Norway and Iceland are though unclear as discussed further in chapter 4, and the possibility of supremacy through those acts arises. It should be mentioned that Icelandic law does not state that in cases of conflict the (implemented) EEA rule shall prevail, but only that Icelandic law shall be interpreted in accordance with EEA law. In comparison, sec 2 of the Norwegian EEA implementation Act states that provisions of Acts of Parliament (provisions of an administrative regulation) which serve to fulfil Norway’s obligations under the Agreement shall in case of conflict prevail over other provisions which regulate the same matter, even a latter Act of Parliament. Therefore the rule of lex posterior derogat legi priori does not apply in these context in Norway. See discussion Baudenbacher, 2000, p. 52 and 60, and also Björgvinsson. 2001, p. 86, where he mentions the preparatory documents related to the Icelandic and Norwegian implementation law, where the denial of direct effect and supremacy in was specially stated. See also Graver, 2000, 7, were he points out that the dualistic principle has constitutional status in Norway, therefore it is not possible to state that “all” international law shall be directly effective in Norwegian law without changing the constitution.

proceedings,[168] bearing in mind the principles of criminal law. Because of these principles of criminal law (in dubio mitius) a national court will most likely have to address such question ex officio. It is at least obvious that an agreement like EEA A will not just have a narrow influence strictly limited to its express wording, and it is quite likely that national judges will use the Agreement in various ways depending on the nature of the pending case. If we also look at the problem from the Pescatore point of view, the conclusion is indeed still possible, that the EEA Agreement really has direct effect at least in some instances.

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[168] See discussion in Björgvinsson, 2001, p. 91, and in chapters 2.1.3.2 and 2.1.4.

3 State Liability

3.1 EC-Law

In the **Francovich**[169] ruling the Court declared that the State could be liable to individuals in damages for loss caused by its failure to implement a directive.[170] The Court held that the provisions of this directive lacked sufficient precision to be directly effective or to make the state liable as guarantor. The directive was however seen a clear indication to confer rights on individuals. The individuals of the case had been deprived of this

[169] Cases C-6 and 9/90 Francovich and Bonifaci v Italy [1991] ECR I-5357. Regarding the development before Francovih and the development in details, see for example Craig and de Búrca, 1998, p. 213-236, where they state that the approach of the Court has shifted from the stand which largely treated rights as a matter for Community law and remedies a matter for national law, to one drawing increasingly on ”the principle of cooperation” in Article 10 of the Treaty to develop and direct the role of national courts providing adequate remedies for breach of Community law. There they talk about the principles of equivalence (non-discrimination), which provide that remedies and forms of action available to ensure the observance of national law must be made available in the same way to ensure the observance of Community law, and secondly the principle of efficiency (practical possibility), which provides that applicable national conditions and procedures should not make the exercise of this right impossible in practice. These principles were established in Case 33/76 Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland [1976] ECR 1989, (time limits in the rules of procedure of national law rendered it impossible in practice to exercise the Community rights ”which the national courts are obliged to protect”). See also for example Case 158/80, Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kiel [1981] ECR 1805, were the Court stated that if a relevant national principle would be applied systematically it could breach the principle of efficiency. See also the above-mentioned Von Colson case, para 23, regarding that relevant measure must be such as to guarantee real and effective judicial protection and have real deterrent effect on the employer (see chapters 2.1.2.2 and 2.1.3.3). See as well the Case C-213/89 The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others [1990] ECR I-2433, [1990] 3 (see footnote 176). There the was a question of granting interim relief against a provision of national law regarding the so-called quota hopping which appeared to be in conflict with Community law. It was held that the grant of interim relief in such circumstances was prohibited in the British legal system. The Court did not repeat its statement from earlier cases that there was no obligation on the national court to create new remedies for enforcement of Community measures, but focused on Article 10 of the Treaty and made clear that a rule which prohibited absolutely the grant of interim relief would contradict the principle of effectiveness. So the conclusion was that in certain cases Community law may itself confer on national judicial authorities the necessary powers in order to ensure effective judicial protection of those rights, even when similar powers do not exist in national law.

[170] The main facts of the case were that the applicants were owed wages from their employers after insolvency, but the Italian government had failed to implement in time the Directive on protection of employees in the event of insolvency of their employer. The applicants claimed that the Italian State was liable to pay them sums owed, either by

right through the State's failure to implement it.[171] The Court began its argumentation on the reasoning for the doctrines of direct effect and supremacy of Community law,[172] and based its findings primarily on the effective judicial protection and *effect utile*,[173] After this ruling, it is clear that it is no longer for the national courts to decide what sort of remedy to provide for certain kinds of breaches attributable to the State, compensation must in such instances be provided for as a matter of Community law. Secondly the judgement lay in fact that it required the provision by national courts of a damages remedy for breach of Community measures which lack of direct effect thus enchancing the effectiveness of such laws without their first having to satisfy the criteria for direct effect.[174] Because of the reasoning of the Court, the Francovich doctrine has understandably been seen as an extension of the principle of direct effect in the enforcement of EC law.[175]

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way of having the guarantees in the Directive enforced against the State, or by way of an action in damages against the State.

[171] It is considered that there the Court gave a further and increasingly important way for an individual to enforce a directive when a barrier to horizontal direct effect is encountered. See also chapter 2.1.3.2.

[172] Para 30: "That issue [the existence and scope of a State' s liability] must be considered in the light of the general system of the Treaty and its fundamental principles." And in paras 31-32 one finds the same wordings and reference in Van Gend en Loos and Simmenthal and Factortaime I.

[173]The Court stated in para 3 that the "full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible. …" See also discussion in Afilalo, 1998, p. 2.

[174] The above-mentioned criteria of necessary precision and etc., see discussion, Craig and de Búrca, 1998, p. 238 where they state that Francovich represented an important additional move in the direction of enhancing the effectiveness of non-implemented directives, as described in the development of the principle of indirect effect, by providing a remedy in damages for individuals who suffer loss as a result of a State's failure to implement "non-directly effective directives."

[175] The Court gave three conditions for state liability, para 40: "The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State' s obligation and the loss and damage suffered by the injured parties. The Judgement in Francovich has been rightly hailed as one of major constitutional significance for the Community. See discussion in Coppel, 1994, p. 870.

In **Brasserie du Pêcheur/Factortame III**[176] the Court cited the Francovich ruling, that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible, is inherent in the system of the Treaty,[177] but held that the principle of state liability would be based on more than the principle of effectiveness and duties of the Member States under Article 10 of the Treaty. The Court used Article 288 in this respect by holding that its simply an expression of the general principle familiar to the legal systems of the Member States: that an unlawful act or omission gives rise to an obligation (also on public authorities) to make good the damage caused. Then the Court reaffirmed that the State will be liable which ever organ of the State is responsible for the breach, and regardless of the internal division of powers between constitutional authorities.[178]

The Court went into the liability of the Community and also compared, if a legislator has relatively wide discretion in order to achieve a result required or not as the circumstances were in Francovich and in

[176] Joined cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others [1996] ECR I-1029. The background was on the one hand the same as in above-mentioned Factortame I case (footnote 169). Spanish fishermen invoked Article 43 of the Treaty to challenge the UK´s conditions for registration as a British vessel, and had succeeded on the substantive point in a second ECJ ruling (Factortame II). They now sought damages for losses caused to them and their business by the UK´s breach of the Treaty. At the same, time, in a case arising from earlier litigation over Germany's beer purity laws, in which Germany had been found to infringing Article 28 of the Treaty, a French company which suffered loss sought compensation from the German state in reliance of Community law.

[177] The Court began ruling that breach of Articles 28 and 43 of the Treaty could give rise to reparation, and rejected the argument that a general right to reparation under Community law could only be created by legislation and stated that this was a matter of Treaty interpretation within its jurisdiction. The Court stated in para 20 that it " …has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty (see, in particular, Case 168/85 Commission v Italy [1986] ECR 2945, paragraph 11, Case C-120/88 Commission v Italy [1991] ECR I-621, paragraph 10, and C-119/89 Commission v Spain [1991] ECR I-641, paragraph 9). The purpose of such right is to ensure that provisions of Community law prevail over national provisions. …" And in para 22 "…the right to reparation is necessary corollary of the direct effect of the Community provision whose breach cause the damage sustained." See also para 25 regarding the jurisdiction of the Court. Then in para 27 the Court cited to its tasks in Article 220 of "…ensuring that in interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States."

such case the fact that it is for the national legislator to take necessary measures has no bearing on the Member State's liability for failing to transpose the directive. On the other hand if a Member State acts in a field were it has wide discretion, comparable that of Community institutions of implementing Community policies, the conditions for its liability is in principle the same as the Community institutions in comparable situation.[179]

3.2 EEA-Law

In spite of the ECJ Opinion 1/91, the Francovich doctrine was not specially dealt with or mentioned in the re-opened negotiations.[180] The development is therefore a question of decision of the EFTA Court. But in the **Sveinbjörnsdóttir**[181] case the Court[182] held that the provisions of a

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[178] Therefore also the legislative and judicial institutions.

[179] Then the Court found out that the German and United Kingdom legislatures were faced with situations involving choices comparable to those made by the Community institutions when they adopt legislative measures pursuant to a Community policy. In continuance the Court stated (para 51): "In such circumstances, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties."
In this relation see paras 52-53: "Firstly, those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer. […]
Secondly, those conditions correspond in substance to those defined by the Court in relation to Article …[288] in its case-law on liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions."
The aim of this paper is not to go much deeper into the guidelines on the conditions governing state liability, and various other issues concerning the shape and the scope of the remedy. See further discussion, Craig and de Búrca, 1998, p. 239-254. It should be mentioned that because of the Treaty rules of *locus standi* the questions of State liability in relation to individuals arise in Article 234 proceedings. Stefánsson, 2000, p. 1068.

[180] Eyjólfsson, 2000, p. 192, where he talks about that this silence is a vital subject in the EEA A. That and the somewhat misleading guidance of the ECJ have led to the situation that a judgement on either of the "EEA" Courts on this issue is awaited with a great deal anticipation

[181] Case E-9/97, Erla María Sveinbjörnsdóttir v the Government of Iceland 1998 Rep. EFTA Ct., 95. Ms Sveinbjörnsdóttir had worked in a company partly owned by her brother. As a result of that family relationship, she was refused access to the Icelandic Wage Guarantee Fund when the company became insolvent. She argued that the exclusion went beyond what is permitted by the Insolvency Directive and that the State was liable to compensate her for lost earnings. See also discussion regarding this case in chapter 2.2.2.

[182] Regarding the textual interpretation and English as a language of reference see Eyjólfsson, 2000, p. 198-200. There he states that the EFTA Court seems to have had

directive[183] should be interpreted as barring Iceland from maintaining a provision of national law incompatible with the same directive as were at stake in the Francovich ruling.[184] As in earlier instances the Court did not mention Opinion 1/91, but concluded from the homogeneity objective in the EEA A,[185] the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities, and the obligation of the Contracting Parties to take all appropriate measures to ensure fulfilment of their obligations according to the loyalty clause in Article 3 EEA A.[186]

After that reasoning the Court especially concluded that "…the 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 judgment 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

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more difficulties in solving the language question regarding the Directive, than incorporating the principle of State liability into the EEA A, and it could have avoided the skating on "thin language ice" by using the common interpretation method of the ECJ and look at the aim of the Directive. That would have been more "homogeneous approach" to the issue.

[183] The same Directive was also dealt with in the Andersson Judgement, see footnote 193.

[184] See also para 63 where the Court found that the principle of State liability is an "…integral part of the EEA Agreement as such. Therefore, it is natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of State liability."

[185] One should bear in mind that homogeneity requires not only identically worded but first and foremost a uniform application and interpretation. Therefore when the EEA Court speaks of homogeneity it is referring to how the ECJ has interpreted Community "internal law" but not the "corpus of identically-worded Community rules", which it refers in Opinion 1/91. Eyjólfsson, 2000, p. 207. This situation arises almost whenever the EFTA Court refers to the case law of ECJ, because in these cases it is a question of interpretation of provisions modelled on identically worded provisions of EC law. The unique thing about Sveinbjörnsdóttir case is that the principle of state liability laid down in Francovich was based on the special nature of Community legal order.

[186] Paras 61-62. Article 3 EEA is corresponding to Article 10 EC. See discussion, Baudenbacher, 2000, p. 56, and Eyjólfsson, 2000, p. 202, and 208, where he mentions that Article 3 EEA however refers only to obligations not as far-reaching as those under the EC Treaty. In comparison the ECJ also invoked the loyalty clause in its Francovich ruling. Eyjólfsson points out that the reference to Article 3 EEA only constitutes a supplementary ground of the EFTA Court's reasoning. However it remains to be seen whether the EFTA Court will use Article 3 EEA as a further instrument for bridging legal gaps in the EEA legal system in the same manner as the ECJ has done for Community purposes.

the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law."[187]

This inductive reasoning reminds very much of reasoning in the Van Gend en Loos case[188] were the ECJ emphasized primarily on three grounds. First the vital role of the individuals, and that the EC Treaty creates more than mutual obligations between States. Secondly the ECJ recalled the establishment of Community institutions endowed with sovereign rights, and thirdly that the nationals of the Member States are called upon to cooperate through the intermediary of the EP and ECOSOC. In comparison the EFTA Court also puts particular emphasis on the role of individuals and economic operators.[189] It also recalls the role of ESA and the EFTA Court, but did not go so far as stating that EFTA institutions are

[187] Para 59. The Governments of Iceland, Sweden and Norway referred to ECJ Opinion 1/91 regarding that state liability was only conceivable as a consequence of the special nature of Community law, but the EEA A were a classic international agreement. The Commission took the same stand, but the ESA took the view that the question is not in the first place to be settled on the basis of the extent to which the principle of state liability can be seen as an expression of the special nature of the Community and Community law. Rather, the decisive test should be whether or not the principle of State liability is reconcilable with the basic philosophy underlying the EEA Agreement.
The district Court of Reykjavík granted Sveinbjörnsdóttir compensation, and the Icelandic Supreme Court confirmed that ruling upon appeal. See further discussion in chapter 4.

[188] Eyjólfsson, 2000, p. 204. There he cites the following Editorial Comment in 36 CML Rew., 697: "Reading this fairly daring Opinion one is reminded of the European Court of Justice in the early days of *Van Gend en Loos* and *Costa v. Enel*."

[189] See paras 50, were the EFTA Court cites the objectives stated in the fourth recital of the Preamble of the EEA A. "…establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;"
See also para 51, where the Court cites the fifteenth paragraph of the Preamble, see footnote 131.
See also para 57: "Another important objective of the EEA Agreement is to ensure individuals and economic operators equal treatment and equal conditions of competition, as well as adequate means of enforcement. Again, reference can be made to the fourth and fifteenth recitals of the Preamble […] and, in particular, to the eighth recital in the Preamble to the EEA Agreement, which states:
"CONVINCED of the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defense of these right."
Finally in para 58 the Court " notes that the provisions of the EEA Agreement are, to a great extent, intended for the benefit of individuals and economic operators throughout the European Economic Area. Therefore, the proper functioning of the EEA Agreement is dependent on those individuals and economic operators being able to rely on the rights thus intended for their benefit."

endowed with sovereign rights.[190] Then the EFTA Court set the same conditions for State liability as under EC law after the clarification of the ECJ on the Francovich ruling.[191]

In the **Rechberger**[192] case the ECJ was inter alia asked whether the principle of state liability applied in Austria after 1 January 1994, when the EEA A entered into force, in the view of the fact that Austria had become a part of EEA on that date. Austria had not implemented the package Tour Directive in good time and travellers had suffered damage. The Court held that Austria was, according to Article 7 EEA in conjunction with section 11 of Protocol 1 EEA, required to transpose the directive in question on the day the EEA A entered into force. The Court, however, declared itself not having jurisdiction, either under Article 234 of the Treaty or under the EEA Agreement, to rule on the interpretation of the EEA Agreement as regards its application by Austria during the period prior to the accession of Austria to the European Union. That Austria on 1 January 1995 subsequently adhered to the European Union did not change anything. The Court went on, however, by referring to the Sveinbjörnsdóttir case when taking into account the basic objective of the EEA A of uniform interpretation and application:

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[190] Paras 55-56, but only recalling those fields were the EFTA Court has powers similar to ECJ. See discussion in chapter 2.2.1. Eyjólfsson, 2000, p. 205 mentions that it would have been difficult to compare the EP and ECOSOC, on the one hand, and EEA Parliamentary Committee and EEA Consultative Committee on the other, the latter meeting only twice a year with extremely limited competence's. Despite of that the EFTA Court finds that the EEA A contains a specific legal order a "distinct legal order of its own." Eyjólfsson argues that this content of autonomous EEA legal order will probably have to be clarified by further opinions and decisions of the EFTA Court. He cites Pescatore, in a French article, defining the concept Community legal order as "an autonomous system of rules which provides for its own independent mechanisms to create legal rules, to implement these rules and to enforce them."

[191] Paras 64-66: "Although the establishment of State liability is thus required by the EEA Agreement, the conditions under which such liability gives rise to a right to compensation must depend on the nature of the breach of the obligations thereunder which has caused the loss or damage.
In the event of incorrect implementation of a directive in national law contrary to Article 7 EEA, the effectiveness of that rule requires that there should be a right to reparation provided that three conditions are fulfilled.
First, the directive in question must be intended to confer rights on individuals, the content of which can be identified on the basis of the provisions of the Directive.
Secondly, the breach on the part of the State concerned must be sufficiently serious.
Thirdly, there must be a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties." See discussion in chapter 3.1.

”Moreover, in view of the objective of uniform interpretation and application which informs the EEA Agreement, it should be pointed out that the principles governing the liability of an EFTA State for infringement of a directive referred to in the EEA Agreement were the subject of the EFTA Court's judgement of 10 December 1998 in Sveinbjörnsdóttir…”[193]

It seems that these words confirm State liability in EEA law, and the ECJ is admitting some changes from its Opinion 1/91. [194]

In the **Finanger**[195] case it was a question of misimplementation of a directive. The EFTA Court cited to the aim of the directive and declared that the provisions in the Norwegian Automobile Act, regarding denial of compensation to a passenger injured in a car accident knowing that the driver was drunk, was incompatible with EEA law, that is the so-called Motor Vehicle Insurance Directives. The Court acknowledged though the

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[192] Case C-140/97 Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v Republik Österreich [1999] ECR I-3499.

[193] Para 39. On the same day the ECJ rendered a second judgement dealing with the same question. Case C-321/97. Ulla-Brith Andersson and Susannne Wåkerås-Andersson v Svenska staten (Swedish State) [1999] ECR I-3551. Again the Court denied its competence to rule on a question of interpretation related to the application by a Member State of the EEA A during the period preceding accession to the Community, i.e. whether the Swedish State was liable to cover damage caused to individuals and economic operators by misimplementing a directive, see para 24-33. Unlike in Rechberger, the Court did not quote the Sveinbjörnsdóttir ruling. See discussion in Baudenbacher, 2000, p. 58-59, and Eyjólfsson, 2000, p. 207-208. The latter one mention that in the Andersson case AG Cosmas came to the conclusion that the EEA A were not Community law which could be tested under Article 234 EC, see para 32 of his Opinion. The AG, however, gave his opinion on the possibility of “Francovich liability.” He cited ECJ Opinion 1/91, and compared the aims of the Treaty v the EEA A, and draw the conclusion that the EEA legal system did not apply in the EEA system, and therefore the Francovich liability did not either, see para 49 : “…Det ovan citerade avsnittet ur domstolens yttrande innebär *e contrario* att de grundläggande kännetecknen i gemenskapens rättsordning, det vill säga dess företräde [framför nationell rätt] och direkta effekt, är unika för den särskilda skapelse som gemenskapen utgör och inte gäller för det rättsliga system som skapats genom EES-avtalet. Inte ens Francovich-rättspraxisen, som är ouppl̈osligt förbunden med dessa grundläggande principer, kan därför överföras till området för EES-avtalet, oavsett vad som stadgas i artikel 6 i detta.” See also para 54 of his opinion. http://curia.eu.int/jurisp/cgibin/form.pl?lang=en&Submit=Submit&docrequire=opinions&numaff=c-321%2F97&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100 16 May 2002. Further see discussion Pétursson, 1999, p. 209-210.

[194] In this relation it worth mentioning that Sevón and Johansson, 1999, p. 385, argue that the recognition of State liability as a principle of the EEA A can never be a substitute for, but rather a complement to, the application of the principles of direct effect and supremacy. They come to the conclusion at the given fact, that this principle is not applicable in all the situations in which direct effect of a provision can be invoked before national courts and the relatively strict conditions for its application.

possibility of reducing compensation as a consequence of contributory negligence in exceptional circumstances.[196]

3.3 Concluding Remarks

The doctrines of direct effect and supremacy of Community law are considered to be quite developed both in scope and precision, but the doctrine of State liability is thought to be still in its formative stage.[197]

This development is not so advanced in EEA law. As discussed before the EFTA Court did not base its finding on State liability on the doctrines of direct effect and supremacy. Nor did the Court acknowledge the principle under Article 6 EEA, which seems to have been operative possibility, and therefore it could have followed the path of referring to identically worded provisions of Community law by referring to Article 3 SCA. By using this method the Francovich judgement would *per se* have been incorporated into the Agreement.[198] But as stated before there is no explicit provision in EEA law that establishes the basis for state liability,

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[195] Case E-1/99 from 17 November 1999 (Storebrand Skadeforsikring AS v Veronika Finanger)

[196] Para 26: "However, the principles set out in the Motor Vehicle Insurance Directives must be respected. A finding that a passenger who passively rode in a car driven by an intoxicated driver is to be denied compensation or that compensation is to be reduced in a way which is disproportionate to the contribution to the injury by the injured party would be incompatible with the Directives."

[197] Ojanen, 1998, p. 351. Further development of State liability in EC law will not be addressed because it is enough for the aim of this paper to discuss the main features of that doctrine. One can although mentions Case C-91/92. Paola Faccini Dori v Recreb Srl. [1992] ECR I 3325, where the ECJ ruled that a directive which requires the Member States to adopt certain rules specifically intended to govern relations between private individuals may be ground for state liability. One can also mention that several commentators have read the Court's case law in the field of legal remedies to gradually move towards a jus commune. See discussion in Afilalo, 1998, p. 7. See also Van den Bergh and Shäfer, 1998, 562, where they for example strongly resist the "tendency towards expanding the domain of State liability by accepting a rule of strict liability in the sense that no breach of a duty of care is required or by softening the proof of a fault committed by the Member State."
For further reading, see for example Roberto Caranta: "Judicial Protection Against Member States: A New *Jus Commune* Takes Shape" (1995). Josephine Steiner: "The Limits of State Liability for Breach of European Community Law." (1998) 4 European Public Law. Walter Van Gerven. "Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie." (1996) 45 I.C.L.O.

[198] Before the court ruling it had though been suggested as a possibility to use the Francovich doctrine because the case was decided before EEA A, see Stefánsson, 1998, p. 47-47, and Pálsson, 1998, p. 146-147. The above-mentioned account from the Norwegian

and it seems that the EFTA Court was not ready to stretch the wording of Article 6 EEA to cover the Francovich judgement, despite of supplementary arguments of the ECJ referring to Article 10 EC, parallel to the loyalty clause in Article 3 EEA. The other possibility was maybe to justify the existence of the principle on the purposes and the legal structure of the Agreement. It seems that the first mentioned solution would have been in line with the CFI in the Opel Austria case. Since the EFTA Court did not refer to ECJ jurisprudence[199] as a guidance for its conclusions for the three conditions for state liability these conditions flow from the "purposes and legal structure" of the EEA A. [200]

In this relation one must, however, consider the EFTA Court based it conclusion of State liability on the "main part"[201] of the EEA A which has undoubtedly direct effect because of the implementing national acts in Norway and Iceland. Therefore one can say that the findings of the Court is at least indirectly based on the direct effect of the EEA A, even though the EFTA Court is not supposed to interpret national legislation.

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government in continuance with the Francovich ruling can possibly have had some effect in this regard, see footnote 160.

[199] All the EFTA States (and also the Commission) that intervened in the Sveinbjörnsdóttir case, submitted that the EEA A does not impose State liability towards individual for misimplementation of a directive. Only the applicant and the ESA indicated that there could be a State liability (UK also intervened but did not make submissions regarding this question), see written observations of these governments.
In comparison with van Gend en Loos, three of then six Member State intervened in the proceedings, Belgium, Germany and the Netherlands. They all indicated that the concept of direct effect probably did not accord with the intention or understanding of those states of the obligations they had assumed when they became party of the EEC Treaty. See also discussion in footnote 35, and in Pescatore, 1983, p.157, and Craig and de Búrca, 1998, p. 165.

[200] See discussion in Eyjólfsson, 2000, p. 196-197, 200-202, and 210.
In spite of all this it is not obvious how the homogeneity objective in the EEA A can reach as far as being the basis for establishing a principle of State liability within the EEA which are in so many ways different from the EC legal system. In the said Karlsson case pending before the EFTA Court, the applicant bases it claims of state liability inter alia on the Sveinbjörnsdóttir case. In spite of the Courts findings in Sveinbjörnsdóttir the Norwegian Government a strong arguments stating that the EEA A does not contain a sufficient legal basis to establish a principle of State liability. The Government bases its arguments on similar reasons as the EFTA States did in Sveinbjörnsdóttir, and criticises the results and the reasoning of the Court in that case It points out that the question of State liability is in effect similar to the principle of direct effect, and because EEA A does not create such right there is lack of sufficient grounds in finding a EFTA State liable. The Norwegian Government argues that the general homogeneity objective must be understood in the light of the limitations in Articles 6, 7 and 102 EEA, and Article 3 SCA. See also footnote 160.

[201] Para 63.

4 Conclusions

As has been discussed, the scope and the magnitude of direct effect and supremacy in Community law has been debated and scholars have approached the doctrine of direct effect in somewhat different ways. These doctrines are, however, firmly embodied as foundations of EC Law, and render the Treaty as constitution for the Member States, which undoubtedly makes EC law so special in the history of legal integration between nations. There is also no doubt that EEA Agreement is considered to be capable of having direct effect and enjoy supremacy within EC law.

The situation in EEA law seems at first sight to be quite different. The depth of integration in EEA law is less far-reaching than under the EC Treaty. One can hardly understand Protocol 35 and Article 7 of the Agreement and the findings of the EFTA Court otherwise than the Agreement is not supposed to have direct effect, neither horizontally nor vertically, and that the question of such effects depends therefore on the substance of the national law of the EFTA States.

But the answer is not so simple. One cannot ignore the fact that it has been shown that the EEA Agreement and Acts stemming from the Agreement can have direct effect in under some circumstances, in spite of statements from the EFTA States and regardless of some provisions in the Agreement stating the opposite. As described the Agreement was a result of complicated and difficult negotiations, which had the aim of reaching conclusions in matters, which were probably impossible to unify. On the one hand by establishing an international treaty under public international law, on the other hand to be interpreted parallel with and producing similar results as the corresponding provision of the highly developed Community law. In that light the somewhat inconsistent reasoning of the EFTA Court regarding these questions becomes a quite natural consequence of the troubles the EFTA Court must find itself in when it comes to interpreting those inconsistent rules of the Agreement, especially when bearing in mind the aims of legal integration between these two legal systems and the

EFTA Court's obligations of interpretation methods based on the idea of effectiveness.

The principles of EC law that manifested itself in the judgements in Van Gend en Loos and Costa v ENEL came at that time as a surprise. After that the development of State liability in EC law was the logical consequence. In comparison with EEA law the conclusion of the EFTA Court in the Sveinbjörnsdóttir case that State liability was inherent in the EEA Agreement was the surprising one. As described a comparison with the reasoning of the ECJ and the EFTA Court for State liability leads to the conclusion that the EFTA Court's reasoning can be questioned as somewhat controversial. The conclusion of the EFTA Court lacks the same firm ground as exists in EC law, where same result are considered to have been unthinkable if it were not for the doctrines of direct effect and supremacy. Maybe the EFTA Court did not use the most obvious reasoning through Article 6 EEA in order to leave the door open for further development of State liability within EEA law. One has, however, to bear in mind that in spite of all criticism it is nearly impossible that the EFTA Court will change its course in such a basic matter. It on the other hand will be exciting to see how far the EFTA Court is willing to follow the development of the doctrine of State liability within the EC.

The serious conflicts between the ECJ and the national courts of the Member States seem to be over and the doctrine of supremacy of community law prevails regardless of the fact that some Member States still adheres to the doctrine of dualism. In comparison the debate in the EFTA States of conflicts between EEA law with the constitutions of the participating EFTA States has not yet reached its peak. In that light it will also be interesting to see how the EEA "new legal order" will develop in comparison with the constantly changing environment of the EC Treaty and judge made EC constitutional law.

The internationalisation of law has been regarded to be a condition for creating a global legal culture, and the judicialization of politics is one of the phenomenon's of a global dimension to be found on the border between political and legal culture. European community law is an

example of a supranational system of law, which can contribute to a European legal culture.[202] But one has to bear in mind that politicisation of the courts can create a crucial problem of confidence.[203] In that regard one also has to look at the fact that the scope of significance for the doctrine of dualism has probably changed in Europe (at least in Iceland), and therefore somewhat the constitutional powers of the parliaments. The different approach towards dualism in Iceland has been visible through the findings of the Icelandic Supreme Court regarding Human Rights. The dualistic approach towards international law was no longer applicable to the ECHR and this has caused a dilemma as to its standing as a source of Icelandic law and has complicated the analysis of case law and theory, but Icelandic scholars seem to agree that the Convention ranks higher than ordinary law.[204] However one can not securely build on the reasoning for that

[202] However some say that European legal systems are not converging. Legrand in Modéer, 1998, p. 122, see also Modéer, 1997, p. 281-282.

[203] That statement suits Iceland, because the debate regarding the power of the courts to "make law" is a hot topic today in Iceland. See for example Oddsson, 2002, p. 9-11, where he states that Icelandic judges have trespassed the boundary between the judiciary and legislators, and therefore for example, without accountability, disturbed the financial management of the Parliament and the Government. On the other hand one can point out that in Iceland like in many other countries the elected representatives have delegated powers to the courts, and the courts are increasingly obliged to make more or less political decisions, regardless if cases are essentially political in their character. The same applies to the development of the EEA A, that the politicians did not addressee the delicate matters and therefore left it to the EFTA Court. See further discussion, Modéer, 1998, p. 126-128. See also Rasmussen, 1998, p. 521- 544, where he discusses and criticises the "political" activism of the ECJ, especially in the years of so-called institutional malaise or stagnation. He argues that the Court did not have the arsenal to build up some of its conclusion regarding the fundamental principles of Community law, but also points out that the Court seems to show more self-restraint in recent years. See also Mancini, 1989, p. 612, where he mentions that Judicial activism is not necessarily a good thing, and judges are usually incompetent as law-makers, and their inventiveness is incompatible with the values of certainty and predictability, and the findings of interventive courts is indeed unfair since it catches the litigants by surprise.
One can point out that this "new" role of the Icelandic courts reminds somewhat of the role of the old Icelandic institution Lögrétta, which was established in Iceland in the year 930. Discussion on the role of Lögrétta, see for example Tómasson, 2001, p. 96-99.

[204] The new assessment of the effects of the Convention on Icelandic law has to bee seen in the light of the process, which started in the late 1980´s. This process is still ongoing and it is hard to provide concrete answers to the different aspects of the Convention as a source of law in Iceland, but the application of the dualistic doctrine has not been able to give satisfactory answers to the new questions. Thus Icelandic scholars have called for rethinking of the traditional theory of legal sources in Iceland. See Gauksdóttir, 2001, p. 401, 403, and 421-422. There she mentions that the Explanatory report with the law states: Despite that the provisions of the Convention on Human Rights are not enacted as constitutional law it is not possible to assume, if this bill of law is enacted, that the provisions of the Convention shall yield to subsequently enacted law. In that connection it has to be kept in mind that the enactment of this bill inevitably will influence the

development in relation to EEA law. One has to look at the different nature of the Human Rights rules in comparison with the economical linked rules of the EEA Agreement, and make the conclusion that it is more "natural" to give Human Right such a torque.[205]

Even though the approach of the Icelandic Supreme Court in the Sveinbjörnsdóttir case is somewhat dualistic in essence, which can be seen by it reservations in reasoning, the judgement still contributes to the retreat of the dualistic approach in general since the liability rule implies that non-implemented or misimplemented acts have a certain effect on the rights of individuals via the liability rule. Besides the content of the concept "dualism" seems to have changed, from the time I was in law school 15 years ago,[206] because even though EFTA rules are given direct effect through national Acts in accordance with the doctrine of dualism, the question of some kind of supremacy of such rules occurs through the conclusions of State liability in instances were a new provisions of law does not harmonise with the EEA Agreement.[207] In relation to the practical conclusion of the real impact of EEA law in Iceland one has also to bear in mind the undisputed and massive influence of the doctrine of a "friendly" interpretation method.

So the practical conclusion of this paper can be described by one example: If a client ask a lawyer in Iceland about some subject, that is covered by the massive EEA Agreement it is necessary for him to look

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interpretation of excising constitutional provisions in such away that subsequent law, possibly conflicting with the Convention might at the same time conflict with the Constitution as interpreted in the future.

[205] See for example discussion in Arnesen, 1997, p. 637.

[206] See also discussion in Pálsson, 1998, p. 125-126. One can mention in this relation for example the Lugano Agreement. On the other hand it is fully recognised that if Iceland were to join the EU a constitutional change would be unavoidable. See for example discussion in Stefánsson, 2000, p. 64-72, and in Björgvinsson, 2000, p. 92-100.

[207] One can argue that the acknowledgement in Protocol 35 that EEA rules which had been introduced into the Icelandic legal order would (have to) prevail over conflicting internal provisions, is incompatible with the Icelandic constitution. Describing the judgement of the Icelandic Supreme Court in the Sveinbjörnsdóttir case in plain words one can say that the Supreme Court decided that the Icelandic Parliament acted "unlawfully" by making a perfectly "normal" law, with perfectly "normal" provisions regarding Icelandic Wage Guarantee Fund. That law was in no way inconsistent with the Icelandic constitution, but just older law, which happened to be the EEA Act. For different opinion, see Pálsson, 1999, p. 119, where he argues that it enough to make a ordinary law in Iceland rendering the Icelandic State liable for breaches of the EEA A.

into the EC rules, because if they are not (correctly) implemented a question of state liability rises, or sometimes the possibility of direct effect. So it is not longer a question for the lawyer of interpreting the Icelandic law, but also a question of "finding" the law, which could possible be unpublished and "alien" to the Iceland legal system. And the methods of interpretation of EEA (EC) law is in many ways different from the general interpretation methods the Icelanders got from Denmark, and have used for the last 100 years or so.

It is not likely that Iceland will in the future develop in a different direction than those Scandinavian countries, which today are in the European Union. On the contrary the EEA Agreement applies to large parts of the acquis communautaire, and after many other EFTA countries joined the Union, the Agreement can be regarded as a temporary one, especially in the light of the interpretation methods of the EFTA Court and the willingness of the Icelandic Supreme Court to follow its findings. In this relation one can bear in mind that the legal integration in Europe covers areas, which would hardly have been taken seriously if suggested 10 or 15 years ago.

The concluding remarks of this discussion must be that the legal integration will continue to develop within the EEA Area as a whole. The problem is however the lack of legal certainty within the Area which is unhealthy for future development. If a deficit of equality emerges that is decidedly unfair to individuals which the Agreement is supposed to protect. These arguments are not entirely political but in harmony with the interpretation methods. Therefore there is a need for amending the provisions of the EEA Agreement in order to make it more substantial. Because of the incompatible rules within the EEA Agreement the EFTA Court, with its supranational powers, plays a vital role in interpreting the Agreement in a clear and precise way, and the Court has several more or less equally legally valid opportunities in that regard. Therefore the EFTA Court has to make a clear choice which path to take; to stop the integration or to follow the development of ECJ jurisprudence. The most secure way to ensure the prime goal of law -legal certainty- is to recognise as possible

the direct effect in similar scale as in EC law. One has to assume that the participating EFTA States are likely to follow the Court findings. The consequences will be that Iceland has to change its constitution, but the most likely result is, however, that the legal development will among other things lead to that Iceland will join the Union, sooner rather than later, and work closely within the Union with the Scandinavian countries and other countries with similar legal tradition.

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