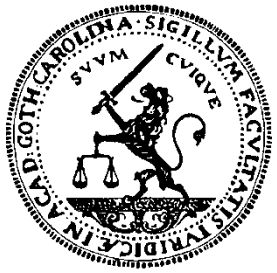

FACULTY OF LAW
Lund University

Arnar Kári Axelsson

Article 34 SCA – An Obligation to Request an Advisory Opinion of the EFTA Court?

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Abstract

This thesis examines the question of whether Iceland, Liechtenstein and Norway are under an obligation to refer questions on the interpretation of EEA law to the EFTA Court (the Court). These countries enjoy access to the EU's internal market through the EEA Agreement. Article 34 of the Surveillance and Court Agreement, concluded between the EEA/EFTA States, establishes an advisory opinion procedure similar to the preliminary ruling procedure in Article 267 TFEU. The thesis focusses on the difference in wording between Article 34 SCA and Article 267 TFEU, where wording of the former suggests that national courts are under no obligation to refer questions on the interpretation of the EEA Agreement to the EFTA Court. The examination is conducted against the fundamental objectives of the EEA Agreement and the purpose which Article 34 SCA serves in the attainment of those objectives.

Advisory opinions serve an important purpose for the fundamental objective of the EEA Agreement, which is the achievement of a dynamic and homogeneous European Economic Area. When national courts do not make use of the advisory opinion procedure this objective is undermined. The thesis examines the objective reasons for references to be made to the EFTA Court in order to achieve this objective. These reasons derive from the principles of homogeneity, reciprocity and loyal cooperation. A decision not to refer can also impact more subjective interests, such as the right to a fair trial under Article 6(1) ECHR or contribute to damages to individuals and economic operators. These issues are examined, as well as the question of whether the EFTA Surveillance Authority can initiate infringement proceedings against the EEA/EFTA States when their national courts adopt a systematic practice of not referring questions on the interpretation of EEA law to the EFTA Court.

Preface

During the Autumn of 2016 I spent three months as a trainee at the EFTA Court in Luxembourg. It was during that time that my interest in European Union law developed and I made my decision to pursue further education in the field. I find it appropriate that this thesis, which will mark the end of my studies in European Business Law, examine the judicial institution that inspired this decision.

The relationship between the EEA/EFTA States and the EU is of much interest to me. During my studies I reflected on questions of how specific principles of EU Law may affect legal reasoning under the EEA Agreement. Before I decided on the subject which forms the research question of this thesis I reached out to Arnljótur Ástvaldsson, lecturer and doctoral student at the law faculty, to discuss how this relationship could form an interesting subject matter. His suggestion of a comparative study of Article 267 TFEU and Article 34 SCA formed the basis of my initial research. Arnljótur showed much interest in my thesis and for the illuminating discussions we had, and his suggestions regarding the subject I am grateful.

For helping me further shape my research question I thank my supervisor, Eduardo Gill-Pedro. His interest in the subject matter and constructive criticism provided the perfect guidance I needed to understand and highlight the key issues addressed in the thesis.

At the time of writing this thesis I enjoyed the unwavering support of my family, for this support I thank, in particular my girlfriend, Margrét, and my parents, Axel and Elínborg.

Arnar Kári Axelsson

Abbreviations

CJEU	Court of Justice of the European Union
EEA	The European Economic Area
ECHR	European Convention on Human Rights
ECtHR	The European Court of Human Rights
EEA Agreement	Agreement on the European Economic Area
EEA/EFTA States	The Member States of the European Free Trade Association which are also Contracting Parties to the EEA Agreement.
EEC	European Economic Community
EFTA	European Free Trade Association
ESA	The EFTA Surveillance Authority
EU	The European Union
SCA	The Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Subject Matter and Background

This thesis asks the question whether the national courts of Iceland, Liechtenstein and Norway are under an obligation to refer questions to the EFTA Court for an advisory opinion. The subject of advisory opinions of the EFTA Court forms a part of EEA law, which has at its core the legal order established by the Agreement on the European Economic Area (the EEA Agreement).[1] Before the subject matter is further examined a brief overview of the background to the EEA Agreement is appropriate.

The EEA Agreement was concluded between member states of the European Free Trade Association (EFTA), the European Union (EU) and its Member States. The establishment of EFTA was a response to the creation of the European Economic Community (the EEC). The EFTA States felt the need to create a united front against discrimination by the EEC and to find a joint agreement with the EEC Member States.[2] In 1992 all the EFTA States, except Switzerland, the EEC and its Member States concluded the Agreement on the European Economic Area. The Agreement, which came into force on January 1, 1994 provides the participating EFTA States (the EEA/EFTA States) with access to the internal market of the European Union.[3] The aim of such an expansion of the internal market was to be achieved without requiring the EFTA States to transfer any legislative powers to any institution of the EEA.[4] With a number of EFTA States having since then acceded to the EU, only Iceland, Liechtenstein and Norway remain as signatories on the EFTA side.

The objective of the EEA Agreement is the achievement of a dynamic and homogeneous European Economic Area.[5] The Agreement confers on the EEA/EFTA States the rights and obligations related to EU's internal market, competition and state aid rules. For the proper functioning of the Agreement, Article 108 EEA imposed an obligation on the EEA/EFTA States to establish an independent surveillance authority and a court of justice (the EFTA Court).

[1] Agreement on the European Economic Area [1994] OJ L37/3.
[2] Sven Norberg and Martin Johansson 'The History of the EEA Agreement and the First Twenty Years of Its Existence' in Carl Baudenbacher (ed), The Handbook of EEA Law (Springer 2016), 3, 8.
[3] Halvard Haukeland Fredriksen and Gjermund Mathisen, *EØS-rett* (Fagbokforlaget 2012), 15.
[4] Protocol 35 to the EEA Agreement.
[5] Recital 4 of the Preamble of the EEA Agreement.

These obligations were carried out in the Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).[6]

In this thesis the advisory opinion procedure, established in Article 34 SCA, will be examined. Article 34(2) EEA provides that any court or tribunal of the EEA/EFTA States may request the EFTA Court to give an advisory opinion on the interpretation of the EEA Agreement, where such a question is raised before it, if it considers it necessary to enable it to give judgment. The advisory opinion procedure draws inspiration from the EU's preliminary reference procedure[7] established in Article 267 TFEU.[8] According to its wording Article 267 TFEU obliges courts against whose decision there is no judicial remedy to refer questions on the interpretation of EU law to the Court of Justice of the European Union (CJEU). Whether such an obligation exists under Article 34 SCA is not as clear.

Article 34 SCA will be examined in the context of two judgments of the EFTA Court, *Irish Bank*[9] and *Jonsson*[10]. In these two cases the Court approached the subject of whether there might exist an obligation to refer under EEA law. In *Irish Bank* the Court held that national courts will take due account of the fact that they are bound to fulfil their duty of loyalty under Article 3 EEA. EEA/EFTA citizens and economic operators benefit from the obligation of courts of the EU Member States against whose decision there is no judicial remedy under national law to make a reference to the CJEU. Moreover, the Court noted that when such a court refuses a motion to refer a case to another court, it could not be excluded that such a decision may fall foul of the standards of Article 6(1) of the European Convention on Human Rights (ECHR).[11] In *Jonsson* the Court continued this line of reasoning stating that in order to render the EEA Agreement effective it is important that questions are referred to the Court under the procedure provided for in Article 34 SCA if the legal situation lacks clarity. 'Thereby unnecessary mistakes in the interpretation and application of EEA law are avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU are ensured.'[12]

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[6] Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [1994] OJ L344/3 ('SCA').
[7] Carl Baudenbacher, 'The EFTA Court: Structure and Tasks' in Carl Baudenbacher (ed), The Handbook of EEA Law (Springer 2016), 139, 151.
[8] Consolidated versions of the Treaty on the Functioning of the European Union [2016] OJ C202/47 ('TFEU').
[9] E-18/11 *Irish Bank Resolution Corporation Ltd. v Kaupþing hf*, [2012] EFTA Ct. Rep. 592.
[10] E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* [2013] EFTA Ct. Rep. 136.
[11] *Irish Bank* (n 9) paras. 57-58 and 63-64.
[12] *Jonsson* (n 10) para. 60.

While a textual interpretation of Article 34 SCA suggests that courts in the EEA/EFTA States, against whose decisions there is no judicial remedy, are under no obligation to refer questions on the interpretation of the EEA Agreement to the EFTA Court, the Court's statements in *Irish Bank* and *Jonsson* indicate that Article 34 SCA might warrant a different interpretation.

1.2 Research Question

The research question examined in this thesis is whether EEA law imposes an obligation on national courts of the EEA/EFTA States, against whose decision there is no judicial remedy, to refer questions on the interpretation of the EEA Agreement to the EFTA Court.

1.3 Method and Outline

This thesis applies a method of teleological interpretation of EEA law. In applying a teleological interpretation, a provision must be interpreted in the light of its purpose and the context in which it occurs.[13] As the CJEU described in *Van Gend en Loos* '[t]o 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.'[14] In applying such an interpretation, the CJEU is not simply concerned with ascertaining the aim of a particular legal provision. A teleological interpretation requires an understanding of the broader context of the EU.[15] The EFTA Court adheres to the same method of legal interpretation, with the fundamental objective being a dynamic and homogeneous EEA.[16] In order to answer the question of whether there is an obligation on national courts of last instance to refer questions of EEA law to the EFTA Court under EEA law the research cannot be confined only to an analysis of Article 34 SCA. An analysis of the fundamental objectives of the EEA Agreement and the obligations which the EEA/EFTA States have undertaken with the Agreement is necessary.

To set the stage for later considerations, Chapter 2 will examine Article 34 SCA and arguments against an obligation to refer on the basis of procedural autonomy. Against the backdrop of these arguments the Court's case law on the subject will be examined, most importantly the Court's judgments in *Irish Bank* and *Jonsson*. These two cases set the scene for Chapter 3 which will introduce the objective of a dynamic and homogeneous EEA, the principles of reciprocity and loyal cooperation and how the EEA Agreement foresees the enforcement of EEA rights

[13] C-292/82 *Merck Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, para. 12.
[14] C-26/62 *Van Gend en Loos v Administratie der Belastinger* [1963] ECR 3, 12.
[15] Miguel Poiares Maduro 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1(2) European Journal of Legal Studies, 137, 140.
[16] Baudenbacher, 'The EFTA Court: Structure and Tasks' (n. 7) 172-173.

and obligations through national courts as an important mechanism for achieving these objectives. Chapter 4 will introduce the subjective reasons for an obligation to exist, that is, how a decision not to refer may in certain circumstances contribute to unfairness in proceedings and fall foul of the standards in Article 6(1) ECHR, whether a decision not to refer can contribute to state liability and whether the EFTA Surveillance Authority can commence infringement proceedings against a state whose courts do not make use of the procedure in Article 34 SCA. These considerations will finally be summarized and concluded in Chapter 5.

1.4 Delimitations

This is a thesis in EEA law. Although the legal situation as it is, or legal uncertainties, in EU law will be referenced, the thesis is not intended to address these issues from an EU perspective. All such references are for the purposes of highlighting how those situations are reflected in the EEA and serve a purpose in the interpretation of EEA law. EEA law is closely linked to EU law and the Agreement gives rights to EU citizens and economic operators. Although questions of EEA law can arise before the CJEU and the Court of Justice can be tasked with interpreting provisions of the EEA Agreement it is a distinct legal order of its own and has developed as such.[17] The case law of the CJEU serves as important interpretative authority in EEA law and legal uncertainties which arise from the EU Treaties or secondary law have a considerable effect on how the EFTA Court arrives at conclusions in its interpretations of the EEA Agreement. The intention is not to arrive at conclusions of EU law, but to conclusions of EEA law.

The examination will be confined to an assessment of whether the EEA Agreement and the Surveillance and Court Agreement impose an obligation to refer. The legal situation is reflected differently in the legal orders of the EEA/EFTA States. Considerations on whether those legal orders correctly reflect that legal situation will be limited to an examination of situations where discrepancies have been reflected in the case law of the EFTA Court or in a decision by the EFTA Surveillance Authority. The question is therefore whether there exists an obligation under EEA law, not whether the EEA/EFTA States are complying with, or would submit to, such an obligation.

[17] See E-9/97 *Erla María Sveinbjörnsdóttir v The Government of Iceland* [1998] EFTA Ct. Rep. 95, para. 59.

2 Article 34 SCA – A Case for Procedural Autonomy?

This chapter will examine Article 34 SCA and how the principle of procedural autonomy affects the national courts' margin of discretion in deciding on whether to refer questions for an advisory opinion. Article 34 SCA reads:

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

When compared to Article 267 TFEU, Article 34 SCA has four distinct characteristics. First, Article 34 SCA does not refer to any obligation on national courts to make a reference to the EFTA Court. Second, the rulings of the EFTA Court are referred to as 'advisory opinions', whereas the rulings of the CJEU are referred to as 'preliminary rulings'. It is thus frequently argued that there is not only a lack of an obligation to refer, but also that advisory opinions are non-binding.[18] Third, the right to make a reference to the EFTA Court may be limited to courts of last instance by the national legislature.[19] Finally, Article 34 SCA contains no provision mirroring Article 267(1)(b) TFEU which empowers the CJEU to give preliminary rulings concerning the validity and interpretation of acts of the institutions, bodies, offices and agencies of the EU. Under EU law national courts have no jurisdiction themselves to declare that acts of EU institutions are invalid.[20] The EFTA Court has established that it has jurisdiction to rule on the competences of the institutions established by the EEA Agreement.[21] Whether national courts have the same competences to rule on the validity of an EEA Act has not been directly addressed by the Court.

The question of whether advisory opinions rendered by the EFTA Court are binding upon the national courts is a highly interesting one and closely related to the research question. While the subject matter and scope of this thesis does not allow for an independent examination of this question, it is submitted that the arguments for an obligation to refer are to a large extent

[18] Fredriksen and Mathisen (n 3) 173.
[19] Baudenbacher, 'The EFTA Court: Structure and Tasks' (n. 7) 155.
[20] C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para. 20.
[21] E-6/01 *CIBA and Others v The Norwegian State* [2002] EFTA Ct. Rep. 281, para. 22-23.

also arguments which support that a national court should, in general, view the advisory opinions of the EFTA Court as binding.

The purpose of Article 34 SCA is to establish cooperation between the EFTA Court and the national courts and tribunals in order to ensure homogeneous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law.[22] The concept of homogeneity will be discussed further in Chapter 3. For the purposes of this chapter it should be noted that when procedural provisions in the SCA are identical in substance to procedural provisions of EU law, the CJEU's case law on those provisions is relevant.[23]

This chapter will discuss the principle of procedural autonomy and introduce arguments against an obligation to refer on the basis of that principle. The Court's reasoning in *Irish Bank*, and later case law, will then be examined against the backdrop of these considerations.

2.1 Procedural Autonomy in EEA Law

In EU law procedural autonomy means that in the absence of EU procedural rules, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of EU law.[24] There are limitations to procedural autonomy pursuant to the principle of equivalence, which provides that such rules may not be less favourable than those governing similar domestic actions, and the principle of effectiveness, which provides that such rules may not render practically impossible or excessively difficult the exercise of rights conferred by EU law.[25] Moreover, the rule of procedural autonomy only applies if there are no EU procedural provisions applicable.[26]

In the EEA national procedural rules governing actions for safeguarding rights of individuals and economic operators must satisfy the principles of equivalence and effectiveness in order to

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[22] E-9/14 *Proceedings concerning Otto Kaufmann AG* [2014] EFTA Ct. Rep. 1048, para. 28, E-23/13 *Hellenic Capital Market Commission (HCMC)* [2014] EFTA Ct. Rep. 88, para. 33 and E-1/11 *Norwegian Appeal Board for Health Personnel – appeal from A* [2011] EFTA Ct. Rep. 484 (*Dr. A*), para. 34.
[23] E-18/10 *EFTA Surveillance Authority v The Kingdom of Norway* [2011] EFTA Ct. Rep. 202, para. 26, E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v EFTA Surveillance Authority* [2003] EFTA Ct. Rep. 52, para. 39 and Joined Cases E-5/04 and E-6/04 *Fesil and Finnfjord, PIL and others and The Kingdom of Norway v EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 117, para. 53.
[24] C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5.
[25] C-453/99 *Courage and Crehan* [2001] ECR I-6297, para. 29.
[26] C. N. Kakouris 'Do Member States Possess Judicial Procedural "Autonomy"?' (1997) 34 CML Rev. 1389, 1396.

secure that rights conferred by EEA law enjoy an equivalent protection to rights conferred by EU law.[27] In its case law the EFTA Court introduced statements which directly mirror those developed by the CJEU on the principle of procedural autonomy and the principles of equivalence and effectiveness.[28] The principle of procedural autonomy and it limitations, as developed by the CJEU are thus recognized in EEA law.[29] In *Fokus Bank* the Court noted that the EEA Agreement does not, as a general rule, lay down specific provisions governing the administrative proceedings in the Contracting Parties' legal orders. However, such proceedings must be conducted in a manner that does not impair the individual rights flowing from the EEA Agreement.[30] The Court has held that, on the basis of the principle of loyal cooperation and the objective of homogeneity, national courts are bound, as far as possible, to interpret national law in conformity with EEA law. 'Consequently, they must apply the methods of interpretation recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule'.[31] Moreover, the EFTA Court has recognised the principles of access to justice and effective judicial protection as essential elements in the EEA legal framework.[32]

The general principle of homogeneity, which will be discussed in Chapter 3, requires that the EU and EEA legal orders develop in parallel. When there are no EEA procedural rules governing the enforcement of EEA rights the national procedural rules must as far as possible be applied in conformity with EEA law. EEA law governs the objective, procedural autonomy only entails that when there is a lack of procedural rules, which govern how that objective shall be achieved, it is for the national legal order to do designate the procedural methods applied to achieve that objective. In that context national procedural rules become a means of achieving the objective of homogeneity.

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[27] John Temple Lang 'The Principle of Sincere Cooperation in EEA Law' in Carl Baudenbacher (ed), The Fundamental Principles of EEA Law: EEA-ities (Springer 2017) 73, 83.
[28] See E-24/13 *Casino Admiral AG v Wolfgang Egger* [2014] EFTA Ct. Rep. 732, para. 69 and E-11/12 *Beatrix Koch, Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG* [2013] EFTA Ct. Rep. 272, para. 121
[29] Halvard Haukeland Fredriksen 'Tvisteloven og EØS-avtalen' (2008) 121(3) Tidskrift for Rettsvitenskap 289, 296.
[30] E-01/04 *Fokus Bank ASA v Staten v/Skattedirektoratet* [2004] EFTA Ct. Rep. 11, para. 41.
[31]E-13/11 *Granville Establishment v Volker Anhalt, Melanie Anhalt and Jasmin Barbaro née Anhalt* [2012] EFTA Ct. Rep. 400, paras. 52 and 54, E-25/13 *Gunnar V. Engilbertsson v Íslandsbanki hf.* [2014] EFTA Ct. Rep. 524, para. 159 and E-6/*13 Metacom AG v Rechtsanwälte Zipper & Collegen* [2013] EFTA Ct. Rep. 856, para. 69.
[32] E-11/12 *Beatrix Koch* (n 28) para. 117.

As will be examined below arguments that there is no obligation to refer under Article 34 SCA usually proceed on the notion that there is more room for manoeuvre under EEA law, based on the principle of procedural autonomy.[33]

2.2 Arguments for Procedural Autonomy Under Article 34 SCA

The Surveillance and Court Agreement does not form a part of the EEA Agreement but was a unilateral act of the EEA/EFTA States, necessary to fulfil their obligation to establish a court of justice under Article 108 EEA.[34] The differences in wording between Article 34 SCA and Article 267 TFEU may suggest that it was the intention of the Contracting Parties to the SCA to retain the national courts' procedural autonomy, in whether or not they intended to make use of the advisory opinion procedure. In arguing against an obligation to refer there tends to be a focus on this intention of the Contracting Parties.

Fredriksen and Franklin argue that the legal basis for advisory opinions to the EFTA Court, Article 34 SCA, has no provision mirroring that of Article 267(3) TFEU, and the EEA Agreement as such does not even foresee the possibility of preliminary references to the EFTA Court.[35] It should be mentioned that Article 107 EEA and Protocol 34 EEA allow for the national courts of the EEA/EFTA States to send questions of interpretation of provisions of the Agreement, which are identical in substance to the provisions of the EU Treaties, or of acts adopted in pursuance thereof, to the CJEU for a preliminary reference. This provision has never been used in practice.

Fredriksen further argues that the differences between the EFTA Court and the CJEU is that the latter is establishing itself as a court of last instance in an EU federal court hierarchy. It is difficult to draw parallels between such an objective and the relationship between the EEA/EFTA States' national courts and the EFTA Court.[36] This statement is based on Fredriksen's own perception of the CJEU and warrant reasoning, which he does not provide. Article 267 TFEU establishes a system of cooperation between national courts and the CJEU based on a separation of functions, it does not establish the CJEU as a court of last instance. Under Article 267 TFEU the national court alone has jurisdiction to find and assess the facts in

[33] Skúli Magnússon, 'On the Authority of Advisory Opinions: Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court' (2010) 3 Europarättslig Tidskrift 528, 530.
[34] ibid 531.
[35] Halvard Haukeland Fredriksen and Christian N.K. Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On (2015) 52 CML Rev 629, 672.
[36] Fredriksen, 'Tvisteloven og EØS-avtalen' (n 29) 297-298.

the case before it and to interpret and apply national law. Moreover, it is the national courts, and not the CJEU, which must determine the need for and the relevance of the questions it submits to the CJEU.[37] This separation of functions entails that the CJEU 'is empowered to rule on the interpretation or validity of EU law in the light of the factual and legal situation as described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it'.[38] The CJEU's clear separation of functions under Article 267 TFEU is mirrored in the EFTA Court's case law on Article 34 SCA. The EFTA Court has described the advisory opinion procedure as 'a special means of judicial cooperation between the Court and national courts with the aim of providing the national courts with the necessary elements of EEA law to decide the cases before them.'[39] Similarly the Court has established that it is for the national court, before which the dispute has been brought, to determine in the light of the particular circumstances of the case both the need for an advisory opinion, in order to enable it to deliver judgment, and the relevance of the questions which it submits to the Court.[40] The adoption by the EFTA Court of the same wording as the CJEU does not suggest any substantial differences between the separation of functions in the respective legal orders.

There are also arguments against an obligation to refer from the perspective of the national legal orders of the EEA/EFTA States. Sigurbjörnsson puts forward three arguments against the existence of an obligation to refer. These arguments may be summarised as follows; First the wording of the Icelandic legislative Act which empowers domestic courts to request advisory opinions is clear on the fact that there is no obligation.[41] Second, Iceland adheres to the principle of duality between national and international law. International law, including the EEA Agreement and its complementary materials do not automatically form an integral part of national law, but will need to be incorporated into Icelandic legislation. Third, the Icelandic rules of legal procedure may have an effect in the matter of assessing whether an advisory opinion should be sought in connection with a civil action.[42]

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[37] C-553/11 *Bernhard Rintisch v Klaus Eder* EU:C:2012:671, para. 15.
[38] C-423/15 *Nils Johannes Kratzer v R+V Allgemeine Versicherung AG* EU:C:2016:604, para. 27.
[39] *Irish Bank* (n 9) para 53.
[40] ibid, para 55 and *Granville* (n 31) para. 18.
[41] Icelandi Legislative Act, no. 21/1994, on Obtaining an Advisory Opinion of the EFTA Court on the Interpretation of the EEA Agreement (*Lög um öflun ráðgefandi álits EFTA-dómstólsins um túlkun samnings um Evrópska efnahagssvæðið*)
[42] Markús Sigurbjörnsson 'To Refer or Not to Refer?' in EFTA Court (ed), The EEA and The EFTA Court: Decentred Integration (Hart Publishing Limited 2014), 101, 102-103.

An issue with Sigurbjörnsson's arguments is that he only argues against the existence to refer under Icelandic law. Even if there is no obligation to refer under Icelandic law, the existence of an obligation under EEA law would require the Icelandic Supreme Court to interpret the national legislative act in the light of such an obligation, pursuant to the principles of loyal cooperation and effectiveness. Fredriksen and Franklin's argument, while more convincing from an EEA perspective, also has its faults. The fact that there is no explicit mention of a preliminary ruling procedure in the EEA Agreement does not necessarily mean that the Agreement does not foresee such a procedure. As will be seen more clearly in Chapters 3 and 4, the teleological interpretation of provisions of EEA law adopted by the EFTA Court highlights that a dynamic and homogeneous EEA cannot be achieved unless national courts of last instance consistently refer questions to the Court.

There is another issue with these arguments in that the authors argue against an obligation to refer on the basis of a textual interpretation of Article 34 SCA without highlighting where the national courts' margin of discretion is. It is should be recalled a national court 'may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.' According to the wording the right to request an advisory opinion arises when an answer is necessary to give judgment. Holding that a national court has any margin of discretion in requesting an advisory opinion when the court itself considers it necessary in order to give judgment is a paradox. If the national court doesn't request an advisory opinion the court clearly hasn't considered an answer from the EFTA Court necessary to give judgment and the court would never have been empowered to request an advisory opinion. However, if the legal situation under EEA law lacks clarity, and the national court does not see the need for an advisory opinion of the EFTA Court, the national court runs the risk of wrongful application of EEA law. There are therefore situations where an advisory opinion becomes objectively necessary to guarantee the correct legal outcome from an EEA perspective. The important question is when an advisory opinion becomes necessary to avoid the risk of wrongful application of EEA law by the national courts. The next section will examine the case law of the EFTA Court where it has underlined the most important factors in deciding on whether or not a national court should request an advisory opinion.

2.3 The EFTA Court's Approach

2.3.1 Irish Bank

The Icelandic legislative act on obtaining an advisory opinion of the EFTA Court allows for a decision of a district judge to request an advisory opinion, to be appealed, by the parties to the proceedings, to the national Court of Appeals. Prior to the recent establishment of the Icelandic Court of Appeals (*Landsréttur*), these decisions were appealed directly to the Supreme Court.

During the national proceedings in the *Irish Bank* case, the Reykjavik District Court decided to refer two questions on the interpretation of Article 14 of Directive 2001/24/EC, on the reorganisation and winding up of credit institutions.[43] This decision was appealed to the Supreme Court which upheld the decision to seek an advisory opinion, but substantially amended the questions posed, breaking the first question up into two parts and omitting the second question.[44] Following the Supreme Court's judgment, the Reykjavík District Court referred to the EFTA Court, the questions as amended by the Supreme Court.

The plaintiff argued that the EFTA Court should answer the questions as originally posed by the Reykjavík District Court in the first reference. In deciding which set of questions the Court should give an answer to the Court held:

> When drafting Article 34 SCA, the EFTA States were inspired by Article 267 TFEU. There are, however, differences. According to the wording of Article 34 SCA, there is, in particular, no obligation on national courts against whose decisions there is no judicial remedy under national law to make a reference to the Court. This reflects not only the fact that the depth of integration under the EEA Agreement is less far-reaching that under the EU treaties (see Case E-9/97 Sveinbjörnsdóttir [1998] EFTA Ct. Rep. 95, paragraph 59). It also means that the relationship between the Court and the national courts of last resort is, in this respect, more partner-like.[45]

Thus, the Court noted the differences in wording between Article 34 SCA and Article 267 TFEU, highlighting that the former does not confer an obligation to refer. It also refers to the 'partner-like' relationship between the EFTA Court and national courts. This might suggest that Article 34 SCA does not go beyond its wording. However, the Court goes on to minimize the practical effects of these differences, holding:

> At the same time, courts against whose decisions there is no judicial remedy under national law will take due account of the fact that they are bound to fulfil their duty of loyalty under Article 3 EEA. The Court notes in this context that EFTA citizens and economic operators benefit from the

[43] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions [2001] OJ L125/15.
[44] Judgment of the Icelandic Supreme Court 16 December 2011 (637/2011)
[45] *Irish Bank* (n 9) para. 57.

> obligation of courts of the EU Member States against whose decision there is no judicial remedy under national law to make a reference to the ECJ.[46]

Here, the Court invokes considerations of loyal cooperation and reciprocity. If EEA/EFTA citizens benefit from the obligation of courts the EU Member States, against whose decision there is no judicial remedy, to make a reference to the CJEU, reciprocity should require that citizens and economic operators, in the EU Member States, should enjoy the same benefits from the advisory opinion procedure.

It appears that the Court has legitimized the approach taken in the Icelandic Legislative Act, of allowing decisions of the district courts to be appealed. The Court does so by noting that Article 34 SCA does not preclude decisions to refer questions to the Court for an advisory opinion by a court or tribunal, whose decision are generally subject to appeal under national law, 'from being subject to the remedies normally available under national law.'[47] Seemingly however, the Court was not fully content with allowing the appellate court full autonomy in overruling such a decision, or amending the questions posed by the lower court. The Court thus recalls that provisions of the EEA Agreement and the SCA are to be 'interpreted in the light of fundamental rights' and that provisions of the ECHR and the judgments of the European Court of Human Rights are important sources 'for determining the scope of these fundamental rights'. It might, therefore, not be excluded that when a court or tribunal against whose decisions there is no judicial remedy overrules a decision of a lower court to refer a case to another court, or as the Supreme Court had done, amends the questions, such decisions may fall foul of the standards of Article 6(1) ECHR on the right to a fair trial.[48] The Court found that as the Supreme Court did not substantially amend the first question posed, by the Reykjavík District Court, it would answer that question as amended. In regard to the second question posed by the District Court, the EFTA Court found that it was not apparent that the question of the Supreme Court covered those issues. The Court therefore examined the problem raised by that question as well, noting that the judgment by the Supreme Court did not set out any reasons as why the second question originally put in by the District Court was omitted.[49]

The fact that the EFTA Court decides to answer the second question suggests that there are clear limits to procedural autonomy. While seemingly accepting the Icelandic legal Act's

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[46] *Irish Bank* (n 9) para. 58.
[47] ibid, para. 62.
[48] ibid, para. 63-64.
[49] ibid, paras. 66-70.

system of appeal, the Court establishes that it has competences to review the higher court's decision to omit or amend a question.

The Icelandic system of appeals is not beyond criticism, and the Court's approach shows that. Under Article 34 SCA a national court may refer questions on the interpretation of EEA law to the EFTA Court when it considers it necessary to enable it to give judgment. The separation of functions between the EFTA Court and the national courts entails that it is for the national court before which the dispute has been brought to determine both the need for an advisory opinion and the relevance of the questions. This court has knowledge of the factual and legal situation and is best suited to determine the questions which need answering in order to give judgment.[50] Moreover it is the court that is tasked with passing judgment that has determined that an answer to the question is necessary for it to give judgment. The Supreme Court is in this situation taking up the role of the EFTA Court in determining the relevance of the questions and de facto ruling on their admissibility. The difference is that the EFTA Court proceeds on a presumption of relevance of the questions submitted to it,[51] while the Supreme Court does not proceed on such a presumption. The opportunity of allowing lower courts to refer also provides a procedural safeguard against the Supreme Court, which might be reluctant to refer. The Court therefore seeks to limit the impact of the system of appeals by revising the Supreme Court's decision to omit a question. However, if the Supreme Court overrules a decision by a lower court to refer, the EFTA Court won't have the opportunity to revise such a decision and the court tasked with giving judgment will not receive the answers that it itself has deemed necessary to give judgment.

2.3.2 Development after Irish Bank

The EFTA Court sent a strong signal to the national courts in *Jonsson*, where the Court noted that it was important that questions are referred to the Court under the procedure provided for in Article 34 SCA if the legal situation lacks clarity. Thereby unnecessary mistakes in the interpretation and application of EEA law were avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU were ensured.[52] In an Order of the Court on the interpretation of the judgment in *HOB-vín III* the Court referred to *Irish Bank* and *Jonsson*. The Court noted that under the system of cooperation in Article 34 SCA, which is intended as a means of ensuring a homogeneous interpretation of the EEA

[50] See Baudenbacher, 'The EFTA Court: Structure and Tasks' (n. 7) 158.
[51] E-10/14 *Enes Deveci and Others v SAS Denmark, Norway and Sweden* [2014] EFTA Ct. Rep 1364, para. 30.
[52] *Jonsson* (n 10) para. 60.

Agreement, a national court or tribunal is entitled to request the Court to give an advisory opinion on the interpretation of the Agreement. The Court then referred to *Jonsson*, regarding the 'different legal situation concerning courts against whose decision there is no remedy under national law.'[53]

2.4 Conclusion

Baudenbacher holds the case-law above to mean that, if there is no clear case-law from the CJEU of the EFTA Court, a court of last instance is basically obliged to make a reference. Moreover, if there is a conflict between the EFTA Court and the CJEU case-law, a reference must be made.[54] While Fredriksen and Franklin agree that it was the ambition of the Court to create such an obligation they are more sceptical of the Court's approach. They argue that while EEA based rights are adequately protected by the national courts of the EFTA States, the obligations flowing from Article 6(1) ECHR will be satisfied.[55]

It is clear from *Irish Bank* that considerations of reciprocity and loyal cooperation limit the procedural autonomy national courts enjoy under Article 34 SCA. In *Jonsson* the Court highlights the importance of referrals being made to the Court when the legal situation lacks clarity. The Court is ambiguous as to whether it is establishing a concrete obligation to refer, in such situation, or merely giving guidance as to the situations which would merit a referral.

Under the separation of functions between the EFTA Court and national courts, national courts are tasked with assessing the necessity of a reference, they are not tasked with deciding whether or not to refer when a reference is necessary in order to give judgment. The question is thus whether there are situations under EEA law where an advisory opinion is objectively necessary to safeguard the objectives of the EEA Agreement. In the case law above there are clear suggestions that these situations exist and that they are governed by general principles of EEA law.

The Court's reasoning can be broken up into three general principles of EEA law, namely the principles of homogeneity, reciprocity, and loyal cooperation, which we will examine in the next chapter.

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[53] E-2/12 *INT HOB-vín ehf.* [2013] EFTA Ct. Rep. 816, para. 11.
[54] Baudenbacher, 'The EFTA Court: Structure and Tasks' (n. 7) 157.
[55] Fredriksen and Franklin (n 35) 672.

3 Objective Reasons to Refer

The objective of the EEA Agreement is the achievement of a dynamic and homogeneous European Economic Area. For the realization of that objective Article 34 SCA serves an important function. This chapter will examine principle of homogeneity in further detail and how that principle is supplemented by the principles of reciprocity and loyal cooperation.

Before examining these general principles, it is important to understand that the institutional framework of the EEA consists of two pillars. The EU and its institutions constitute one pillar, and the EEA/EFTA States and the EFTA institutions constitute the other. These pillars are independent, with a number joint bodies established between them.[56] EU legislative acts which are of EEA relevance are incorporated into the Annexes to the EEA Agreement by a decision of the EEA Joint Committee, and thus form a part of the EEA Agreement.

For the purposes of this thesis the chapter focuses on the judicial branch of the principle of homogeneity and the principles of reciprocity and loyal cooperation. In order to understand how EEA law impacts the respective national legal orders it is, however, necessary to begin with a brief overview of the EEA Agreements homogeneity rules, both legislative and judicial.

3.1 The Homogeneity Rules

There are several provisions in the Agreement which are intended to facilitate the achievement of the objective of a dynamic and homogeneous EEA. This section will give an overview of the rules which contribute to the achievement of a common legislative framework and the uniform interpretation of that legislation.

The general principles of homogeneity and reciprocity are referred to in Recital 4 in the Preamble to the EEA Agreement which reads:

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

Recital 15 reads:

> WHEREAS, 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

[56] Standing Commitee of the EFTA States: *The Two-Pillar Structure of the EEA Agreement – Incorporation of new EU Acts* < http://www.efta.int/media/documents/eea/16-532-the-two-pillar-structure-incorporation-of-new-eu-acts.pdf> accessed 25 April 2018.

this Agreement **and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;**

According to Article 1(1) EEA, the aim of the Agreement is to 'promote a continuous and balanced strengthening of trade and economic relations between the Contracting parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area'. In addition to these general provisions, Article 3 EEA contains the principle of loyal cooperation, which mirrors Article 4(3) TEU[57] and imposes on the Contracting Parties the obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Agreement. They shall abstain from any measures which could jeopardize the attainment of the objectives of the Agreement. Moreover, they shall facilitate cooperation within the framework of the Agreement.

The objective of achieving a common legislative framework is referred to as legislative homogeneity.[58] Legislative homogeneity is achieved through implementation of EU legal acts into the EEA Agreement following the procedure laid down in Article 102 EEA. When the EU adopts a legislative act, on an issue which is governed by the EEA Agreement, the EEA/EFTA countries shall be informed through the EEA Joint Committee. The EEA Joint Committee consists of representatives of the Contracting Parties and is tasked with taking decisions by agreement between the EU and the EFTA States, pursuant to Article 93 EEA. If informed by the EU of a legislative act, the EEA Joint committee shall take a decision concerning an amendment of an annex to the EEA Agreement. By such an amendment the EU legislative act is incorporated into the annex of the Agreement and becomes binding upon the EEA/EFTA States.

Article 102 EEA does not allow for an amendment to the main text of the EEA Agreement. An update to the main part of the Agreement may only be achieved by participation of all Contracting Parties, including the current 27 EU Member States. Thus, the substantive provisions of the main part of the EEA Agreement still mirror the corresponding provisions of the Treaty establishing the European Economic Community. Subsequent amendments to EU primary law are therefore not mirrored in the EEA Agreement. Most notably, there are no provisions mirroring the EU Charter of Fundamental Rights (CFR)[59] or provisions on Union

[57] Consolidated version of the Treaty on European Union [2016] OJ C 202/13 ('TEU').
[58] Dag Wernø Holter 'Legislative Homogeneity' in Carl Baudenbacher (ed), The Fundamental Principles of EEA Law: EEA-ities (Springer 2017) 1.
[59] Charter of Fundamental Rights of the European Union [2016] OJ C 202/389 ('CFR')

Citizenship. As will be discussed in the next section, these differences have led to a widening gap between EU primary law and the main-part to the EEA Agreement, which the EFTA Court and the CJEU have attempted to bridge through homogeneous interpretation of secondary law.[60]

Article 7 EEA dictates that 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. An act corresponding to an EU directive shall leave the authorities of the Contracting Parties the choice of form and method of implementation. An act of EEA law must be transposed into the national legal order within the time limit in the EU or when the EEA Joint Committee decision enters into force, whichever comes first.[61] A failure to implement within the time limit prescribed is a breach of Article 7 EEA and may lead to infringement proceedings by the EFTA Surveillance Authority under Article 31 SCA.

An important aspect of homogeneity is found in Protocol 35 to the EEA Agreement. The Preamble to Protocol 35 EEA states that the objective of achieving a homogeneous EEA is to be achieved without requiring any Contracting Party to transfer legislative powers to any institution of the EEA. Consequently, legislative homogeneity will have to be achieved through national procedures.[62] Protocol 35's sole article reads:

> For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.

Provisions of EEA law, which have been properly implemented into the domestic legal orders, therefore take precedence over any conflicting provision of national law. This does not extend to every provision of the main part of the EEA Agreement. It only relates to provisions that are framed in a manner capable of creating rights that individuals and economic operators may invoke before national courts. The provisions must thus be unconditional and sufficiently precise.[63]

The objective of achieving a uniform interpretation of the common rules is referred to as judicial homogeneity.[64] The two-pillar structure of the EEA Agreement foresees two separate courts,

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[60] Halvard Haukeland Fredriksen 'Bridging the Widening Gap Between the EU Treaties and the Agreement on the European Economic Area' (2012) 18 European Law Journal 868, 870.
[61] Páll Hreinsson 'General Principles' in Carl Baudenbacher (ed), The Handbook of EEA Law (Springer 2016), 349, 386.
[62] E-1/01 *Hörður Einarsson v The Icelandic State* [2002] EFTA Ct. Rep. 2, para. 52.
[63] ibid, para. 53.
[64] Philipp Seitler 'Judicial Homogeneity as a Fundamental Principle of EEA Law' in Carl Baudenbacher (ed), The Fundamental Principles of EEA Law: EEA-ities (Springer 2017), 19.

the EFTA Court and the CJEU, interpreting the common EEA rules.[65] The CJEU is mainly tasked with developing EEA law through its interpretation of EU law, which is substantially reproduced in the EEA Agreement. In the EFTA-pillar the EFTA Court interprets the EEA Agreement and the EU law provisions incorporated into its annexes.

The EFTA Court is under an obligation to follow the case law of the CJEU. Article 6 EEA provides that EEA provisions shall be interpreted in conformity with the relevant case law of the CJEU given prior to the signature date of the Agreement. However, the EFTA Court has consistently taken into account the relevant rulings of the CJEU after the given date. Therefore, there is a consensus that the EFTA Court will consider the whole of the CJEU's case law.[66] Article 3 SCA further states that the EFTA Court will pay due account of the principles laid down by the relevant rulings of the CJEU after the signature date. The Court established in *Scottish Salmon Growers* that due account should also be paid to the principles laid down in rulings of the Court of First Instance.[67] The same applies to the case law of the General Court.[68]

The EEA Agreement also contains obligations on the EEA Joint Committee to preserve a homogeneous interpretation of the Agreement. Chapter 3 of the Agreement contains provisions on homogeneity, surveillance procedure and settlement of disputes. Article 106(1) provides that the EEA Joint Committee is to manage a system of information exchange concerning judgments between the EFTA Court, the ECJ and the General Court.[69] Further Article 105(2) obliges the EEA Joint Committee to keep under constant review the development of the case-law of the of the ECJ and the EFTA Court. Article 105(3) provides that in case of a different interpretation between the two courts, the Committee 'shall act as to preserve the homogeneous interpretation of the Agreement'.

There is no equivalent of the EU principles of direct effect and primacy in EEA law. While legislative homogeneity requires that all EU legislation which has a relevance to the internal market, competition and state aid be made a part of the EEA Agreement, EEA law does not require a transfer of legislative powers as evident from Protocol 35 EEA. While provisions of

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[65] Halvard Haukeland Fredriksen 'One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area' (2010) 79 Nord J Int Law 481, 482.
[66] Fredriksen and Franklin (n 35) 631-632.
[67] E-2/94 *Scottish Salmon Growers Association Limited v EFTA Surveillance Authority* [1994-1995] EFTA Ct. Rep. 59, para. 13.
[68] Hreinsson (n 61) 351.
[69] Due to the fact that the main part of the EEA Agreement has not been updated in order to mirror the TEU and TFEU the Agreement refers to 'The Court of Justice of the European Communities' and 'The Court of First Instance of the European Communities'.

EU law become binding upon the EEA/EFTA States when a decision by the EEA Joint Committee has been adopted they do not become enforceable by individuals and economic operators in national courts until they have been adopted into the domestic legal orders through national procedures. However, as we will see in the following section, the EFTA Court has developed its own principle of state liability which severely limits the effects of this lack of direct effect and primacy.

The EEA Agreement's and the SCA's, provisions on judicial homogeneity impose on the EFTA Court the obligation to pay due account to the principles laid down in the relevant rulings of the CJEU. The following section will expand on the principle of judicial homogeneity, which has developed significantly through the case law of the EFTA Court.

3.2 Judicial Homogeneity

As we have seen the two-pillar structure of the EEA foresees two courts interpreting the common rules. Each court has the legal competence to interpret the EEA Agreement by giving final rulings.[70] The EFTA Court has placed a strong emphasis on judicial homogeneity, meaning that the common rules shall have the same substance, effect and means of judicial enforcement in both pillars.

The most important difference between the EEA and the EU is that there is no direct effect or primacy in EEA law.[71] Moreover the introduction of the EU Charter of Fundamental Rights, and the recognition of EU Citizenship have contributed to a growing gap between the main part of the EEA Agreement and EU primary law. Despite these differences the EFTA Court has refrained from adopting an EEA specific interpretation of the Agreement, and instead let the objective of homogeneity prevail.[72]

Judicial homogeneity has three branches: substantive, effects-based and procedural.[73] The differences between these branches are not always clear and there are several overlaps. These branches will be examined in the following sections.

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[70] Seitler (n 64) 22.
[71] See E-4/01 *Karl K. Karlsson v the Icelandic State* [2002] EFTA Ct. Rep. 240, para. 28 and E-1/07 *Fürsliches Landgericht (Princely Court of Justice), Liechtenstein in Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, para. 40.
[72] Catherine Barnard, 'Reciprocity, Homogeneity and Cooperation: Dealing with Recalcitrant National Courts?' in EFTA Court (ed), The EEA and The EFTA Court: Decentred Integration (Hart Publishing Limited 2014), 151, 163.
[73] Baudenbacher, 'The EFTA Court: Structure and Tasks' (n 7) 145.

3.2.1 Substantive homogeneity

The common EEA rules, concerning the fundamental freedoms, competition, state aid and harmonised economic law must be interpreted in a uniform way in both EEA pillars.[74] Substantive homogeneity is inferred from Article 6 EEA which requires that provisions of the EEA Agreement which are identical in substance to corresponding provisions of the EU Treaties be interpreted in conformity with the relevant rulings of the CJEU. Article 3(2) SCA further requires that the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings of the CJEU. This is commonly referred to as the *interpretative principle of homogeneity*. There are two substantive conditions for the interpretative principle of homogeneity to apply.

First, the judgment of the CJEU must concern an EU rule, meaning that where a provision in the EEA Agreement is substantially copied from EU law, the former provision must be understood in the same manner as the CJEU has interpreted the latter.[75]

Second, the judgment of the CJEU must be relevant in an EEA context.[76] If a provision of EU law is substantially reproduced in the EEA Agreement the EFTA Court will proceed on a presumption that the CJEU's judgment is relevant in the EEA Context. As Fenger points out, in its *Opinion 1/91*[77] the CJEU held the differences between the EEA Agreement and the EU Treaties should imply that the interpretation of the two legal systems must differ.[78] The EFTA Court's case law shows that the Court has not prescribed to this initial view by the CJEU, opting for a more homogeneous approach. This is highlighted by a comparison of *Maglite*[79] and *L'Oréal*[80] where the EFTA Court showed a change in position regarding international exhaustion of trade mark rights, based on a subsequent interpretation of the same rules by the CJEU.

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[74] ibid 145.
[75] Niels Fenger 'Limits to a Dynamic Homogeneity Between EC Law and EEA Law' in Niels Fenger, Karsten Hagel-Sørensen and Bo Vesterdorf (eds), Festskrift Til Claus Gulman (Forlaget Thomson 2006), 131, 133-134.
[76] ibid 133.
[77] Opinion 1/91 on the Draft agreement between the Community, on the on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1991] ECR I-6079.
[78] Fenger (n 75) 135.
[79] E-2/97 *Mag Instrument Inc. And California Trading Company Norway, Ulsteen* [1997] EFTA Ct. Rep. 127, para. 26.
[80] Joined Cases E-9/07 and E-10/07, *L'Oréal Norge AS and L'Oréal SA v Per Aarskog AS, Nille AS and Smart Club AS* [2008] EFTA Ct. Rep. 259, para. 37.

In *Maglite* the Court held that the differences between the EU as a customs union and the EEA as a free trade area had to be reflected in the application of the principle of exhaustion of trade mark rights:

> According to Article 8 EEA, the principle of free movement of goods as laid down in Articles 11 to 13 EEA applies only to goods originating in the EEA, while in the Community a product is in free circulation once it has been lawfully placed on the market in a Member State. In general, the latter applies in the context of the EEA only in respect of products originating in the EEA. In the case at hand, the product was manufactured in the United States and imported into Norway. Accordingly, it is not subject to the principle of the free movement of goods within the EEA.[81]

The Court used these differences to support its finding that Article 7(1) of Council Directive 89/104/EEC[82] was to be interpreted as leaving it up the EFTA States to decide whether they wish to introduce or maintain the principle of international exhaustion of rights conferred by a trade mark with regard to goods originating from outside the EEA.[83] However, in *Silhouette* the CJEU subsequently came to a different conclusion, finding that international exhaustion was contrary to Article 7(1) of the Directive.[84] This led the EFTA Court to reconsider the rule laid down in *Maglite*, holding, in *L'Oréal*, that:

> In the light of what is stated above in relation to the scope of the provisions of the EEA Agreement concerning intellectual property rights and, more specifically, exhaustion of such rights, the Court holds that the differences between the EEA Agreement and the EC Treaty with regard to trade relations with third countries do not constitute compelling grounds for divergent interpretations of Article 7(1) of the Trade Mark Directive in EEA law and EC law.[85]

Notably the Court suggests that compelling grounds might justify a divergent interpretation of the Trade Mark Directive in EEA law and EU law. The Court has never given a clear indication as to what circumstances might constitute compelling grounds for such a divergent interpretation. There seems to be an established a presumption against the existence of such circumstances, evident from the EFTA Courts' frequent statements that it has not been presented with any specific circumstances which would compel it to disregard the CJEU's case-law in relation to a corresponding provision of EU law.[86]

When interpreting provisions of EEA law, which are identical in substance to provisions of EU law, the EFTA Court will generally follow the relevant case law of the CJEU. The Court has implied that compelling grounds for divergent interpretation may be invoked. Some academics have even suggested that in light of the *L'Oréal* judgment these differences have been all but

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[81] *Maglite* (n 79) para. 26.
[82] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L40/1.
[83] *Maglite* (n 79) para. 28.
[84] C-355/96 *Silhouette International Schmied v Hartlauer Handelsgesellschaft* [1998] ECR I-4799.
[85] *L'Oréal* (n 80) para. 37.
[86] ibid, para. 27.

neutralized.[87] To date the only situations in which the Court has purposely diverged from the case law of the CJEU are in cases when a homogeneous interpretation would lead to a difference between EEA law and EU law in effect. These situations will be considered in the next section.

3.2.2 Effects-based Homogeneity

Effects-based homogeneity requires that citizens and economic operators be able to defend their rights flowing from the EEA Agreement in a comparable way in both EEA pillars.[88] The EFTA Court has not let the inherent differences in the EU and the EEA legal orders affect its position that the rights and obligations conferred on citizens and economic operators should be the same.[89] This section will highlight how the Court has created principles equivalent to constitutional principles of EU law, which take due account of the structural differences between the EU and the EEA.[90]

Whereas the principle state liability in EU law is a necessary corollary of direct effect,[91] in EEA law the principle of state liability is a corollary of homogeneity. In *Karlsson* the EFTA Court held the Preamble to Protocol 35 to mean that EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts.[92] In *Sveinbjörnsdóttir* the Icelandic Government, supported by the Government of Sweden, the Government of Norway, and the European Commission argued that the principle of state liability in EU law was based on the transfer of legislative powers and the principles of direct effect and primacy of EU legislation. As these principles were not a part of the EEA Agreement, a similar rule of state liability could not exist in EEA law.[93] The EFTA Court did not accept this argument, instead establishing that the EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own. The homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement that the EFTA States must be obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive.[94] The Court expanded on the principle of State liability in

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[87] Fenger (n 75) 135.
[88] Baudenbacher, 'The EFTA Court: Structure and Tasks' (n. 7) 145.
[89] See E-26/13 *The Icelandic State v Atli Gunnarsson* [2014] EFTA Ct. Rep. 254, para. 59 and E-28/15 *Yankuba Jabbi v the Norwegian Government, represented by the Immigration Appeals Board* [2016] EFTA Ct. Rep. 575.
[90] Barnard (n 72) 154.
[91] Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and the Queen / Secretary of State for Transport, ex parte Factortame and Others* [1996] ECR I-1029, para. 22.
[92] *Karlsson* (n 71) para. 28.
[93] *Sveinbjörnsdóttir* (n 17) para. 44.
[94] ibid, paras. 59-60.

Karlsson, holding that it was applicable not only in cases of inadequate implementation of directives, but in cases of any breach of a rule of EEA law, provided that the rule of law infringed is intended to confer rights to individuals, the breach is sufficiently serious, and there is a direct causal link between the breach of obligation resting on the state and the damage sustained by the injured party. Under the EEA Agreement, an EEA State may, in principle, be held liable for breaches of its obligations under both secondary acts of EEA legislation and the main part of the EEA Agreement.[95]

In *Kolbeinsson* the EFTA Court noted, *obiter dicta*, that if States were to incur liability under EEA law for an infringement resulting from the incorrect application of EEA law by national courts, the infringement would have to be manifest in character.[96] This suggests that the EFTA Court has adopted the CJEU's *Köbler*[97] jurisprudence on the existence of state liability resulting from judicial wrongdoing. The significance of this in regard to whether EEA law imposes an obligation on national courts of last instance to refer will be further discussed in Chapter 4.

The Court's strong emphasis on effects-based homogeneity is also shown in the Court's insistence on interpreting provisions of the EEA Agreement as well as provisions of the Surveillance and Court Agreement in light of fundamental rights.[98] The Court does not recognize the EU Charter of Fundamental Rights as a legal authority in EEA law, but refers to provisions of the ECHR and judgments of the European Court of Human Rights as important sources for determining the scope of fundamental rights.[99] The Court has also recognized the freedom to conduct business, stating that such a freedom lies at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national law and practices.[100]

There are situations where an interpretation of EEA law, in line with the case law of the CJEU, may lead to different conclusions in the two legal orders. This is most apparent when the EU Treaties confer rights to individuals which are not directly provided for in the EEA Agreement.

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[95] *Karlsson* (n 71) paras. 31-32.
[96] The Court held that the matter of state liability for losses caused by incorrect application of EEA law by national courts fell outside of the scope of the question referred by the national court, E-2/10 *Þór Kolbeinsson v The Icelandic State* [2009-2010] EFTA Ct. Rep. 234, para. 77.
[97] Case C-224/01, *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239. See Carl Baudenbacher 'Reciprocity' in Carl Baudenbacher (ed), The Fundamental Principles of EEA Law: EEA-ities (Springer 2017), 35, 43.
[98] See for example: *Irish Bank* (n 9) paras. 63-64, E-2/03 *Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson* [2003] EFTA Ct. Rep. 185, para. 23, E-15/10 *Posten Norge v EFTA Surveillance Authority* [2012] EFTA Ct. Rep. 245, para. 85.
[99] *Irish Bank* (n 9) para. 63.
[100] *Deveci* (n 51) para. 64.

In such situations the EFTA Court has shown a willingness to adopt a broader interpretation of secondary law than the CJEU, in order to ensure that the rights conferred are the same in both legal orders. The clearest example of this is *Yankuba Jabbi* where the Court came to the conclusion that where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of Directive 2004/38/EC,[101] has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that Directive will apply by analogy where that EEA national returns with the family member to his home State.[102] While arriving at the same conclusion regarding the content of rights as the CJEU had in *O. and B*, the CJEU had refused the application of the Citizens Directive in that case, basing its finding basing its finding on an interpretation of Article 21(1) TFEU,[103] which has no equivalent in EEA law. On the basis of *O. and B*, it could be argued, that for the sake of substantial homogeneity, the Citizens Directive should be interpreted uniformly in both the EU and the EEA legal orders, leading the EFTA Court to refuse the application of the Directive. Instead the Court stated that it must examine if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement. Such an examination must be based on the EEA Agreement, legal acts incorporated into it and case law.[104] The Court then proceeded with its own interpretation of the Citizens Directive, rationalizing the application of the directive in 'the EEA Context'.[105] A similar approach was taken by the Court in *Gunnarsson* where it derived the right of persons to move freely from the EEA State of origin from Article 7(1)(b) of the Citizens Directive.[106] *Gunnarson* and *Yankuba Jabbi* underline the autonomy of the EFTA Court. Instead of striving towards parallelism with the CJEU's case law the EFTA Court emphasises the reciprocity and effectiveness of EEA law.[107]

This development highlights the importance of national courts making use of the advisory opinion procedure in Article 34 SCA. The EFTA Court is aware of the inherent differences between the EU and EEA legal orders. In order to reduce the effect of these differences the

[101] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 68/221/EEC, 68/360/EEC, 72/194/EEC, 75/34/EEC, 75/35/EEC,90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L47/77.
[102] E-28/15 *Yankuba Jabbi* (n 89).
[103] C-465/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* [2014] ECR I-135.
[104] E-28/15 *Yankuba Jabbi* (n 89) para. 68.
[105] ibid, paras. 68-82.
[106] See *Gunnarsson* (n 89) 253.
[107] Ciarán Burke and Ólafur Ísberg Hannesson 'Citizenship by the back door? Gunnarsson' (2015) 52 CML Rev. 1111, 1118.

Court has established its own autonomy and a method of reasoning, driven by the objective of a dynamic and homogeneous EEA for the purposes of establishing general principles of EEA law which mirror fundamental principles of EU law. Although the case law of the CJEU may be clear on the interpretation of certain provisions of EU law, the focus on homogeneity, reciprocity and equal rights by the EFTA Court may lead it to adopt a different interpretation of such provisions in situations where there are differences between EU primary law and the main part of the EEA Agreement.

3.2.3 Procedural Homogeneity

In order to ensure equal access to justice and compliance with judgments rendered in infringement proceedings, for parties appearing before the EEA Courts, the Court has recognized a rule of procedural homogeneity.[108] When interpreting the Surveillance and Court Agreement, Article 6 EEA and Article 3(1) SCA do not require the EFTA Court to follow the reasoning of the CJEU concerning parallel provisions of EU law.[109] In order to preserve procedural homogeneity the Court has therefore gone further that required by these provisions, holding that homogeneity cannot be restricted to the interpretation of provisions of the EEA Agreement whose wording is identical in substance to parallel provisions of EU law.[110] Evidence of the principle of procedural homogeneity can first be identified in *Restamark* where the Court was faced with the interpretations of the expressions 'court or tribunal' under Article 34 SCA. The Court found that the reasoning which had led the CJEU to its interpretation of the same expressions in Article 267 TFEU was relevant in this context.[111] The Court has applied this rule frequently when faced with the interpretation of procedural provisions.[112]

The most important aspect of procedural homogeneity is the Court's establishment of the principle of effective judicial protection. The principle of effective judicial protection is firmly established in the case law of the CJEU.[113] In the EEA context the principle is not clearly inferred from the Agreement but has been considered an important element in EEA law. Recital 8 to the Preamble to the EEA Agreement refers to the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by the

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[108] E-14/11 *DB Schenker v EFTA Surveillance Authority* [2012] EFTA Ct. Rep. 1178, para. 77.
[109] *INT HOB-vín* (n 53) para. 9 and Fenger (n 75) 134.
[110] *DB Schenker* (n 108) para. 78 and E-02/12 *HOB-vín ehf. v Áfengis- og tóbaksverslun ríkisins* [2012] EFTA Ct. Rep 1092, para. 9.
[111] E-1/94 *Ravintoloisijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct Rep. 15, paras. 24-25.
[112] See for example *Scottish Salmon Growers* (n 67) para. 11, *Bellona* (n 23) para. 39, *ESA v Norway* (n 23) para. 26 and more recently E-5/16 *Municipality of Oslo* [2017] EFTA Ct. Rep. 52, para. 37.
[113] C-432/05 *Unibet (London) Ltd. and Unibet (International) Ltd v Justitiekanslern* [2007] I-2271, para. 37.

Agreement and through the judicial defence of these rights. In *Bellona* the EFTA Court established that access to justice was an essential element of the EEA legal framework holding that a Court of Justice for the EFTA-Pillar of the EEA was established to uphold such rights, to review the surveillance procedure and to settle disputes.[114] In *Beatrix Koch* the Court held that access to justice and effective judicial protection were essential elements in the EEA legal framework. This could only be achieved if EEA/EFTA and EU nationals and economic operators enjoy equal access to the courts in both the EU and EFTA pillars of the EEA to ensure their rights which they derive from the EEA Agreement.[115] If access to the EFTA Court is restricted through national courts' reluctance in making use of the procedure provided for in Article 34 SCA, there is an obvious breach of these principles.

Although the EFTA Court does not refer to procedural homogeneity in *Irish Bank*, the Court's reference to Article 6(1) ECHR on the right to a fair trial, suggests that the EFTA Court considers the matter of whether an obligation to refer under Article 34 SCA, to be a question of procedural homogeneity.[116] Equal access to the EEA Courts in both pillars is also important in this context and will be considered further in the next section.

3.3 Reciprocity

The fourth Recital of the Preamble to the EEA Agreement refers to the principle of reciprocity. Reciprocity requires that the rights conferred by the EEA Agreement should be the same for EU nationals in the EFTA pillar as for EEA/EFTA nationals in the EU pillar.[117] In this sense reciprocity is closely related to procedural homogeneity and equal access to justice. However, whereas, homogeneity guides the uniform interpretation of EEA law and EU law, reciprocity requires that an EU Citizen situated in an EEA/EFTA State have at least comparable means of enforcing EEA rights as an EEA/EFTA Citizen situated in an EU Member State. This was highlighted in the Opinion of Advocate General Kokott in *UK v Council* where she recalled that a decision of the EEA Joint Committee on social rights did not only seek to regulate the social rights of third country nationals – Norwegians, Icelanders and Liechtensteiners – in the Union, but also, conversely, to regulate the social rights of *Union Citizens* in the three EFTA States concerned. Not only can a national of an EEA/EFTA State benefit from the coordination of

[114] *Bellona* (n 23) para. 36.
[115] *Beatrix Koch* (n 28) para. 117.
[116] See *Irish Bank* (n 9) para. 64.
[117] Barnard (n 72) 154.

social security systems under Regulation No 883/2004[118] within the territory of the European Union, but also a Union citizen in an EEA/EFTA State.[119] In the EFTA pillar the Court noted, in *Irish Bank*, that EFTA citizens and economic operators benefit from the obligation of courts of the EU Member States against whose decision there is no judicial remedy under national law to make a reference to the CJEU, suggesting that EU citizens and economic operators should enjoy the same benefits from Article 34 SCA. [120]

Baur suggests that a disregard for the principle of homogeneity may have repercussions in regard to compliance with the principle of reciprocity in the EU pillar. The CJEU has adopted a jurisprudence in relation to texts of free trade agreements that are identically or similarly worded to provisions of EU law. In *Polydor* the CJEU decided that such provisions were to be interpreted in a differentiated way, taking into account the purpose and the context of the respective agreement.[121] Baur holds that, should the EFTA States' national jurisprudence be seen as systematically jeopardising the homogeneity principle, this could, ultimately, lead to the application of the Polydor doctrine by the CJEU. Should this happen, individuals and enterprises from the EEA/EFTA States would no longer be able to enjoy the same rights and freedoms conferred by the EEA Agreement as EU citizens.[122] However, in *Ospelt*, the CJEU recognised its responsibility to ensure uniform interpretation of substantially identical provisions in both legal orders:

> Furthermore, one of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States. From that angle, several provisions of the abovementioned Agreement are intended to ensure as uniform an interpretation as possible thereof throughout the EEA[...]. It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly within the Member States.[123]

The recognition by the CJEU of its responsibility to secure uniform interpretation suggests that it does not view the EEA Agreement as a conventional free-trade agreement and will continue

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[118] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.
[119] C-431/11 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [2013] ECR I-589 Opinion of AG Kokott, para. 42.
[120] *Irish Bank* (n 9) para. 58.
[121] C-270/80 *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited* [1982] ECR 329, para. 19.
[122] Georges Baur 'Preliminary Rulings in the EEA— Bridging (Institutional) Homogeneity and Procedural Autonomy by Exchange of Information' in EFTA Court (ed), The EEA and The EFTA Court: Decentred Integration (Hart Publishing Limited 2014), 169, 180.
[123] Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, para. 29.

to respect the principles of reciprocity and homogeneity. National courts should be expected to do the same.

Importantly for the EEA/EFTA States the EEA Agreement is not a one-way street and should provide the same rights for individuals and economic operators in both pillars. The Surveillance and Court Agreement, as has been mentioned, was not an act of the EEA but a unilateral act of the EEA/EFTA States necessary to ensure the fulfilment of the obligations undertaken by them under the EEA Agreement. A failure to correctly implement EEA law into the national legal orders, and a failure by national courts to correctly interpret and apply the common rules, contributes to a fragmentation of the internal market, and is a breach of the contractual obligations undertaken by all the Contracting Parties.

3.4 The Principle of Loyal Cooperation

Pursuant to the principle of loyal cooperation the EEA institutions, the EU and the EEA States shall assist one another, in full mutual respect, in carrying out tasks flowing from the EEA Agreement.[124] The principle of loyal cooperation has its basis in Article 3 EEA which states that the Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the Agreement. They shall abstain from any measures which could jeopardise the attainment of the objectives of the EEA Agreement. Moreover, they shall facilitate cooperation within its framework. This provision and Article 4(3) TEU are substantially identical and must therefore, to a large extent, have the same legal consequences.[125]

If a national court does not refer questions on the interpretation of EEA law to the EFTA Court when the legal situation lacks clarity it cannot be said to have acted in conformity with the principle of sincere cooperation. Article 3 EEA not only requires that the legislative bodies implement EEA law so that it becomes binding in the national legal orders. The EEA/EFTA States are also under an obligation to ensure the homogeneous application of that law, and a failure to do so is a breach of the Member States' contractual obligations. The EFTA Court has established that the national courts are under an obligation to apply the methods of interpretation recognised by national law, as far as possible, to achieve the result sought by the relevant rules

[124] Hreinsson (n 61) 357.
[125] John Temple Lang 'The Principle of Loyal Cooperation and the Role of the National Judge in Community, Union and EEA Law' (2006) 7 ERA Forum, 476, 497.

of EEA law.[126] The result sought by Article 34 SCA is the homogeneous application of the substantive rules of the EEA Agreement. As the Court highlighted in *Jonsson* the advisory opinion procedure is necessary to avoid mistakes in the interpretation and application of EEA law and to ensure coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU.[127] If a national court, instead of requesting an advisory opinion, proceeds on its own interpretation of EEA law that court is contributing to a fragmentation of the internal market and undermines the objective of a dynamic and homogeneous EEA.

3.5 Conclusion

In *Irish Bank* and *Jonsson* the EFTA Court reminded the national courts of the EEA/EFTA States of the fact that they are key players in the functioning of a dynamic and homogeneous legal order. The objective of a dynamic and homogeneous EEA has led the Court to interpret and develop the EEA Agreement in parallel with EU law, reconciling growing differences between the main text of the EEA Agreement and the EU Treaties. On the basis of homogeneity, the EFTA Court has established a principle of state liability, which might even extend to liability for the incorrect application of EEA law by national courts. The Court has also established fundamental rights recognised in the EU Charter of Fundamental rights as inherent in the EEA Agreement and mitigated the differences between EU primary law and the main part of the Agreement. The principles of reciprocity and loyal cooperation complement the principle of homogeneity. Reciprocity by providing citizens and economic operators the means to enforce their rights in both EEA pillars and loyal cooperation by requiring national authorities, including judicial bodies, to cooperate in order to achieve the homogeneous application of EEA law. One of the most important method of cooperation is the advisory opinion procedure in Article 34 SCA.

A national court of last instance's refusal to refer questions on the interpretation of the EEA Agreement, when the legal situation lacks clarity, is liable to harm the objective of a dynamic and homogeneous EEA and lead to a fragmentation of the internal market. Holding that national courts are competent to satisfy the standards of Article 6(1) ECHR by adequately protecting EEA based rights, as Fredriksen and Franklin do,[128] is not an argument against an obligation to refer. It is an argument that Article 34 SCA is not a necessary procedural safeguard for individual rights. In this author's opinion, such an argument overlooks the fact that the purpose

[126] *Engilbertsson* (n 31) para. 159.
[127] *Jonsson* (n 10) para. 60.
[128] Fredriksen and Franklin (n 35) 672

of Article 34 SCA is not only to adequately protect EEA based rights, but to ensure compliance with EEA law in all situations and secure a homogeneous application of the common legislation. As Baudenbacher points out, the advisory opinion procedure is not about right and wrong, it is about authority and the need to ensure homogeneity of the law in the EEA and thereby also about guaranteeing legal certainty.[129]

The Court's reasoning in *Irish Bank*, discussed in Chapter 2, corresponds well with its development of the principles of homogeneity and reciprocity and underlines the important role that national courts are entrusted with, pursuant to the principle of loyal cooperation, in the achievement of a dynamic and homogeneous EEA. An examination of these principles shows that Article 34 SCA is as important of a component in EEA law, as Article 267 TFEU is in EU law. When the legal situation lacks clarity, it is objectively necessary for courts to request an advisory opinion in order to facilitate the achievement of these objectives. There is therefore no reason as to why courts in the EEA/EFTA States should enjoy a wider margin of discretion in refusing to make references to the EFTA Court.

As has been discussed in the section above a decision not to refer can be a breach of the principle of loyal cooperation. Such a decision is also liable to result in the incorrect application of EEA law by national courts which can have legal consequences for individuals of the EEA/EFTA States. A decision not to refer, as was noted by the Court in *Irish Bank* may be fall foul of the standards in Article 6(1) ECHR.[130] Moreover questions may be raised as to whether such a decision can contribute to a finding of state liability or result in infringement proceedings by the EFTA Surveillance Authority. These issues will be considered in the next chapter.

[129] Baudenbacher, 'The EFTA Court: Structure and Tasks' (n. 7) 158-159.
[130] *Irish Bank* (n 9) para. 64.

4 Subjective Reasons to Refer

The discussion above was concerned with how a decision by a national court not to refer questions on the interpretation of EEA law to the EFTA Court when the legal situation lacks clarity adversely affects the objectives of the EEA Agreement. Non-referral can also have more subjective consequences. A refusal to refer can limit an individual's opportunities of enforcing rights which are conferred on him by EEA law. Such a decision may contribute to the wrongful application of EEA law and thus lead to damages or result in infringement proceedings by the EFTA Surveillance Authority ('ESA'). This chapter will examine these consequences in comparison to the situation as it is under EU law.[131]

4.1 Article 6(1) ECHR

It may be recalled that in *Irish Bank* the EFTA Court held that national courts of last instance should keep in mind that when a court of tribunal against whose decision there is no judicial remedy under national law refuses a motion to refer a case to another court it cannot be excluded that such a decision may fall foul of the standards of Article 6(1) ECHR.[132] Article 6(1) ECHR provides that in the 'determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

The basis for the Court's reasoning in *Irish Bank* was the judgment of the European Court of Human Rights (ECtHR) in *Ullens de Schooten and Rezabek*[133] in which the two applicants, respectively brought decisions of the Belgian Cour de Cassation and the Conseil d'État not to refer questions, in criminal proceedings against them, to the CJEU for a preliminary ruling. The ECtHR held that:

> It should further be observed that the Court does not rule out the possibility that, where a preliminary reference mechanism exists, refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings [...]The same is true where the refusal proves arbitrary [...], that is to say where there has been a refusal even though the applicable rules allow no exception to the principle of preliminary reference or no alternative thereto, where the refusal is based on reasons other than those provided for by the rules, and where the refusal has not been duly reasoned in accordance with those rules. Article 6 § 1 thus imposes, in this context, an obligation on domestic courts to give reasons, in the light of the applicable law, for any decisions in

[131] For a discussion on the consequences of non-referral in EU law see Morten Broberg 'National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom' (2016) 22 European Public Law, 243.
[132] *Irish Bank* (n 9) para. 64.
[133] *Ullens de Schooten and Rezabek v. Belgium* Apps. nos. 3989/07 and 38353/07 (ECtHR, 20 September 2011).

> which they refuse to refer a preliminary question, especially where the applicable law allows for such a refusal only on an exceptional basis.[134]

Thus, national courts against whose decision there is no judicial remedy, which refuse to refer questions on the interpretation of EU law to the CJEU are obliged to give reasons for their refusal in light of the exceptions provided for in the *CILFIT* line of case law of the CJEU.[135] National courts are required to indicate the reason why they have found that the question is irrelevant, that the EU law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.[136] While the ECtHR did not find there to have been an infringement, as the courts' rulings were reasoned, the ECtHR did find an infringement in *Dhabi v. Italy* holding:

> The Court has examined the Court of Cassation judgment of 15 April 2008 and found no reference to the applicant's request for a preliminary ruling to be sought or to the reasons why the court considered that the question raised did not warrant referral to the CJEU. It is therefore not clear from the reasoning of the impugned judgment whether that question was considered not to be relevant or to relate to a provision which was clear or had already been interpreted by the CJEU, or whether it was simply ignored[...].[137]

According to the wording of Article 34 SCA a court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give an advisory opinion on the interpretation of EEA law. Considering the case law above, this wording is problematic, as it implies that the national court enjoys a margin of discretion, even after it has deemed an advisory opinion necessary in order to give judgment. If the court considers an advisory opinion necessary to give judgment, then a decision not to refer and the subsequent judgment would be arbitrary. It was also established in Chapter 3 that there are objective reasons which necessitate referrals 'if the legal situation lacks clarity' as the Court pointed out in *Jonsson*.[138] If in such situations a national court refuses to refer questions to the EFTA Court it runs the risk of the incorrect application of EEA law and individual rights which are derived from EEA law are not adequately protected. Advisory opinions are therefore necessary when the legal situation lacks clarity. If the legal situation is clear, then there is no need for a reference. This is the same situation as under EU law.

Despite the differences in wording between Article 34 SCA and Article 267 TFEU the two provisions provide an equally important means of protecting individual rights in the respective

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[134] Ibid, paras. 59 and 60.
[135] Ibid, para. 62 and C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.
[136] *Ullens de Schooten* (n 133), para. 62.
[137] *Dhabi v. Italy* App. No. 17120/09 (ECtHR, 8 April 2014), para. 33.
[138] *Jonsson* (n 10) para. 60 and Baudenbacher, 'The EFTA Court: Structure and Tasks' (n. 7) 157.

legal orders. It should be recalled that in *Irish Bank* the Icelandic Supreme Court, had upon appeal of a decision by the Reykjavík District Court to make a reference to the EFTA Court, decided that a question posed by the lower court should be omitted from the reference. The EFTA Court nevertheless, decided to answer that question, stating that the Icelandic Supreme Court did not set out any reasons why the second question originally put by the District Court was omitted.[139] If the EFTA Court emphasizes the need to state reasons for a question to be omitted, and decides to answer the question due to the fact that the decision was not reasoned, it should be equally important that decisions to not make a reference are reasoned. A decision by a court in an EEA/EFTA State not to refer questions to the EFTA Court is an equivalent restriction in the means of enforcing those rights as a decision by a court in an EU Member State not to refer. In a more recent judgment, *Baydar v. the Netherlands*, the ECtHR held that a refusal to refer would infringe the fairness of proceedings where the refusal proves to have been arbitrary, by *inter alia*, not having been duly reasoned.

> Such a refusal may be deemed arbitrary in cases where the applicable rules allow no exception to the granting of a referral or where the refusal is based on reasons other than those provided for by the rules, or where the refusal was not duly reasoned. Indeed, the right to a reasoned decision serves the general rule enshrined in the Convention which protects the individual from arbitrariness by demonstrating to the parties that they have been heard and obliges the courts to base their decision on objective reasons (see Ullens de Schooten and Rezabek v. Belgium, nos. 3989/07 and 38353/07, 20 September 2011, §§ 54-59). [140]

While the rules which allow for a refusal to refer may be held to be clearer in the EU, where the CJEU has established the *acte claire* doctrine, the objective reasons which warrant a refusal to refer under EEA law are much the same. Holding that there is no protection against arbitrariness of national courts applying Article 34 SCA is therefore farfetched considering the EFTA Courts recognition of the principle of effective judicial protection.

The discussion above does not support Fredriksen and Franklin's argument that the obligations flowing from Article 6(1) ECHR are satisfied as long as EEA based rights are adequately protected by the national courts of the EFTA States.[141] Article 6(1) ECHR is about the fairness of proceedings and protection against arbitrary decisions of courts. If a reference to the EFTA Court is necessary and a reference is not made, the procedure is arbitrary. The outcome of the case cannot remedy the arbitrariness of proceedings. The EFTA Court's statements that a decision by a national court against whose decision there is no judicial remedy under national

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[139] *Irish Bank* (n 9) para. 69.
[140] *Baydar v. the Netherlands* App. no. 55385/14 (ECtHR, 24 April 2018), para. 39.
[141] *Fredriksen and Franklin* (n. 35) 672.

law to refuse a motion to refer a question on the interpretation of EEA law to the Court may fall foul of the standards of Article 6(1) ECHR may thus prove well founded.

4.2 State Liability

As mentioned earlier the EFTA Court suggested, in *Kolbeinsson*, that the EEA/EFTA States may incur liability under EEA law for an infringement resulting from the incorrect application of EEA law by national courts.[142] Although the Court did not find the question of such liability to fall within the scope of the questions referred, the Court did not suggest this without reason.

To some extent the national proceedings in *Kolbeinsson* mirror those of *Irish Bank*, as on appeal the Icelandic Supreme Court had amended the questions posed by the Reykjavík District Court. The plaintiff, Þór Kolbeinsson, had suffered damages in a work-related accident. In a judgment of the Icelandic Supreme Court no. 246/2005 he was not awarded any compensation as his own negligence had contributed severely to the accident.[143] In a second set of proceedings Kolbeinsson claimed damages against the State, holding that he should have been awarded damages in the first set of proceedings in light of Council Directives 89/391/EEC, on the introduction of measures to encourage improvements in the safety and health of workers at work,[144] and 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites.[145] As posed by the Reykjavík District Court, the question was asked whether, Article 26(1) of Icelandic Legislative Act no 46/1980,[146] in light of the Supreme Court's interpretation of that provision, complied with these Directives. The Supreme Court decided to amend the questions, holding that the question of the Supreme Court's interpretation was hypothetical, and that the question should only be asked whether the Directives had been correctly implemented.[147] Against the backdrop of this the EFTA Court's reference to *Köbler* seems to have been an attempt by the Court to give some indication as to how they would approach the questions as posed by the District Court. This is supported by the

[142] *Kolbeinsson* (n 96) para. 77.
[143] Judgment of the Icelandic Supreme Court from 20 December 2005 (246/2005).
[144] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.
[145] Council Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eight individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L245/6.
[146] Icelandic Act no. 46/1980, on Working Conditions, Health, Hygiene and Safety in Work places (Lög um aðbúnað, hollustuhætti og öryggi á vinnustöðum).
[147] Judgment of the Icelandic Supreme Court from 23 March 2010 (132/2010).

fact that the existence of a rule of state liability in cases of judicial wrongdoing was argued for by ESA in its written observations.[148]

The Reykjavík District Court did not find the conditions for state liability in Kolbeinsson's case to have been met, a finding which the Supreme Court subsequently confirmed.[149] A very interesting argument is made in the District Court's reasoning where it holds that the former set of proceedings had been final as to a decision of damages, the same claim could not, under the Icelandic law on civil proceedings,[150]be re-examined.[151] This argument may be criticized on the account that, if the District Court claims that the two sets of proceedings regarded the same claim, he should have dismissed the case, and not given a substantial ruling, as the former judgment would have acquired the status of res judicata and been final in regard to the claim. The CJEU approached a similar issue in *Ferreira da Silva*, where it held that proceedings concerning state liability for a decision of a court of last instance do not have the consequence of calling in question that decision as res judicata, the purpose of the proceedings is not the same and the parties not necessarily the same. Thus, the CJEU held that 'the principle of State liability inherent in the EU legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage'.[152] Accordingly the CJEU established that EU law precludes a procedural provision of national law which requires, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible.[153] The Reykjavík District Court's argument suggests that national procedural law requires such setting aside. This means that state liability for damages caused to individuals by breaches of EEA law by a court adjudicating at last instance is excluded in Icelandic law. Pursuant to a complaint to ESA, by Þór Kolbeinsson, the Authority held that by having such a rule in force Iceland had failed to fulfil its obligations arising from the general principle of state liability for breaches of EEA law under the EEA Agreement.[154] ESA therefore clearly interprets the EFTA Court's judgment *Kolbeinsson* as having accepted the existence of state liability in instances of judicial wrongdoing. Although

[148] *Kolbeinsson* (n 96) Report for the Hearing, para. 125.
[149] Judgment of the Icelandic Supreme Court from 21 February 2013 (532/2012).
[150] Icelandic Act no. 91/1991, on civil proceedings (Lög um meðferð einkamála).
[151] Judgment of the Reykjavík District Court from 9 May 2012 (E-10868/2009).
[152] C-160/14 *Ferreira da Silva e Brito and Others* EU:C:2015:565, para. 55.
[153] ibid, para. 60.
[154] Reasoned Opinion of the EFTA Surveillance Authority, 20 January 2016, in Case No. 75004. Decision No: 016/16/COL.

the Icelandic Government initially refused make the necessary amendments to its legislation[155] a draft legislation amending the conditions for the reopening of cases is in the works.[156] It is submitted that, had the reasoned opinion concluded in proceedings before the EFTA Court, the same reasoning as the CJEU adopted in *Ferreira da Silva* is likely to have been adopted in EEA law.

A decision not to refer cannot in and of itself be the cause of damages, as Articles 34 SCA and 267 TFEU are not rules intended to confer rights on individuals. The lack of a referral might however lead to the incorrect application of substantive provisions of EEA law by the court refusing to refer.[157] There is therefore a valid question as to whether a decision, by a court against whose decisions there is no judicial remedy, not to refer questions for a preliminary ruling can contribute to the severity of the infringement in proceedings regarding state liability. Under EU law, it is evident from *Köbler* that the CJEU considers a breach of Article 267(3) TFEU capable of contributing to the severity an infringement.[158] Einarsson considers that the situation might not be the same under EEA law, depending on whether there is an obligation under Article 34 SCA to refer.[159] While Einarsson's views are supported by the fact that a court would not be breaching any EEA law obligation, by not referring, it cannot be overlooked that such an infringement might have been avoided if a national court had referred questions to the EFTA Court in the first place. A lack of a clear obligation to refer under EEA law does not preclude a decision not to refer from being held negligent, especially if a referral was requested during national proceedings and the subsequent decision not to refer was arbitrary. There are situations where there is a clear causal link between damages incurred and a decision not to refer, this might in fact have been the case of the Icelandic Supreme Court in *Kolbeinsson*. These factors should therefore matter in assessing the severity of the infringement.

In this Author's view there should be no differences between how EU law and EEA law view a decision not to refer as contributing to the negligence of the national courts during state

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[155] Reply to the EFTA Surveillance Authority's Reasoned Opinion in Case 75004, dated 27 May 2016 <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=2326> accessed 15 May 2018.
[156] Correspondence between the Icelandic Ministry of the Interior and the EFTA Surveillance Authority regarding Reasoned Opinion in Case 75004, dated 25 April 2017, <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=3987> accessed 24 May 2018.
[157] Broberg (n 131) 249.
[158] *Köbler* (n 97) paras. 117-118 and 123.
[159] Ólafur Jóhannes Einarsson 'Hæstiréttur og EES-samningurinn: Samningsbrotamál og skaðabótaábyrgð' (2011) 64 Úlfljótur, 635, 657-658.

liability proceedings. This view is based on all that has been said above on the need to ensure homogeneity and effective judicial protection.

4.3 Infringement Proceedings

When a national court of last instance refrains from referring questions on the interpretation of EEA law to the EFTA Court the question arises whether the EFTA Surveillance Authority can commence infringement proceedings against the EEA/EFTA State for a breach of its obligations under the Agreement. If ESA considers that an EEA/EFTA State has failed to fulfil an obligation under the EEA Agreement or the SCA, it shall, pursuant to Article 31 SCA deliver a reasoned opinion on the matter giving the State concerned the opportunity to submit its observations. If the State does not comply with the opinion within the period laid down by ESA, the latter may bring the matter before the EFTA Court.

In the EU pillar the CJEU has established that the European Commission may declare a Member State to have failed to fulfil an obligation under the Treaties, under Article 258 TFEU, regardless of which body of the State was liable for the infringement.[160] While the CJEU has never been directly faced with the issue of national courts being held liable under Article 258 TFEU, it has suggested that the criteria for finding a breach by the national judiciary should be applied in a more stringent manner.[161] According to the case law of the CJEU a failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice; that administrative practice must be, to some degree, of a consistent and general nature; and, in order to find that there has been a general and consistent practice, the Commission may not rely on any presumption.[162]

In 2004 the Commission issued a reasoned opinion against Sweden for its failure to fulfil its obligations under Article 267(3) by not introducing the necessary measures to eliminate the Swedish courts of last instance's practice of not making references for preliminary rulings. The Commission also held that Sweden should introduce an obligation on these courts to state reasons for their refusal to refer so that it would be possible to monitor whether they complied with their obligations under Article 267(3).[163] The Swedish Government responded by introducing procedural legislation to resolve the issues, so the case did not proceed to the

[160] C-77/69 *Comission v Belgium* [1970] ECR 237, para. 15. See Maciej Taborowski 'Infringement Proceedings and Non-Compliant National Courts' (2012) 49 CML Rev 1881, 1885.
[161] C-156/04 *Commission v Greece* [2007] ECR I-4129, para. 52.
[162] ibid, para. 50.
[163] Reasoned Opinion 2003/2161, C(2004) 3899, 13 October 2004.

CJEU.[164] If national courts in the EU pillar therefore adopt a consistent practice of not referring questions on the interpretation on EU law the Commission views the infringement as stemming from the legislative branch, for not introducing measures to eliminate such a practice.

In the EFTA pillar the situation is less clear due to the ambiguity of Article 34 SCA. The EFTA Court has established that even though national legislation complies with EEA law, a failure to fulfil obligations may arise due to the existence of an administrative practice which infringes EEA law when the practice is, to some degree, of a consistent nature.[165] Further the Court has established that in proceedings pursuant to Article 31 SCA it is incumbent upon ESA to prove the allegation that the obligation has not been fulfilled, and in doing so ESA may not rely on any presumption.[166] The Court has therefore adopted the same criteria as the CJEU.

The EFTA Surveillance Authority has established that it can find an EEA/EFTA State to have failed to fulfil its obligations in situations where the courts of last instance have adopted a practice which contravenes EEA law. If this was not apparent after the reasoned opinion delivered against the Icelandic State pursuant to Kolbeinsson's complaint,[167] the Surveillance Authority made it very clear in another reasoned opinion addressed to Iceland.[168] In this reasoned opinion the Surveillance Authority held, *inter alia*, that Article 99(2)(j) of the Icelandic Legal Act No. 161/2002 on Financial Undertakings,[169] as interpreted and applied by the Supreme Court of Iceland, fails to ensure the implementation of either Article 23 or 25 of Directive 2001/24/EC.[170] It is worth noting that, the case was an own initiative case opened by ESA following, inter alia, the Icelandic Supreme Court's judgment in case No. 552/2013,[171] in which the Supreme Court had, during the national proceedings, refused a request for an advisory opinion on the interpretation of Articles 23 and 25 of the Directive, on the basis that it had already been decided by the Supreme Court that the legal situation was governed by Icelandic law. Further, in a recent letter of formal notice, which has as of yet not proceeded to a reasoned opinion the Surveillance Authority further held that Iceland had failed to fulfil its obligations

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[164] Paul Craig and Gráinne De Búrca *EU Law – Text, Cases and Materials* (6th ed, Oxford University Press 2016), 450.
[165] E-6/12 *EFTA Surveillance Authority v The Kingdom of Norway* [2013] EFTA Ct. Rep. 618.
[166] E-12/13 *EFTA Surveillance Authority v Iceland* [2014] EFTA Ct. Rep. 58, para. 82.
[167] Reasoned Opinion of the EFTA Surveillance Authority, 20 January 2016, in Case No. 75004. Decision No: 016/16/COL.
[168] Reasoned Opinion of the EFTA Surveillance Authority, 7 February 2018, in Case No. 77308. Decision No. 016/18/COL.
[169] Lög, nr. 161/2002, um fjármálafyrirtæki.
[170] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions [2001] OJ L125/15.
[171] Judgment of the Icelandic Supreme Court from 28 October 2013 (552/2013)

under Protocol 35 EEA, by failing to adopt the necessary measures to ensure that implemented EEA rules prevail over conflicting provisions of national law, and thus failing to ensure that individuals and economic operators can rely on their rights derived from the EEA Agreement. Thereby, the Authority held 'it appears that Iceland has also failed to comply with its obligations under Article 3 EEA.'[172] Although the Surveillance Authority's conclusion is that Icelandic law had failed to implement Protocol 35, which requires that implemented rules of EEA law prevail over contradicting national law, SCA supports its arguments heavily by the fact that the Supreme Court of Iceland has adopted a practice of not letting implemented rules of EEA law take precedence over contravening national law. The Surveillance Authority regards the Supreme Court's practice as a legal authority on the interpretation and therefore application of Article 3 of the Icelandic Act implementing the EEA Agreement.[173] If there has been any reaction from the Icelandic Government regarding this decision, it has as not been published by ESA. It will be interesting to follow whether ESA will bring actions against the Icelandic State before the EFTA Court, pursuant to Article 31(2) SCA, for these infringements.

Speaking at an EFTA Ministerial Meeting in Trondheim, in 2013, then President of the EFTA Court, Carl Baudenbacher, held that from *Irish Bank* and *Jonsson* derived an obligation of national courts of last instance to make a reference in certain cases and that the Court expected this obligation to be respected, and if necessary, enforced.[174] Whether ESA will commence infringement proceedings against a state due to the fact alone that a national court of last instance refuses a motion to refer is questionable. However, if such a practice is adopted during a long period of time and on a consistent basis, there seems little reason to argue that ESA would not have the competences to find that the member state has failed to fulfil its obligations under Article 3 EEA. The two cases above show that ESA will, at the very least, take action against the EEA/EFTA States, when national courts adopt an interpretation of national law which contravenes EEA law and such situations are all the more likely to occur when national courts do not refer questions on the interpretation of the EEA Agreement to the EFTA Court for an advisory opinion.

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[172] Letter of Formal Notice of the EFTA Surveillance Authority, 13 December 2017, in Case No. 71655. Decision No: 212/17/COL.
[173] Lög, nr. 2/1993, um Evrópska efnahagssvæðið.
[174] Carl Baudenbacher 'Oral statement of President Carl Baudenbacher at the EFTA Ministerial Meeting on 24 June 2013
<http://www.eftacourt.int/fileadmin/user_upload/Files/News/2013/24.06.13_President_Baudenbacher_EFTA_Ministerial_2013_Oral_Statement.pdf> accessed 15 May 2018

5 Conclusions

It is important to bear in mind that the Surveillance and Court Agreement was an act of the EEA/EFTA States, and not of the EEA as a whole. The intentions of the Contracting Parties to the SCA may not be confused with the intentions of the Contracting Parties to the EEA Agreement. The SCA was necessary in order to fulfil contractual obligations arising out of the EEA Agreement and the provisions therein must be interpreted in line with those obligations. The discussion above has highlighted that these obligations derive from the principles of homogeneity, reciprocity and loyal cooperation. The EFTA Court has been consistent in interpreting provisions of the SCA in light of these principles and has established that the purpose of Article 34 SCA is to establish cooperation between the EFTA Court and the national courts and tribunals in order to ensure homogeneous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law.[175]

A focus on the purpose of Article 34 SCA is inherent in *Irish Bank*. The Court's approach is interesting for many reasons, most notably in this Author's opinion, is the fact that the Court submits that Article 34 SCA does not confer an obligation to refer.[176] By then delving deeper into reasons of homogeneity, reciprocity and sincere cooperation the Court suggests that other obligations which the EEA/EFTA States have undertaken with the EEA Agreement might confer such an obligation.[177] The reference, by the Court, to the difference in wording between Article 34 SCA and Article 267 TFEU[178] is unclear as it has no impact on the outcome of the case. If the Court really felt that there was no obligation to refer under Article 34 SCA it contradicted that view, not only in its subsequent reasoning, but also in deciding to answer the question that the Supreme Court had omitted. The EFTA Court would not have done this if the decision by the Supreme Court to omit the decision had not been arbitrary. According to Article 34 SCA a national court may request an advisory opinion if it considers it necessary to enable it to give judgments. It was suggested in Chapter 2 that this wording contains a paradox. If the national court decides not to refer it does not consider that an advisory opinion is needed to give judgment. The question of whether an advisory opinion is necessary, in order to secure the correct application of EEA law, must be approached from the perspective of EEA law, not

[175] *Proceedings concerning Otto Kaufmann* (n 22) para. 28, *HCMC* (n 22), para. 33 and *Dr. A* (n 22), para. 34.
[176] *Irish Bank* (n 9) para. 57.
[177] ibid, paras. 58 and 63-65.
[178] ibid, para. 57.

national law. The main consideration is therefore when an advisory opinion is objectively necessary under EEA law. The main part of Chapter 3 was therefore focussed on establishing why a reference to the EFTA Court may be necessary to achieve the objectives of the EEA Agreement. On the basis of those considerations it is submitted that, when the legal situation under EEA lacks clarity, the national courts are under an obligation to refer questions on the interpretation of the EEA Agreement. Otherwise national courts run the risk of applying EEA law incorrectly which undermines the objectives of the EEA Agreement and constitutes an infringement of the principle of loyal cooperation in Article 3 EEA.

The EFTA Court does not consider Article 34 SCA to be a less effective means of enforcing EEA law than Article 267 TFEU is for enforcing EU law. This is evident from the reasoning in *Beatrix Koch*, in which the Court holds that access to justice and effective judicial protection cannot be achieved unless individuals and economic operators must equal access to justice in both the EU and the EFTA pillars of the EEA.[179] *Irish Bank* is well in line with this logic, as the Court invokes the ECtHR's case law on Article 6(1) ECHR regarding access to justice under Article 267 TFEU.[180] How the ECtHR would view the EEA/EFTA national courts of last instance's obligation to state reasons for refusal is unknown. However, when there is an objective necessity to refer questions on the interpretation on the EEA Agreement for an advisory opinion and a national court does not do so, neither the EFTA Court nor the national court can guarantee that EEA rights are adequately protected. Objective necessity arises when a legal situation lacks clarity. The only reason which adequately justifies a refusal to refer questions on the interpretation of EEA law is that the legal situation does not lack clarity. This is the same criteria applied by the CJEU law under the *acte claire* doctrine. When other reasons are invoked as a justification for non-referral, or no reasons at all are invoked, by the national courts in the EEA/EFTA States, the arbitrariness of proceedings is the same as the ECtHR has found to constitute an infringement of Article 6(1) ECHR by the national courts in the EU Member States.

Neither are there substantial reasons for there to be significant differences between the consequences of non-referral in the EU and the EFTA pillars. The subjective interests harmed by a breach of EEA law are the same as the interests harmed by an equivalent breach of EU law. The Court has gone considerable lengths in developing principles which limit any possible

[179] *Beatrix Koch* (n 28) para. 117.
[180] *Irish Bank* (n 9) para. 64.

differences between the two legal orders. As mentioned above, its reference to the ECHR might give citizens and economic operators an avenue to pursue justice before the ECtHR in such situations. The Court's suggestion that a rule of state liability in situations of judicial wrongdoing may apply in EEA law also goes far in limiting these differences and the reasoned opinion by ESA, in which in which it felt that the Icelandic Government did not fulfil its obligation of ensuring the existence of such a rule in the Icelandic legal system[181] seems to have been accepted by the Icelandic Government. An interesting future development will be how ESA concludes its inquiry on the Icelandic Supreme Court's application of Protocol 35.[182]

Article 34 SCA, as interpreted in light of the fundamental objectives of the EEA Agreement and the principles of homogeneity, reciprocity and loyal cooperation, therefore imposes an obligation on national courts to refer questions on the interpretation of EEA law when the legal situation lacks clarity. References to the EFTA Court are necessary in order to achieve a dynamic and homogeneous EEA and the national courts are under an obligation not to undermine this objective. The necessity of such references is further highlighted by the need to effectively protect EEA rights. A national court which refuses a motion to refer when the legal situation lacks clarity runs the risk of the incorrect application of EEA law, which is damaging both to the internal market and to the individual rights affected by such an application. An arbitrary refusal to refer may fall foul of the standards in Article 6(1) ECHR. The incorrect application of EEA law may also contribute to damages which may result in a finding of state liability and ESA may commence infringement proceedings against the EEA/EFTA States if the national courts adopt a consistent practice of not referring questions to the EFTA Court.

[181] Reasoned Opinion of the EFTA Surveillance Authority, 20 January 2016, in Case No. 75004. Decision No: 016/16/COL.
[182] Letter of Formal Notice of the EFTA Surveillance Authority, 13 December 2017, in Case No. 71655. Decision No: 212/17/COL.

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