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# If Not EEA State Liability, Then What? Reflections Ten Years after the EFTA Court's *Sveinbjörnsdóttir* Ruling\*

Carl Baudenbacher \*\*

## I. INTRODUCTION

On 10 December 1998, the European Free Trade Association (“EFTA”) Court held in its landmark ruling in Case E-9/97 *Sveinbjörnsdóttir* that State liability was part of European Economic Area (“EEA”) law. With this, the EFTA Court decided one of the most controversial questions of EEA law. The present article first discusses the scope and aim of the EEA Agreement and the recognition of State liability in Community law. It then analyzes the case law of the EFTA Court and its acceptance by the Court of Justice of the European Communities (“ECJ”) and the Supreme Courts and governments of the EFTA States. It concludes that had the EFTA Court not taken that step ten years ago, the EEA Agreement would have become one-sided, with unequal protection of individual rights in the European Community (“EC”) and the EFTA pillar. The author has served as a judge of the EFTA Court since 1995 and as its president since 2003. He has participated in *Sveinbjörnsdóttir* as well as in all the following State liability cases the EFTA Court has decided.

In October 1991, the negotiations on the EEA Agreement between the then twelve member states of the EC and the then seven EFTA states were informally concluded. The aim of the Agreement was to extend the EC single market to the EFTA States. According to this first draft, the EEA was to be based on a two-pillar system with the law of both pillars, EC and EFTA, being identical in substance but each having its own enforcement institutions. The ECJ was to govern the EC pillar. The EFTA pillar would be governed by a common EEA Court, consisting of five ECJ judges and three judges from EFTA countries, and a common EEA Court of First Instance made up of two ECJ

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judges and three judges from EFTA countries. The main function of the EEA courts was to ensure that the case law in the EFTA pillar developed homogeneously with the practice of the ECJ. However, the ECJ later declared the proposed EEA judicial system incompatible with Community law.<sup>1</sup> Comparing the aims and the context of the EEA Agreement with those of Community law, the ECJ found that the objectives of the Community legal order went beyond the objectives of the Agreement and that the context also differed. According to the ECJ, the EEA was to be established on the basis of an international treaty which merely created rights and obligations between the contracting parties.<sup>2</sup> The ECJ held that the EC Treaty, by contrast, established a new legal order for the benefit of which the States have limited their sovereignty rights, and that the subjects of the new legal order comprise not only the States, but also their nationals, with the essential features being direct effect and primacy. Direct effect means that citizens and economic operators are able to invoke provisions of an international treaty before a court of a Member State if certain conditions are fulfilled. Such provisions take primacy over conflicting provisions of the domestic law of the Member States. These two principles had been recognized by the ECJ as early as 1963<sup>3</sup> and 1964.<sup>4</sup>

On the basis of this comparison, the ECJ concluded that identical wording of EC and EEA law was no guarantee of homogeneity. Since there were no other mechanisms that would secure homogeneity, the ECJ did not consider the fundamental principles of direct effect and primacy to be safeguarded.<sup>5</sup> On the contrary, it assumed that these principles were “irreconcilable with the characteristics of the [EEA] agreement.”<sup>6</sup> The final conclusion was therefore that “the divergences which exist between the aims and context of the agreement, on the one hand, and the aims and context of Community law, on the other, stand in the way of the achievement of the objective of homogeneity in the interpretation and application of the law in the EEA.”<sup>7</sup> As a consequence of ECJ Opinion 1/91, a new version of the institutional chapter of the EEA Agreement was

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<sup>1</sup> See generally *Draft agreement between the Community, 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*, Opinion 1/91, 1991 ECR I-6079 (Dec 14, 1991) (“Opinion 1/91”).

<sup>2</sup> *Id.*, ¶ 20.

<sup>3</sup> *NV Algemene Transport—En Expeditie Onderneming van Gend & Loos v Nederlandse Administratie de Belastingen*, Case C-26/62, 1963 ECR 3, § II.B (Feb 5, 1963).

<sup>4</sup> *Flaminio Costa v ENEL*, Case C-6/64, 1964 ECR 585 (July 15, 1964).

<sup>5</sup> Opinion 1/91, 1991 ECR, ¶¶ 5–29.

<sup>6</sup> *Id.*, ¶ 28.

<sup>7</sup> *Id.*, ¶ 29.

negotiated, which provided for the establishment of a structurally independent EFTA Court.<sup>8</sup>

## II. RECOGNITION OF STATE LIABILITY IN COMMUNITY LAW

### A. BREAKTHROUGH IN *FRANCOVICH*

In view of the fears of the lack of direct effect and primacy of EEA law expressed in Opinion 1/91, it must be noted that less than one month earlier, the ECJ concluded in *Andrea Francovich and Danila Bonifaci and others v Italy* that State liability for the loss and damage caused to individuals by breaches of European Community law is a principle “inherent” to the system of the EC Treaty.<sup>9</sup>

In *Francovich*, the issue was that Italy had not implemented Council Directive 80/897, which provided protection to employees in the event of the insolvency of their employer, a failure that had been confirmed by the ECJ.<sup>10</sup> Two Italian courts had referred to the ECJ for a preliminary ruling the question of whether the country was required to pay compensation for damage caused to workers by this failure.<sup>11</sup> The ECJ held that this question was to be considered in light of the general system and fundamental principles of the EC Treaty.<sup>12</sup> Referring in particular to its jurisprudence in *van Gend en Loos*,<sup>13</sup> *Costa v ENEL*,<sup>14</sup> and *Simmenthal*,<sup>15</sup> the ECJ began its reasoning by recalling that (1) the EC Treaty created its own legal system whose subjects are not only the Member States but also the Member States’ nationals, and (2) that national courts must ensure that the applicable provisions of Community law take full effect and protect the rights which they confer on individuals.<sup>16</sup> The ECJ held that “[t]he full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which

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<sup>8</sup> See Agreement on the European Economic Area (May 2, 1992), OJ (L 1) 3, art 108(2) (Jan 3, 1994).

<sup>9</sup> *Andrea Francovich and Danila Bonifaci and others v Italy*, Joined Cases C-6/90 and C-9/90, 1991 ECR I-5357, ¶¶ 33–35 (Nov 19, 1991).

<sup>10</sup> See generally *Commission v Italy*, Case C-22/87, 1989 ECR 143 (Feb 2, 1989).

<sup>11</sup> *Francovich*, 1991 ECR I-5357, ¶ 7.

<sup>12</sup> *Id.*, ¶ 28–30.

<sup>13</sup> *NV Algemene Transport*, 1963 ECR, § II.B.

<sup>14</sup> *Flaminio Costa v ENEL*, 1964 ECR, 1141.

<sup>15</sup> *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case C-106/77, 1978 ECR 629 (Mar 9, 1978).

<sup>16</sup> *Francovich*, 1991 ECR I-5357, ¶¶ 31–32.

a Member State can be held responsible.”<sup>17</sup> It concluded that this principle was “inherent in the system of the Treaty,”<sup>18</sup> and added that a further basis was to be found in the duty of loyal cooperation of the Member States laid down in Article 5 EC (now Article 10 EC).<sup>19</sup> The argument of Germany, the United Kingdom, Italy and the Netherlands, that the question of whether possible actions against the State for reparation may be brought was a matter of national law, remained unsuccessful.<sup>20</sup>

After stating that State liability was required by Community law, the ECJ found that “the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.”<sup>21</sup> It then defined three conditions for liability in cases of non-implementation of a directive: (1) the result prescribed by the directive should entail the grant of rights to individuals, (2) it should be possible to identify the content of those rights on the basis of the provisions of the directive, and (3) a causal link must exist between the breach of the State’s obligation and the loss and damage suffered by the injured party.<sup>22</sup> With this, a foundation was laid for State liability, but important questions remained open.

## B. CONFIRMATION AND AMPLIFICATION IN *BRASSERIE DU PÊCHEUR*

On March 5, 1996, the ECJ handed down a second landmark ruling on State liability in Joined Cases *Brasserie du Pêcheur* and *Factortame*.<sup>23</sup> It had previously found German statutory rules on the marketing of beer and British conditions relating to the registration of vessels to be in conflict with the Treaty rules on free movement of goods and freedom of establishment.<sup>24</sup> The ECJ rejected the argument put forward by the German, Irish, and Dutch governments that State liability occurs only where the provisions breached are not directly effective.<sup>25</sup> Instead, the ECJ held that there may be cases, such as

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<sup>17</sup> Id, ¶ 33.

<sup>18</sup> Id, ¶ 35.

<sup>19</sup> See id, ¶ 36.

<sup>20</sup> See *Francovich*, 1991 ECR I-5357, ¶ 43 (Opinion of Advocate General Mischo).

<sup>21</sup> *Francovich*, 1991 ECR I-5357, ¶ 38.

<sup>22</sup> Id, ¶ 40.

<sup>23</sup> *Brasserie du Pêcheur SA v Germany, The Queen v Secretary of State for Transport, ex parte Factortame, Ltd*, Joined Cases C-46/93 and C-48/93, 1996 ECR I-1029 (Mar 5, 1996).

<sup>24</sup> See *Commission v United Kingdom*, Case C-246/89, 1991 ECR I-4585, ¶ 39 (Oct 4, 1991); *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others*, Case C-221/89, 1991 ECR I-3905, ¶ 39 (July 25, 1991); *Commission v Germany*, Case C-178/84, 1987 ECR 1227, ¶ 54 (Mar 12, 1987).

<sup>25</sup> *Brasserie du Pêcheur and Factortame*, 1996 ECR I-1029, ¶¶ 18–19.

*Francovich*, in which the provisions of a non-implemented directive lack direct effect, so that reparation has the function of redressing the injurious consequences of a Member state's failure to transpose the directive.<sup>26</sup> Reparation may, however, also be a necessary corollary of the direct effect of the Community provision whose breach has caused the damage.

The ECJ also rejected the argument put forward by the German government

that a general right to reparation for individuals could be created only by legislation and that for such a right to be recognized by judicial decision would be incompatible with the allocation of powers as between the Community institutions and the Member States and with the institutional balance established by the Treaty.<sup>27</sup>

The ECJ replied that “the existence and extent of State liability for damage ensuing as a result of a breach of obligations incumbent on the State by virtue of Community law are questions of Treaty interpretation which fall within the jurisdiction of the Court.”<sup>28</sup> In the absence of an explicit Treaty provision, the ECJ went on, it had “to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system, and, where necessary, general principles common to the legal systems of the Member States,” pursuant to the task conferred on it by Article 164 EC (now Article 220 EC).<sup>29</sup>

The Court then turned to the fact that the second paragraph of Article 215 EC (now Article 288 EC) refers to the general principle common to the laws of the Member States “that an unlawful act or omission gives rise to an obligation on public authorities to make good damage caused in the performance of their duties.”<sup>30</sup> It concluded that the principle of State liability “holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach.”<sup>31</sup> One will notice that in *Francovich*, the ECJ had not followed Advocate General Mischo's proposal to subject the grant of damages by a national court for a breach of Community law to the same conditions as the grant of damages by the ECJ for infringement of that same Community law by a Community institution.<sup>32</sup>

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<sup>26</sup> *Id.*, ¶¶ 20–22.

<sup>27</sup> *Id.*, ¶ 24 (emphasis added).

<sup>28</sup> *Id.*, ¶ 25.

<sup>29</sup> *Id.*, ¶ 27.

<sup>30</sup> *Id.*, ¶ 28.

<sup>31</sup> *Brasserie du Pêcheur and Factortame*, 1996 ECR I-1029, ¶ 32.

<sup>32</sup> See *Francovich*, 1991 ECR I-5357, ¶ 71 (Opinion of Advocate General Mischo).

The ECJ defined three conditions for State liability: (1) the violated rule must have been intended to confer rights on individuals, (2) the breach must be sufficiently serious, and (3) there must be a direct causal link between the breach of the obligation and the damage sustained.<sup>33</sup> For the sake of order, it may be added that the Court clarified shortly after *Brasserie* in Joined Cases *Dillenkofer & Others v Germany* that “the condition that there should be a sufficiently serious breach, although not expressly mentioned in *Francoovich*, was nevertheless evident from the circumstances of that case.”<sup>34</sup> The second condition, that there is a sufficiently serious breach, is the same with regard to the Community’s liability under Article 215 EC (now Article 288 EC) and to Member State liability.<sup>35</sup>

### III. *SVEINBJÖRNSDÓTTIR*: RECOGNITION OF STATE LIABILITY IN EEA LAW

#### A. SECURING HOMOGENEITY AS A MAIN GOAL OF THE EEA AGREEMENT

The EEA Agreement aims to extend the EC single market rules—that is, large parts of harmonized EC economic law and the provisions concerning fundamental freedoms, competition, and state aid law—as far as possible to the contracting EFTA states.<sup>36</sup> Technically speaking, the EC and its Member States form one pillar of the EEA and the participating EFTA States form the other. The two pillars contain separate legal orders and separate enforcement mechanisms but the law in both pillars is largely identical in substance. In order to secure a homogeneous development of the case law in the EEA, Article 6 of the EEA obliges the EFTA Court to interpret the provisions of the EEA Agreement, insofar as they are identical in substance to corresponding rules of Community law, in conformity with the relevant rulings of the ECJ given prior to the date of signature of this Agreement.<sup>37</sup> Under the second paragraph of Article 3 of the Agreement concluded by the EFTA States (Surveillance and

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<sup>33</sup> *Brasserie du Pêcheur and Factortame*, 1996 ECR I-1029, ¶ 51.

<sup>34</sup> *Erich Dillenkofer & Others v Germany*, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94, and C-190/94, 1996 ECR I-4845, ¶ 23 (Oct 8, 1996).

<sup>35</sup> See *Brasserie du Pêcheur and Factortame*, 1996 ECR I-1029, ¶ 55.

<sup>36</sup> See *EFTA Surveillance Authority v Iceland*, Case E-1/03, 2003 EFTA Court Report 143, ¶ 27 (Dec 12, 2003); *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung*, Case C-452/01, 2003 ECR I-9743, ¶ 29 (Sept 23, 2003); Agreement on the European Economic Area, OJ (L 1) 3 at art 1 (naming “respect of the same rules” as one of the aims of the Agreement) (cited in note 8).

<sup>37</sup> Agreement on the European Economic Area, OJ (L 1) 3 at art 6 (cited in note 8).

Court Agreement, “SCA” ),<sup>38</sup> on the same day as the EEA Agreement was signed—May 2, 1992—the EFTA Court must, in the interpretation and application of EEA law, give due weight to the principles laid down by the ECJ’s relevant rulings given after that date. The politically important distinction between old and new case law has been largely qualified in the EFTA Court’s practice.<sup>39</sup>

## B. THE DISCUSSION IN ACADEMIC LITERATURE

From the beginning, the question was discussed whether the ECJ’s judgments acknowledging State liability were relevant rulings within the meaning of Article 6 of the EEA and Article 3 of the SCA.<sup>40</sup> The rules laid down in the EEA Agreement appeared to send mixed signals with regard to the issue of whether direct effect and primacy were part of EEA law. On the one hand, the EEA Agreement emphasizes the significance of establishing a dynamic and homogeneous EEA based on common rules and equal conditions of competition and providing for adequate means of enforcement, including at the judicial level, and the Agreement stresses the importance of achieving such an establishment on the basis of equality and reciprocity with an overall balance of benefits, rights and obligations for the Contracting Parties. It also highlights the important role of individuals through the exercise of the rights conferred on them by the agreement and through the judicial defense of these rights, as well as the need to create a level playing field for individuals and economic operators in both EEA pillars also at the judicial level.<sup>41</sup> On the other hand, Article 7 EEA, unlike Article 249 EC, does not provide that the regulations contained in its annexes are to be “directly applicable” in the EFTA States.<sup>42</sup> Protocol 35 stipulates that “[f]or cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if

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<sup>38</sup> Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, OJ (L 344/1) 3 art 3 (Dec 31, 1994) (“SCA”).

<sup>39</sup> See Carl Baudenbacher, *The EFTA Court—Legal Framework and Case Law* § 2.2 (Luxembourg 3d ed 2008), available online at <[http://www.eftacourt.int/images/uploads/Legal\\_Framework\\_Finalweb.pdf](http://www.eftacourt.int/images/uploads/Legal_Framework_Finalweb.pdf)> (visited Mar 3, 2009) (noting that the EFTA Court has found ECJ court rulings relevant where the provisions of the Community law and the SCA are identical in substance, even though it was not required to follow the case law under the SCA).

<sup>40</sup> See, for example, Carl Baudenbacher, *Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area*, 3 Colum J Eur L 169, 199–200 n 116 (1997); Sven Norberg, et al, *EEA Law: A Commentary on the EEA Agreement* 207 (Fritzes 1993).

<sup>41</sup> Agreement on the European Economic Area, OJ (L 1) 3 at Recitals 4, 8 and 15 of the Preamble (cited in note 8).

<sup>42</sup> Compare id, art 7, with the Treaty Establishing the European Community, 1997 OJ (C 340) 3 art 29, 249 (Nov 10, 1997).



necessary, a statutory provision to the effect that EEA rules prevail in these cases.<sup>43</sup>

### C. THE REFERENCE BY THE REYKJAVÍK DISTRICT COURT

On November 12, 1997, the Reykjavík District Court referred to the EFTA Court two questions: First, it requested an Advisory Opinion on whether Council Directive 80/987/EEC<sup>44</sup> was to be interpreted to mean that national legislation may preclude an employee from receiving payment of a wage claim against an insolvency estate from the State's Wage Guarantee Fund on the grounds that the employee is a sibling of an owner of 40 percent of the shares in the insolvent company. Second, presuming the answer to that question was to the effect that such an employee may not be precluded from receiving payment of a wage claim, it asked whether the State was liable vis-à-vis the employee for not having adapted national legislation when it became a party to the EEA Agreement.<sup>45</sup> Erla Mária Sveinbjörnsdóttir, the plaintiff in the case before the national court, had been dismissed from her position as an employee at a machine workshop.<sup>46</sup> The dismissal came with six months' notice and she was not required to work during the notice period. However, after three months, the machine workshop was declared insolvent.<sup>47</sup> Ms. Sveinbjörnsdóttir filed claims against both the insolvency estate of the machine workshop and the Icelandic Wage Guarantee Fund.<sup>48</sup> After both claims were rejected, she brought an action for compensation against the government of Iceland and argued that it was liable in damages for not having adjusted its national legislation correctly as per the directive.<sup>49</sup>

### D. THE ATTITUDE OF THE GOVERNMENTS AND OF THE EUROPEAN COMMISSION

The governments of Iceland and Norway (EFTA States) and Sweden (an EC State) submitted that the EEA Agreement did not oblige the EFTA States to

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<sup>43</sup> Agreement on the European Economic Area: Protocol on the Implementation of EEA Rules, OJ (L 1) 205, 205 (Jan 1, 1994).

<sup>44</sup> Council Directive 80/987/EEC is part of EEA law according to point 24 of Annex XVIII to the EEA Agreement.

<sup>45</sup> *Erla Mária Sveinbjörnsdóttir v Iceland*, Case E-9/97, 1998 EFTA Court Report 95, ¶¶ 1, 7 (Dec 10, 1998).

<sup>46</sup> *Id.*, ¶ 2.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, ¶ 3.

<sup>49</sup> *Id.*, ¶¶ 4-6.

pay compensation for damages caused to individuals by failure to implement EEA legislation correctly into their national legislation.<sup>50</sup> The ECJ's state-liability case law could not, in their view, be transferred to the EEA Agreement because it was based on special characteristics of the Community legal order that were not present in the EEA Agreement.<sup>51</sup> In other words, they argued that the case law was not relevant within the meaning of Articles 6 EEA and 3(2) SCA.<sup>52</sup> With regard to the alleged fundamental differences between the nature of the EEA Agreement and that of the EC Treaty, the three governments referred in particular to the ECJ's Opinion 1/91, arguing that the EEA Agreement was an international treaty which created rights and obligations only between the contracting parties but lacked the supranational features (direct effect and primacy) that characterize Community law.<sup>53</sup>

The Icelandic government, taking essentially the same position as the governments of Germany, the United Kingdom, Italy, and the Netherlands in *Francoovich*, submitted that the only possible basis for State liability could be the non-contractual liability principles of national law.<sup>54</sup> A second parallel exists with regard to the issue of whether State liability could only be introduced by the "treatygiver." This allocation of powers argument was put forward in *Brasserie* by the German government.<sup>55</sup> In *Sveinbjörnsdóttir*, Iceland made a similar contention and submitted that the matter was for the contracting parties—the governments—to decide.<sup>56</sup> It explicitly stated that if homogeneity should be affected by the absence of State liability, the matter would have to "be dealt with politically and through diplomatic channels as set out particularly in Articles 105 to 111 EEA—the provisions on homogeneity and dispute settlement—and not by the EFTA Court."<sup>57</sup>

The European Commission submitted that in Community law, the principle of State liability rested on three pillars: the notion of the "own legal order" of the Community, the role of national courts in the enforcement of this order, and the good faith obligation in Article 5 EC (now Article 10 EC).<sup>58</sup> The European Commission argued that the fourth, eighth, and fifteenth recitals of

<sup>50</sup> *Sveinbjörnsdóttir*, 1998 EFTA Court Report 95, ¶ 44.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Erla Maria Sveinbjörnsdóttir v Iceland*, Case E-9/97, Report for the Hearing, 1998 EFTA Court Report 115, ¶¶ 54, 67, 79 (Dec 10, 1998).

<sup>54</sup> *Id.*, ¶ 52.

<sup>55</sup> See *Brasserie du Pêcheur and Factortame*, 1996 ECR I-1029 at ¶ 24.

<sup>56</sup> See *Sveinbjörnsdóttir*, Report for the Hearing, 1998 EFTA Court Report 115 at ¶ 62.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*, ¶ 94.

the Preamble to the EEA Agreement especially go a long way in the direction of an EC-like organization, but that “the body of the Agreement, in particular Article 7 EEA and Protocol 35 EEA, makes it quite clear that the EFTA States did not want to create a second EC when they co-operated in the creation of the EEA.”<sup>59</sup> In this context, the Commission also referred to the ECJ’s Opinion 1/91.<sup>60</sup> The Commission concluded that elements of an “own legal order” and of direct effect were not present in the EEA, and therefore the basis for State liability was lacking.<sup>61</sup>

#### E. THE ATTITUDE OF THE EFTA SURVEILLANCE AUTHORITY

The EFTA Surveillance Authority (which plays a similar role in the proceedings of the EFTA Court as the European Commission in the proceedings before the ECJ) noted the similarities between the EEA Agreement and the EC Treaty, the homogeneity objective of the EEA Agreement, and the important role played by individuals through the exercise of their rights in judicial proceedings. In view of these considerations, the EFTA Surveillance Authority submitted that the obligations undertaken by the EFTA States included a duty to pay compensation for damages caused to individuals by incorrect implementation of EEA legislation.<sup>62</sup> It would, in the EFTA Surveillance Authority’s view, clearly not be an equal treatment of individuals and economic operators as set out in the fifteenth recital of the Preamble to the EEA Agreement, “if different rules were to apply with regard to the possibilities of being compensated for losses resulting from a failure to correctly implement a directive.”<sup>63</sup>

#### F. THE EFTA COURT’S ANSWER

In its judgment on December 10, 1998, the EFTA Court answered in the negative the question of whether Council Directive 80/987/EEC allows national legislation to preclude an employee from receiving payment of a wage claim against an insolvency estate from the State’s Wage Guarantee Fund on the grounds that the employee is a sibling of an owner of 40 percent of the shares in the insolvent company.<sup>64</sup> The second question, whether the State was liable vis-à-vis the employee for not having adapted national legislation when it became a

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<sup>59</sup> Id, ¶¶ 94–96.

<sup>60</sup> Id at ¶ 96.

<sup>61</sup> See id, ¶¶ 95–96.

<sup>62</sup> See *Sveinbjörnsdóttir*, 1998 EFTA Court Report 95, ¶ 45.

<sup>63</sup> *Sveinbjörnsdóttir*, Report for the Hearing, 1998 EFTA Court Report 115, ¶ 84.

<sup>64</sup> *Sveinbjörnsdóttir*, 1998 EFTA Court Report 95, ¶ 42.

party to the EEA Agreement, was answered in the affirmative.<sup>65</sup> The EFTA Court held that in the absence of an express provision in the EEA Agreement, the question arose whether such a State obligation was to be derived from the purposes and the legal structure of the EEA Agreement.<sup>66</sup> The court referred first to the general aim of the EEA Agreement, as laid down in Article 1, to create a homogeneous European Economic Area.<sup>67</sup> Secondly, the EFTA Court quoted the fourth and fifteenth recitals of the Preamble to the EEA Agreement, which emphasize the goal of establishing a dynamic and homogeneous EEA.<sup>68</sup> Moreover, the EFTA Court pointed to the identity in substance of EC and EEA law and to the mechanisms for ensuring homogeneous interpretation and application of the law in both EEA pillars.<sup>69</sup> The EFTA Court also referred to the important objective of the EEA Agreement: “to ensure individuals and economic operators equal treatment and equal conditions of competition, as well as adequate means of enforcement.”<sup>70</sup> It noted that “the provisions of the EEA Agreement are, to a great extent, intended for the benefit of individuals and economic operators throughout the European Economic Area” and that “the proper functioning of the EEA Agreement is dependent on those individuals and economic operators being able to rely on the rights thus intended for their benefit.”<sup>71</sup>

The EFTA Court concluded that “the homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities were so strongly expressed in the EEA Agreement” that State liability was to be deemed a part of EEA law.<sup>72</sup> With regard to the implementation of directives integrated into the EEA Agreement, this meant that the contracting parties had a duty to compensate for any loss or damage resulting from the incorrect implementation of those directives. A further basis for State liability was found in Article 3 of the EEA Agreement, under which the contracting parties are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under the Agreement.<sup>73</sup> With these holdings, the EFTA Court implicitly rejected the arguments that State liability could only be based on national law and that

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<sup>65</sup> Id, ¶ 65.

<sup>66</sup> Id, ¶ 47.

<sup>67</sup> Id, ¶¶ 47–48.

<sup>68</sup> Id, ¶¶ 50–51.

<sup>69</sup> *Sveinbjörnsdóttir*, 1998 EFTA Court Report 95, ¶ 56.

<sup>70</sup> Id, ¶ 57.

<sup>71</sup> Id, ¶ 58.

<sup>72</sup> Id, ¶ 60.

<sup>73</sup> Id, ¶ 61. Article 3 of the EEA Agreement mirrors Article 10 EC.

such responsibility could only be introduced by the contracting parties. With regard to the latter issue, one must notice that it has not been possible to have the EEA Agreement amended in the fifteen years of its existence. The EFTA Court finally added that it followed from Article 7 EEA and Protocol 35 that “the EEA Agreement [did] not entail a transfer of legislative powers,” but that “the principle of State liability must be seen as an integral part of the EEA Agreement as such.”<sup>74</sup>

As to the conditions for State liability, the EFTA Court reiterated the ones formulated by the ECJ in *Brasserie* without mentioning that judgment.<sup>75</sup>

#### IV. ACCEPTANCE OF *SVEINBJÖRNSDÓTTIR*

##### A. ACADEMIA

Generally speaking, the EFTA Court’s *Sveinbjörnsdóttir* jurisprudence has been well received in academic literature.<sup>76</sup> Critical voices have not so much focused on the Court’s basic approach, but rather on some alleged contradictions in the reasoning.<sup>77</sup> Others argued that *Sveinbjörnsdóttir* was of major importance, but that full reciprocity between the two EEA pillars would only be achieved once the EFTA Court would also recognize direct effect and the primacy of EEA law over conflicting national law,<sup>78</sup> “possibly in a slightly

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<sup>74</sup> *Sveinbjörnsdóttir*, 1998 EFTA Court Report 95, ¶ 63.

<sup>75</sup> *Id.*, ¶¶ 64–69.

<sup>76</sup> See, for example, Lennart Ritter, W. David Braun, and Francis Rawlinson, *EC Competition Law, A Practitioner’s Guide* 10 (Kluwer 2d ed 2000); John Forman, *The EEA Agreement Five Years on: Dynamic Homogeneity in Practice and its Implementation by the Two EEA Courts*, 36 Common Mkt L Rev 751, 774–76 (1999) (noting that *Sveinbjörnsdóttir* opened the door for an expansion of the “direct effect” doctrine); *Editorial Comments, European Economic Area and European Community: Homogeneity of Legal Orders?*, 36 Common Mkt L Rev 697, 700–01 (1999) (observing that the *Sveinbjörnsdóttir* ruling and the EC Court’s endorsement of the outcome, via *Rechberger*, allows State liability under the EEA Agreement to be similar in scope to the liability under the EC’s *Francovich*); Thomas Bruha, *Is the EEA an Internal Market?*, in Peter-Christian Müller-Graff and Erling Selvig, eds, *EEA-EU Relations* 97, 123–24 (Berlin Verlag 1999) (characterizing the EFTA Court’s decision in *Sveinbjörnsdóttir* as a “pragmatic solution” which leaves untouched the sensible aspects of direct effect and primacy of EEA law and the question of whether the primacy issue must be derived from Article 6 EEA).

<sup>77</sup> See Martin Eyjólfsson, *B. EFTA Court*, 37 Common Mkt L Rev 191, 197–98 (2000); Forman, 36 Common Mkt L Rev at 777 (cited in note 76); *Editorial Comments*, 36 Common Mkt L Rev at 700 (cited in note 76). These sources all allege that the statement in paragraph 63 of the EFTA Court’s *Sveinbjörnsdóttir* judgment, “It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that the EEA Agreement does not entail a transfer of legislative powers,” does not harmonize with the recognition of a new legal order.

<sup>78</sup> See Leif Sevón, *The ECJ, the EFTA Court and the National Courts of the EFTA Countries*, in *Rettssteori og Rettsliv* 721, 730 (Festskrift til Carsten Smith 2002) (“In my view, the application of the principle of State liability can thus never be a substitute for, but is rather a complement to, the application

modified form.”<sup>79</sup> Professor Thomas Bruha, who had been a consultant to the Government of the Principality of Liechtenstein during the EEA negotiations, welcomed the basic holding in *Sveinbjörnsdóttir*, but criticized that the EFTA Court performed some sort of an egg dance which may be explained by a certain considerateness toward the distinct dualistic view of the EEA legal order in the Scandinavian countries.<sup>80</sup> The EFTA Surveillance Authority’s first President, Knut Almestad, welcomed the EFTA Court’s *Sveinbjörnsdóttir* judgment as “a landmark decision.”<sup>81</sup>

## B. ECJ

Important support for the EFTA Court also came from the ECJ, which in *Walter Rechberger and others v Austria*<sup>82</sup> was asked by the Landesgericht Linz whether the principle of State liability applied in Austria after January 1, 1994 in view of the fact that Austria had become an EEA/EFTA state on that date. Austria had not implemented the Package Tour Directive in good time and travelers had suffered damage.<sup>83</sup> On January 1, 1995, the country had joined the European Union.<sup>84</sup> In view of the planned accession of four of them to the EU, the five EEA/EFTA states had entered into an agreement on transitional arrangements for a period after the accession of certain EFTA states to the EU on September 28, 1994.<sup>85</sup> According to Article 5 of this agreement, after accession new preliminary-ruling proceedings could be brought before the EFTA Court only in cases in which

of the principles of direct effect and primacy.”). See also Sven Norberg, *Perspectives on the Future Development of the EEA Agreement*, *Afmálisrit Tþór Vilhjálmsson* 367 (Orators 2002). In favor of direct effect and primacy, see also Thomas Bruha, *Is the EEA an Internal Market?* at 123 (cited in note 76).

<sup>79</sup> Leif Sevón and Martin Johansson, *The Protection of the Rights of Individuals under the EEA Agreement*, 24 *Eur L Rev* 373, 385 (1999).

<sup>80</sup> Thomas Bruha, *EFTA-Gerichtshof anerkennt Staatshaftung bei Verstoss gegen EWR-Recht*, *Eur L Rep* 2, 5 (1999).

<sup>81</sup> Knut Almestad, *The Squaring of the Circle: The Internal Market and the EEA*, in Martin Johansson, Nils Wahl, and Ulf Bernitz, eds, *Liber Amicorum in Honour of Sven Norberg* 1, 6 (Bruylant 2006); see also Thérèse Blanchet, *Le Succès Silencieux de Dix Ans d'Espace Économique Européen: Un Modèle pour l'Avenir avec d'Autres Voisins?*, in Johansson, Wahl, and Bernitz, eds, *Liber Amicorum* 101, 113.

<sup>82</sup> *Walter Rechberger and others v Austria*, Case C-140/97, 1999 ECR I-3499 (June 15, 1999).

<sup>83</sup> *Id.*, ¶ 17.

<sup>84</sup> Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, OJ (C 241/09) 21 (Aug 29, 1994), available online at <<http://eur-lex.europa.eu/en/treaties/dat/11994N/htm/11994N.html>> (visited Jun 3, 2009) (requiring Austria to comply with the conditions of accession by January 1, 1995).

<sup>85</sup> Agreement on transitional arrangements for a period after the accession of certain EFTA States to the European Union, 1994–1995 EFTA Court Report 161 (Sept 28, 1994).

the facts occurred before accession and the application was lodged with the court within three months after accession.<sup>86</sup>

Under Article 7 of the transitional Agreement, the EFTA Court of five judges was to conclude all pending cases within six months of accession.<sup>87</sup> This agreement paid insufficient account to the interests of individuals and economic operators. It seems that the governments of the departing EFTA states did not care about that failure, but rather wanted to save the money which would have been necessary for the perpetuation of the five-member court over a reasonable period of time. The result was that the jurisdiction of the EFTA court to hear the case had been excluded. In its ruling of June 15, 1999, the ECJ held that Austria was, according to EEA Article 7 and in conjunction with Section 11 of Protocol 1 to the EEA Agreement, required to transpose the directive in question on the day the EEA Agreement entered into force: January 1, 1994.<sup>88</sup> However, the ECJ declared itself incompetent to rule on a question of interpretation related to the Austrian application of the EEA Agreement during the period preceding its accession to the Community.<sup>89</sup> That Austria subsequently ascended to the European Union did not change anything. The ECJ went on, however, stating:

Moreover, in view of the objective of uniform interpretation and application which informs the EEA Agreement, it should be pointed out that the principles governing the liability of an EFTA State for infringement of a directive referred to in the EEA Agreement were the subject of the EFTA Court's judgment of 10 December 1998 in *Sveinbjörnsdóttir*.<sup>90</sup>

With this statement, the ECJ made it clear that it was aware of the protection gap created by the EFTA governments. The Common Market Law Review stated in its Editorial Comments, "This is more than a '*coup de chapeau*', a salute to the EFTA Court."<sup>91</sup> It went on to conclude, "With this statement, it is important to note, the EC Court appears to endorse the EFTA Court's judgment."<sup>92</sup> John Forman, a head of unit in the Commission's legal service who has pleaded a considerable number of cases before the EFTA Court (albeit not *Sveinbjörnsdóttir*), spoke of "express endorsement" and pointed out that the ECJ also made reference to the principle of uniformity as regards the interpretation and application of the EEA Agreement.<sup>93</sup> Thérèse Blanchet, a former member

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<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> *Rechberger*, 1999 ECR I-3499, ¶ 36.

<sup>89</sup> Id., ¶ 38.

<sup>90</sup> Id., ¶ 39.

<sup>91</sup> *Editorial Comments*, 36 Common Mkt L Rev at 700-01 (cited in note 76).

<sup>92</sup> Id at 700.

<sup>93</sup> Forman, 36 Common Mkt L Rev at 777 n 151 (cited in note 76).

of the legal service of the EFTA Secretariat, stated that the ECJ “a entériné de manière lapidaire cette interprétation dans son arrêt ‘Rechberger’.”<sup>94</sup> It appears that compensation was in fact paid in the framework of a settlement before the referring Austrian court.<sup>95</sup>

### C. ICELANDIC SUPREME COURT

In *Sveinbjörnsdóttir*, the referring Reykjavík District Court accepted the principle of State liability. It found that the conditions for liability were fulfilled and granted the plaintiff compensation. On December 16, 1999, the Supreme Court of Iceland confirmed that judgment on appeal.<sup>96</sup> The Supreme Court formally took notice of the EFTA Court’s opinion, but it did not deviate from the dualistic approach as it relied partially on the domestic tort law to establish liability. State liability in Icelandic law thus derives from two sources: the implementation of the EEA Agreement into domestic law and, according to *Sveinbjörnsdóttir*, the liability inherent in the EEA Agreement as such. In any case, the outcome fully corresponded with the EFTA Court’s *Sveinbjörnsdóttir* ruling.

### D. GOVERNMENTS

Acceptance by Governments was not facilitated by the fact that, in *Sveinbjörnsdóttir*, the European Commission had argued against EEA State liability and in doing so had based its argument, *inter alia*, on Opinion 1/91.<sup>97</sup> The Commission’s position actually came somewhat unexpectedly, since in the EFTA Court’s very first case, *Ravintoloitsijain Liiton Kustannus Oy Restamark v Helsingin Pöytäkirjatoimikunta*, it had straightforwardly advised the EFTA Court to acknowledge direct effect of Article 16 EEA without even mentioning Opinion 1/91. The Commission submitted in that case

that the Contracting Parties have emphasized the importance of the role played by individuals in the EEA through the exercise of the rights

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<sup>94</sup> Thérèse Blanchet, *Le succès silencieux de dix ans d’Espace économique européen* at 115 (“in its *Rechberger* judgment has confirmed this interpretation in a rather lapidary way,” author’s translation) (cited in note 81).

<sup>95</sup> See Georg Gorton, *Staatshaftung im EFTA-Pfeiler des EWR: Zusammenspiel von EuGH und EFTA-GH*, Eur L Rep 321, 323 (1999); Christine Stix-Hackl, *Europa-Seiten im 5-Jahres-Spiegel*, 8 Österreichisches Anwaltsblatt 440, 468 (Aug 2000); Carl Baudenbacher, *Staatshaftung im gesamten Europäischen Wirtschaftsraum: EuGH und EFTA-Gerichtshof im Doppelpass*, 10 Europäisches Wirtschafts & Steuerrecht 425 (2000).

<sup>96</sup> Judgment of the Supreme Court of 16 December 1999, *Íslenska ríkið v Erlu Mariu Sveinbjörnsdóttir*, Case No 236/1999, Hæstirettur Íslands Report 4916 (Dec 16, 1999) (Iceland).

<sup>97</sup> See *Sveinbjörnsdóttir*, Report for the Hearing, 1998 EFTA Court Report 115, ¶ 96 (citing Opinion 1/91 as support for its assertion that the Member States did not intend to create a binding “superior legal order”).



conferred upon them by the Agreement and through the judicial defence of these rights (eighth recital of the Preamble to the Agreement). This indicates that the provisions of the EEA Agreement, despite its differences with the EC Treaty, are capable of producing direct effect and so may be relied upon by individuals before national courts in the legal orders of the EFTA States.<sup>98</sup>

The EFTA Court in *Restamark* avoided a direct answer to the question of whether provisions of the EEA Agreement are capable of having direct effect. It held that it is inherent in Protocol 35 that individuals and economic operators must be entitled to invoke and claim at the national level any rights that could be derived from the provisions of the EEA Agreement as being or having been made part of the respective national legal order if those rights are unconditional and sufficiently precise. For the sake of completeness, it may be added that the EFTA Court used the same approach when dealing with the primacy issue. In the *Einarsson* case,<sup>99</sup> the Court found that, based on Protocol 35, the implemented EEA rules are sufficiently precise and unconditional to be invoked in national courts and take precedence over conflicting rules of national law.<sup>100</sup>

There was another factor which may have weakened the persuasive power of *Sveinbjörnsdóttir*. At the 1999 Nordic Law Conference in Oslo, the Judge-Rapporteur in *Sveinbjörnsdóttir* when speaking about that case criticized the Court's Statute for lacking a dissenting opinion system by saying that he found "it very difficult to function if we [the judges], if the occasion arises, are not given the opportunity to give 'a dissenting, or even concurring opinion.' One is bound by the majority, not only with regard to the conclusion, but also with regard to the reasoning leading to the conclusion."<sup>101</sup> He then added that he did "not intend to break this rule by saying something which could be interpreted as a further reasoning."<sup>102</sup> Finally, he called part of the Court's reasoning in *Sveinbjörnsdóttir* an act "ultra vires."<sup>103</sup>

On April 6, 2001, the Reykjavík District Court referred another State liability case to the EFTA Court: E-4/01, *Karlsson*.<sup>104</sup> That case again involved a

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<sup>98</sup> *Ravintoloitsijain Liiton Kustannus Oy Restamark v Helsingin Piiritullikamari*, Case E-1/94, Report for the Hearing, 1994-1995 EFTA Court Report 15, ¶ 96.

<sup>99</sup> *Hörður Einarsson v Iceland*, Case E-1/01, 2002 EFTA Court Report 1 (Feb 22, 2002).

<sup>100</sup> *Id.*, ¶¶ 51-55.

<sup>101</sup> *Rettspresident i EFTA-domstolen Bjørn Haug, Norge [Intervention of EFTA Court President Bjørn Haug]*, Forhandlingene ved Det 35. nordiske juristmøtet i Oslo [Proceedings of the 35th Nordic Law Meeting in Oslo], 1005 (Aug 18-20, 1999), available online at <[http://cms.ku.dk//upload/application/pdf/f563aae9/35\\_51.pdf](http://cms.ku.dk//upload/application/pdf/f563aae9/35_51.pdf)> (visited Mar 4, 2009). As in the ECJ, there are no dissents allowed in the EFTA Court.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1006.

<sup>104</sup> *Karl K. Karlsson v Iceland*, Case E-4/01, 2002 EFTA Court Report 241, ¶ 1 (May 30, 2002).

private operator suing the Icelandic government.<sup>105</sup> Iceland had not abolished its state alcohol import monopoly by January 1, 1994, the date the EEA Agreement entered into force.<sup>106</sup> The *Karlsson* firm was therefore prevented from importing and distributing alcoholic beverages into Iceland.<sup>107</sup> The EFTA Court held that Iceland had violated Article 16 EEA, the provision mirroring Article 31(1) EC.<sup>108</sup>

The Norwegian government, presenting observations under Article 20 of the Court's Statute and Article 97 of the Rules of Procedure Government, went for a rematch. It used this opportunity to urge the EFTA Court to overrule *Sveinbjörnsdóttir*.<sup>109</sup> Referring to *Brasserie*, the Norwegian government submitted that in Community law, the principle of State liability was inseparable from the principle of direct effect, with both principles constituting complementary elements of the supranational Community law—principles that the government claimed to be absent in EEA law.<sup>110</sup> Moreover, the Norwegian government contended that in *Brasserie*, the ECJ based its finding of State liability on the existence of liability of the Community institutions under Article 288 EC, a provision that it claimed had no parallel in EEA law.<sup>111</sup> It was also argued that the goal of the EEA Contracting Parties to establish a dynamic and homogeneous European Economic Area implied a certain job sharing between the EFTA Court and the governments, so to speak. According to this view, it was the responsibility solely of the contracting parties to see that the goal of establishing a dynamic EEA was achieved. The EFTA Court's task would be to secure the homogeneous development of the law in the EEA.<sup>112</sup> The Norwegian government also tried to downplay the significance of the ECJ's reference to the EFTA Court's *Sveinbjörnsdóttir* in *Rechberger*.<sup>113</sup> The government submitted that the citation amounted only to dicta, because the ECJ had denied its competence to interpret the EEA Agreement.<sup>114</sup> In that view, the ECJ did nothing more than to take note of the fact that the question of State liability had been dealt with in *Sveinbjörnsdóttir*, but did not approve the EFTA Court's ruling in that case.<sup>115</sup>

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<sup>105</sup> Id., ¶ 7.

<sup>106</sup> Id., ¶¶ 4, 6.

<sup>107</sup> Id., ¶¶ 5–6.

<sup>108</sup> Id., ¶ 23.

<sup>109</sup> *Karlsson*, Case E-4/01, Report for the Hearing, 2002 EFTA Court Report 254, ¶¶ 51–53 (May 30, 2002).

<sup>110</sup> Id., ¶¶ 54, 71.

<sup>111</sup> Id., ¶ 72.

<sup>112</sup> *Karlsson*, Transcript of the Oral Hearing, 33, on file with the EFTA Court.

<sup>113</sup> Id.

<sup>114</sup> Id.

<sup>115</sup> Id.

In its judgment of May 30, 2002, the EFTA Court noted the reference in *Rechberger* and it confirmed its *Sveinbjörnsdóttir* jurisprudence.<sup>116</sup> The Court held that EC-law-style direct effect was absent in EEA law, but that this did not preclude the existence of an obligation on the State to pay compensation for loss and damage caused to individuals and economic operators as a result of breaches of obligations under the EEA Agreement.<sup>117</sup> It also rejected the argument put forward by the Norwegian government that the concept of EEA State liability must be limited to incorrect implementation of directives.<sup>118</sup> In fact, the EFTA Court had already found in *Sveinbjörnsdóttir* that “it is a principle of the EEA Agreement that the Contracting Parties are obliged to provide for compensation for loss and damage cause[d] to individuals by breaches of the obligations under the EEA Agreement for which the EFTA States can be held responsible.”<sup>119</sup> The EFTA Court therefore ruled that compensation must be paid for breaches of obligations under EEA law if the three conditions defined in *Sveinbjörnsdóttir* were met.<sup>120</sup> Again, the EFTA Court did not make reference to ECJ *Brasserie* on that point.

As far as the conditions in question are concerned, the EFTA Court ruled that Article 16 EEA (which corresponds to Article 31 EC) confers rights upon individuals for which they may seek the protection of national courts.<sup>121</sup> Unlike in *Sveinbjörnsdóttir*, the EFTA Court itself answered the question of whether there was a sufficiently serious breach of EEA law, and the answer was in the affirmative.<sup>122</sup> The Court did so because it had been clear long before the entry into force of the EEA Agreement that a state import monopoly was incompatible with European law.<sup>123</sup> The Icelandic government, having negotiated, drafted, signed, and ratified the EEA Agreement, was in the best position to assess the legislative amendments required to comply therewith and there was sufficient time between the signature of the EEA Agreement and its

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<sup>116</sup> *Karlsson*, 2002 EFTA Court Report 241, ¶ 25.

<sup>117</sup> *Id.*, ¶¶ 25–34.

<sup>118</sup> *Id.*, ¶¶ 31–32.

<sup>119</sup> *Sveinbjörnsdóttir*, 1998 EFTA Court Report 95, ¶ 62.

<sup>120</sup> *Karlsson*, 2002 EFTA Court Report 241, ¶ 32.

<sup>121</sup> *Id.*, ¶ 37.

<sup>122</sup> *Id.*

<sup>123</sup> See *Pubblico Ministero v Flavia Manghera and others*, Case C-59/75, 1976 ECR 91 (Feb 3, 1976) (holding as early as 1976 that Article 37(1) of the EEC Treaty requires Member States to eliminate the exclusive right to import from other Member States).

entry into force.<sup>124</sup> Whether there existed a causal link was left to the national court to decide.<sup>125</sup>

The Norwegian Government gave up its resistance against State liability after the EFTA Court decided *Storebrand Skadeforsikring AS v Veronika Finanger*.<sup>126</sup> The case began as a lawsuit in the Norwegian court system: Veronika Finanger had taken a ride in a motor vehicle driven by an intoxicated driver, and the driver's insurer refused compensation invoking § 7 para 3 litra b of the Norwegian Automobile Liability Act.<sup>127</sup> That provision denies insurance protection to a passenger who rides in a car driven by an intoxicated driver and knows or must have known that the driver was intoxicated.<sup>128</sup> Veronika Finanger nevertheless brought an action for payment against the driver's insurance company.<sup>129</sup>

Upon reference from the Norwegian Supreme Court, the EFTA Court held in 1999 that the provision was incompatible with the EEA Motor Vehicle Insurance Directives.<sup>130</sup> The Supreme Court concurred with the EFTA Court's ruling by finding that Norway had mis-implemented the Directives in question and was therefore in breach of EEA law.<sup>131</sup> Veronika Finanger's claim against the driver's private insurance company was, however, rejected because the majority of the Supreme Court felt that it could not bring an unambiguous provision of Norwegian law into line with a conflicting provision of an EEA law Directive in a horizontal context.<sup>132</sup> Ms. Finanger then brought a second action, this time for compensation against the Norwegian State based on the EFTA Court's State liability jurisprudence. She obtained a favorable judgment in the Oslo City Court but lost before the Court of Appeal.<sup>133</sup> In its judgment of October 28, 2005, the Norwegian Supreme Court followed the EFTA Court's State liability jurisprudence and granted her compensation.<sup>134</sup> The government argued that the breach in question—the mis-implementation of the Motor

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<sup>124</sup> *Karlsson*, 2002 EFTA Court Report 241, ¶ 45.

<sup>125</sup> *Karlsson*, 2002 EFTA Court Report 241, ¶¶ 47–48.

<sup>126</sup> *Storebrand Skadeforsikring AS v Veronika Finanger*, Case E-1/99, 1999 EFTA Court Report 119 (Nov 17, 1999).

<sup>127</sup> *Id.*, ¶¶ 2–4.

<sup>128</sup> *Id.*, ¶ 4.

<sup>129</sup> *Id.*, ¶ 3.

<sup>130</sup> *Id.*, ¶ 36.

<sup>131</sup> *Finanger*, Case No 55/1999, HR-2000-00049B 1811 (Nov 16, 2000) (Norway).

<sup>132</sup> *Id.*

<sup>133</sup> *Finanger II*, Case No 2005/412, HR-2005-01690-P 1365 (Oct 28, 2005) (Norway).

<sup>134</sup> *Id.* at 1365.

Vehicle Insurance Directives—did not constitute a sufficiently serious breach. The Supreme Court did not accept that view.<sup>135</sup>

### E. SWEDISH SUPREME COURT

On November 26, 2004, the Swedish Supreme Court held in *Wåkerås-Andersson v Svenska staten*<sup>136</sup> that Sweden was liable to pay compensation to two workers who had suffered damages caused by the incorrect implementation of the Directive 80/987/EEC in Sweden in 1994, the year Sweden became an EEA/EFTA country. In doing so, the Supreme Court made reference, inter alia, to the EFTA Court's judgments in *Sveinbjörnsdóttir* and in *Karlsson* as well as to the Icelandic Supreme Court's ruling in *Sveinbjörnsdóttir*.<sup>137</sup>

The ECJ's *Andersson* case has an interesting procedural history in relation to *Rechberger*. The Stockholm City Court, which had to deal with Andersson's claims, referred essentially the same questions to the ECJ under the Article 234 EC procedure as the Austrian court did in *Rechberger*. The ECJ handed down both rulings on the same day—June 15, 1999.<sup>138</sup> As in *Rechberger*, the ECJ denied its competence to rule on the question of whether the EEA Agreement applies to a member state during the period preceding its accession to the Community; that is, whether the Swedish State was liable for damages caused to individuals and economic operators by its misimplementation of a directive.<sup>139</sup> Unlike in *Rechberger*, the ECJ in *Andersson* did not make reference to the legal situation created in the EFTA states by the EFTA Court's *Sveinbjörnsdóttir* ruling. The reasons for the unequal course of action in the two cases are unknown. One will not, however, overlook that the composition of the ECJ differed in the two cases. Both cases were decided in plenary session: *Rechberger* by what at the time was called the small plenum, which consisted of nine judges, and *Andersson* by the big plenum, which was made up of eleven judges. The Swedish judge Hans Ragnemalm participated in *Andersson*, but not in *Rechberger*. The Italian judge Federico Mancini participated in *Rechberger*, but not in *Andersson*.<sup>140</sup> The Stockholm City

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<sup>135</sup> Id.

<sup>136</sup> Case No T 2593-01 (Nov 26, 2004) (Sweden).

<sup>137</sup> Id. See also the review by Martin Johansson, *State Liability within the EEA from a Swedish Perspective – Sveinbjörnsdóttir Confirmed*, 2 Eur L Rep 50, 52 (2005).

<sup>138</sup> *Ulla-Brith Andersson and Susanne Wåkerås-Andersson v Sweden*, 1999 ECR I-3551 (June 15, 1999); *Rechberger*, 1999 ECR I-3499.

<sup>139</sup> *Wåkerås-Andersson v Sweden*, 1999 ECR I-3551, ¶¶ 30–33.

<sup>140</sup> The renowned Swedish newspaper *Svenska Dagbladet* alleged that Mr. Ragnemalm had seen to it that the ECJ did not quote *Sveinbjörnsdóttir* in order to help his Government. See *Svenska Dagbladet Måndagen* 8 (June 21, 1999).

Court nevertheless found in favor of the plaintiffs, but the Svea Court of Appeal reversed.<sup>141</sup>

It may be added that the injured workers would most probably have succeeded much earlier had the ECJ referenced the EFTA Court's jurisprudence. The Supreme Court's ruling was of considerable significance also beyond the EEA law context. University of Stockholm Law Professor Ulf Bernitz, one of Sweden's leading academics in the field of European law, noted that

the Swedish Supreme Court's stance in the *Andersson* case concerning liability for damages according to the EEA Agreement has become an important precedent also in relation to the long disputed issue of the Swedish courts' possibilities to award damages to be paid by the Swedish State for violations of the European Convention connected to flaws in Swedish legislation or practices by Swedish courts or other authorities.<sup>142</sup>

## F. LIECHTENSTEIN SUPREME COURT

Surprisingly, EEA State liability has not so far been accepted by the Supreme Court of Liechtenstein, even though Liechtenstein is the only EEA/EFTA State adhering to the monist approach in its constitutional law. According to monist tradition, international law becomes part of the domestically applicable law without any additional implementation or incorporation.<sup>143</sup> In August 2005, the Liechtenstein Court of Appeal ruled in favor of an Austrian physician who had been refused a license to practice in Liechtenstein and who, after having been successful before the EFTA Court and the Liechtenstein Supreme Administrative Court with his claim that this amounted to a breach of the freedom of establishment, had sued the Liechtenstein government for damages.<sup>144</sup> The Court of Appeal did not,

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<sup>141</sup> Cases T 4064-00, *Staten mot Wåkerås Andersson*, and T 4065-00 *Staten mot Andersson*, judgments delivered on 7 June 2001; see Johansson, 2 Eur L Rep at 51 n 15 (2005) (cited in note 137).

<sup>142</sup> Ulf Bernitz, *The Application of EEA Law in Sweden*, in Mario Monti, et al, eds, *Economic Law and Justice in Times of Globalization, Festschrift for Carl Baudenbacher* 29, 35–36 (Nomos 2007).

<sup>143</sup> See Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (Or, The European Way of Law)*, 47 Harv Intl LJ 327, 327 n 1 (2006); J. G. Collier, *Is International Law Really Part of the Law of England?*, 38 Intl & Comp L Q 924, 924–25 (1989). Consider J. G. Starke, *Monism and Dualism in the Theory of International Law*, 17 Brit YB Intl L 66, 70, 74 (1936) (expounding on Kelsen's characterization of monism, which claims that "the state as a legal concept is merely a schema serving to embrace the totality of legal norms which apply over certain persons within a defined territorial area").

<sup>144</sup> *Tschanett*, Judgment CO.2004.2 (Aug 18, 2005) (Liechtenstein).

however, base its judgment on the principles of EEA State liability as developed by the EFTA Court, but on the national Public Liability Act.<sup>145</sup>

In a judgment on December 7, 2006, the Supreme Court of Liechtenstein stuck to this approach, but found in favor of the government holding that the latter had not committed a fault within the meaning of the Liechtenstein Public Liability Act.<sup>146</sup> Upon appeal, the State Court quashed that judgment.<sup>147</sup> On June 5, 2008, the Supreme Court handed down a second judgment along the same lines as the first one.<sup>148</sup> It stated that the case had to be dealt with under national law and reiterated that, in its view, the government had not committed a fault nor had it acted unlawfully.<sup>149</sup> The Supreme Court did not even mention the EFTA Court's state-liability case law, noting only that the EEA's criterion that the breach be sufficiently serious was identical to the requirements of the Liechtenstein Public Liability Act.<sup>150</sup> It must nevertheless be noted that according to the case law of the Liechtenstein State Court, EEA law takes precedence over domestic law.<sup>151</sup> The case has again been appealed to the State Court.

## V. CONCLUSIONS

The EFTA Court summarized its jurisprudence on the mechanisms that aim to secure member state compliance with EEA law in the case *Criminal proceedings against A*, which concerned the freedom of lawyers to provide services in Liechtenstein.<sup>152</sup> The Court reiterated that “[t]he EEA Agreement is an international treaty *sui generis*” containing a distinct legal order of its own, whose depth of integration is less far-reaching than under the EC Treaty, but whose

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<sup>145</sup> Id.

<sup>146</sup> *Beschluss, Oberster Gerichtshof, CO.2004.2-25* (Dec 7, 2006), Jus & News 137 (January 2007). For critical comments on the Supreme Court's judgment, see Von Bernhard Hofstötter, *Rechtsfehlerhafte Abweisung einer EWR-Staatshaftungsklage als judikatives Unrecht?: (Urteil des Obersten Gerichtshofs vom 7. Dezember 2006 [CO.2004.2-25])*, Jus & News 33 (Jan 2007); Constanze Semmelmann, *Staatshaftung in Liechtenstein – ein Sonderweg im EWR?: (Fürstlicher Oberster Gerichtshof Liechtenstein, Urteil vom 7. Dezember 2006, CO.2004.2 – 25.)*, 2007 Eur L Rep 131 (2007).

<sup>147</sup> *Dr med T v Liechtenstein*, StGH 2007/15 (Staatsgerichtshof [State Law Court] acting as Verfassungsgerichtshof [Constitutional Court] 2007) (Liechtenstein), available online at <<http://www.stgh.li/Inhalte/themen/StgHPDF/StGH2007-15.pdf>> (visited Mar 9, 2009).

<sup>148</sup> *Tschanett*, Judgment CO.2004.2-38 (June 5, 2008) (Liechtenstein).

<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> *S GmbH v C AG*, StGH 2006/94 (Staatsgerichtshof [State Law Court] acting as Verfassungsgerichtshof [Constitutional Court] 2008) (Liechtenstein), available online at <<http://www.stgh.li/Inhalte/themen/StgHPDF/StGH2006-94.pdf>> (visited Mar 4, 2009).

<sup>152</sup> *Criminal proceedings against A*, Case E-1-07, 2007 EFTA Court Report 248 (Oct 3, 2007).

scope and objective “go[] beyond what is usual for an agreement under public international law.”<sup>153</sup> With regard to the mechanisms that secure homogeneity between the two EEA pillars, the Court referred to Article 7 and Protocol 35 EEA and stated that it is inherent in the objectives of the EEA Agreement and in Article 3 EEA that national courts are bound to interpret national law as far as possible in conformity with EEA law.<sup>154</sup> The Court further held that in cases of conflict between national law and non-implemented EEA law, the contracting parties may decide whether under their national legal order national administrative and judicial organs can apply the relevant EEA rule directly and thereby avoid violation of EEA law in a particular case.<sup>155</sup> But it also noted that in cases of violation of EEA law a contracting party is obliged to provide compensation for loss and damage caused to individuals and economic operators in accordance with the principle of State liability which is an integral part of the EEA Agreement, if the conditions laid down in *Sveinbjörnsdóttir* and *Karlsson* are fulfilled.<sup>156</sup>

In *Celina Nguyen*, the EFTA Court once more confirmed its state-liability jurisprudence.<sup>157</sup> On the first referred question from the Oslo District Court, it held that the Motor Vehicle Directives precluded an EEA/EFTA State from maintaining legislation excepting redress for noneconomic loss, such as pain and suffering, from the compulsory insurance system.<sup>158</sup> On a second question referred by the national court, the EFTA Court found that the exclusion of redress for noneconomic loss constituted in principle a sufficiently serious breach of EEA law to entail State liability.<sup>159</sup> That means that, as in *Karlsson*, the EFTA Court answered the question whether there was a sufficiently serious breach of EEA law in the affirmative. The case shows that for the courts in Norway, State liability has become part of the “courant normal.”

In Community law, the principle of State liability has been called the “fourteen carat gold” example of European judicial lawmaking.<sup>160</sup> The same can be said with regard to EEA law. Particularly in view of the legal nature of the EEA Agreement, it is understandable that the EFTA Court’s *Sveinbjörnsdóttir* judgment has caused commotion. But meanwhile, EEA State liability has been

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<sup>153</sup> Id., ¶ 37.

<sup>154</sup> Id., ¶ 39.

<sup>155</sup> Id., ¶ 41.

<sup>156</sup> Id., ¶ 42.

<sup>157</sup> *Celina Nguyen v Norway*, Case E-8/07, 2008 EFTA Court Report 223 (June 20, 2008).

<sup>158</sup> Id., ¶¶ 1, 29.

<sup>159</sup> Id., ¶ 36.

<sup>160</sup> Koen Lenaerts and Kathleen Gutman, “Federal Common Law” in the European Union: A Comparative Perspective from the United States, 54 Am J Comp L 1, 81 (2006).



accepted not only by the courts, but also by the governments of Iceland and Norway.

According to the EFTA Court's jurisprudence, EEA State liability follows from the EEA Agreement. With one exception, the EFTA Court has not made reference in its case law to the ECJ's landmark rulings in *Franovich* and in *Brasserie*.<sup>161</sup> It is clear, however, that the recognition of this principle has its basis in the jurisprudence of the ECJ. One of the reasons that has prompted the EFTA Court to acknowledge State liability is the fact that the homogeneity objective is strongly expressed in the EEA Agreement. In *Brasserie*, the ECJ based its finding of State liability on the existence of liability for the Community institutions under Article 215 EC (now Article 288 EC).<sup>162</sup> The EEA's Article 46(2) SCA, mirrors *mutatis mutandis* Article 288(2) EC.<sup>163</sup> In that respect, academic literature on the EEA Agreement points to the case law of the ECJ regarding Article 288(2) EC.<sup>164</sup> Still, Article 46(2) SCA is, by far, not as important as Article 288(2) EC. No cases have been brought before the EFTA Court up to now under that provision. The EFTA Court did not connect its state-liability jurisprudence to the noncontractual liability of EFTA institutions. This may have implications for the definition of the "seriousness" condition.

In its *Karlsson* judgment, the EFTA Court held that:

The finding that the principle of State liability is an integral part of the EEA Agreement differs, as it must, from the development in the case law of the Court of Justice of the European Communities of the principle of State liability under EC law. Therefore, the application of the principles may not necessarily be in all respects coextensive.<sup>165</sup>

Different conclusions have been drawn from that statement. The Norwegian government argued before the Norwegian courts in *Finanger II*, using paragraph 30 of the EFTA Court's *Karlsson* ruling, that the second condition for State liability (the existence of a sufficiently serious breach) was to be seen as stricter in EEA law than in Community law.<sup>166</sup> The Supreme Court rejected that argument and held that the conditions for liability were the same in EEA law as in Community law.<sup>167</sup> One will notice in *Karlsson* that the Norwegian government

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<sup>161</sup> The only exception is *Sveinbjörnsdóttir*, 1998 EFTA Court Report 95, ¶ 67.

<sup>162</sup> See *Brasserie du Pêcheur and Factortame*, 1996 ECR I-1029, ¶ 28.

<sup>163</sup> The provision reads as follows: "In the case of non-contractual liability, the EFTA Surveillance Authority shall, in accordance with the general principles of law, make good any damage caused by it, or by its servants, in the performance of its duties." SCA at art 46, OJ (L 344/1) 3 (Dec 31, 1994) (cited in note 38).

<sup>164</sup> See Norberg, et al, *EEA Law* §4.3.9 at 719 (cited in note 40).

<sup>165</sup> *Karlsson*, 2002 EFTA Court Report 241, ¶ 30.

<sup>166</sup> *Finanger II*, HR-2005-01690-P 1365.

<sup>167</sup> *Id.*, ¶ 58.

had already, as an alternative, proposed a narrower interpretation of the condition that there must be a sufficiently serious breach under EEA law than under EC law that would take into account the differences between the two legal orders.<sup>168</sup> The fact that no legislative powers have been transferred under the EEA Agreement would indicate that a breach could be regarded sufficiently serious only in extraordinary circumstances.<sup>169</sup>

On the other hand, it has been suggested in academic literature that paragraph 30 of the EFTA Court's *Karlsson* judgment must be interpreted to the effect that, in view of the homogeneity objective underlying the EEA Agreement on the one hand and the lack of EC-style direct effect on the other, the requirements for a sufficiently serious breach must be lower in EEA law than in Community law.<sup>170</sup>

In the sphere of EC law, the principle of State liability has in recent years developed in a way that makes it part of an emerging body of tort law.<sup>171</sup> In *Köbler*, the ECJ reaffirmed that the principle of State liability was inherent in the system of the Treaty and applied liability to infringements of Community law committed by the highest court of a Member State.<sup>172</sup> The three conditions laid down in *Brasserie* were held to be applicable, although the requirement of a "sufficiently serious breach" was modified in light of the particular nature of the judicial function.<sup>173</sup> The EFTA Court has not yet dealt with a case of judicial wrongdoing, but academic literature appears to assume that the ECJ's *Köbler* jurisprudence would equally apply in EEA law.<sup>174</sup>

The ECJ's elaboration of State liability in Community law constitutes an enlargement of the level of judicial protection provided by direct effect and supremacy. The possibility of obtaining compensation from the member states is of particular importance in cases involving the horizontal relations between private operators in the context of the non-implementation of a directive, because there is no direct effect in such cases. In EEA law, the principle of State

<sup>168</sup> *Karlsson*, Report for the Hearing, 2002 EFTA Court Report 254 at ¶¶ 74–79.

<sup>169</sup> *Id.*, ¶¶ 75–76.

<sup>170</sup> See Skúli Magnússon, Um hið sérstaka eðli Evrópska efnahagssvæðisins, *Afmálsrit til heiðurs Gunnars G. Schram* 461, 478 (Almenna Bókafelagið 2001); Georg Gorton, *Staatshaftung im EWR nach EuGH Köbler – eine Zwischenbemerkung*, 2004 Eur L Rep 65 (2004). The question was discussed at the Oral Hearing in the *Nguyen* case. See the Oral Hearing transcript, 18 f on file with the EFTA Court.

<sup>171</sup> See *Lenaerts and Gutman*, 54 Am J Comp L at 87–91 (cited in note 160) (discussing the implications of the ECJ's decision to apply the three Community conditions to determinations of the Community's tort liability).

<sup>172</sup> *Gerhard Köbler v Austria*, Case C-224/01, 2003 ECR I-10239, ¶¶ 30–31 (Sept 30, 2003).

<sup>173</sup> *Id.*, ¶ 59.

<sup>174</sup> See Gorton, 2004 Eur L Rep at 67 (cited in note 170); Hofstötter, *Jus & News* at 33 (cited in note 146); Semmelmann, 2007 Eur L Rep at 131 (cited in note 146).

liability is not a complement of direct effect and primacy. Rather it must, together with the maxims of quasi-direct effect (provisions of EEA law that have been implemented into the legal orders of the EEA/EFTA states may be invoked before national courts), quasi-primacy (provisions of EEA law that may be invoked before national courts take primacy over conflicting norms of domestic law on the EEA/EFTA states), and conforming interpretation, compensate for the lack of these principles. State liability is therefore even more important in the EFTA pillar of the EEA than in the EC pillar, because it is a tool to secure member state compliance.<sup>175</sup> One may say that in EEA law we do not have the giant gothic cathedral with the three naves—direct effect, primacy, and State liability—which is characteristic for EC law. Instead, our construction resembles a simple Nordic stave church. But worshipping is possible in both places, with essentially the same results.

Had the EFTA Court not opted for State liability ten years ago, the EEA Agreement would have become one-sided, with extensive protection of individuals and economic operators from the EC and the EFTA in the EC pillar and rather limited safeguards in the EFTA pillar. This would have been incompatible not only with the homogeneity objective underlying the EEA Agreement, but also with the legitimate reciprocity expectations of the Community and of its citizens. To put it bluntly, without the recognition of State liability, the EEA Agreement and the EFTA Court would never have taken off.

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<sup>175</sup> George A. Berman called EC law's State liability principle "the surest legally enforceable mechanism for promoting member state compliance." See George A. Berman, *Member State Liability in the Member State's Own Court: An American Law Comparison*, in Ninon Colneric et al, eds, *Une communauté de droit: Festschrift für Gil Carlos Rodríguez Iglesias*, 305, 306 (BWV 2003).