The Effectiveness of EEA Law and the EFTA Court[1]

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Abstract

The principle of effectiveness is an unwritten principle of European Economic Area law (EEA). It is required by the general principle of homogeneity with European Union law (Article 1(1) EEA Agreement) and the loyalty principle (Art. 3 EEA Agreement). This study explores how this concept has been applied in practice by the EFTA Court within the framework of this legal order during 2010-2020. This European Court has confirmed the existence of the principle as inherent in the EEA Agreement and mostly refers to effectiveness in three different strands of jurisprudence (where effectiveness takes different meanings). The findings of the study show that, while the Court has used the doctrine to guarantee the judicial protection and justiciability of individual rights; it has not defined, clarified or elaborated on the meaning, content and scope of this important principle, A table of most important case-law of the EFTA Court on effectiveness and its different meanings is to be found in the conclusions.

Keywords: *European Economic Area, EEA law, EFTA Court, effectiveness.*

JEL Classification: F59, K33

1. Introduction

As the Preamble and Article 1 of the European Economic Area (EEA) Agreement state, the objective of this *sui generis* European treaty is to establish a dynamic and homogeneous European economic area by extending the internal market and some other extra policies of the European Union (EU now but EC at the time) to some EFTA countries (now Iceland, Norway and Liechtenstein). EEA law rests on two pillars as a mix of supranational law and public international law; the EU at one side and the EFTA-EEA at the other. The interpretation of the EEA Agreement signed in Oporto in 1992 is secured by a parallel treaty, the so called Surveillance and Court Agreement, with the EFTA Court assuring a similar role to that of the Court of Justice of the European Union (EU).[3]

This study focuses on the principle of effectiveness in EEA law as applied by the EFTA Court in its case-law during last decade. In general, the EFTA Court has established in its jurisprudence that the general principles of EU law form part of EEA law as long as this is not irreconcilable with the provisions and characteristics of the EEA Agreement[4]. The term "effectiveness" is somehow ambiguous and has acquired

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[3] Agreement on the European Economic Area (EEA), (OJ 1993 L 1) entered into force on 1.1.1994 and Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice with protocols (SCA) OJ L 344, 31.12.1994. For a recent commentary see Arnesen, Finn, Fredriksen, Harvard Haukeland, Graver, Hans Peter, Mestad, Ola og Vedder, Christoph (eds.). *Agreement on the European Economic Area: A commentary*. C. H. Beck- Hart- Nomos, Munchen, 2018.
[4] Hreinsson, Pall, "General Principles", in: Baudenbacher C. (ed). *The Handbook of EEA Law*. Springer Verlag, Heidelberg, 2016, pp. 349-389, at p. 356.

several meanings, both in EU law and EEA law. The study of the concept in relation to other general unwritten principles is done in section 1.

In EU law, "effectiveness" as such has no explicit legal basis in the EU Treaties alghough it has been frequently used by the Court of Justice of the European Union (ECJ/CJEU)[5] to secure the primacy and authority of EU law over national law. Difficulties remain surrounding the conceptualization of the principle since the Court uses it in a variety of ways depending on the context of every individual case. On one hand, we find effectiveness as a stand-alone principle or expression of general "effet utile"; but, on the other hand, we see the use of the term strongly connected to the effective judicial protection of individual rights and/or as limit to national procedural autonomy of Member States. The concept is furthermore embedded in a complex matrix of various other seminal "constitutional" principles of EU law, namely primacy, direct effect, indirect effect or the obligation of consistent interpretation, and Member State liability for breaches of EU law[6].

The situation can be described as similar under the EEA Agreement as constructed by the EFTA Court. In a broad and general sense, we can refer to effectiveness of EEA law as a comprehensive "constitutional" doctrine requiring an "obligation de resultat" or outcome of effect of EEA law in practice (what Baudenbacher might call effect-related homogeneity[7]). In this way, the effectiveness of EEA law would be constructed on the basis of four complementary unwritten principles in this legal order: quasi primacy, quasi direct effect, conform interpretation and State liability for breaches of EEA law. These concepts are studied in the following section 2.

As it is the case in EU law, there is a more precise way to understand and conceptualize the principle of effectiveness as "effet utile" of the EEA Agreement (efficacy and actual observance of an international treaty as distinguished from mere validity or legality)[8]. This notion comes from public international law. But, more specifically, there is an understanding of the principle derived from EU law that requires, inter alia, the effective protection, application, enforcement and judicial review of EEA rights under the EEA Agreement; both at national and European level[9].

Understood as general unwritten principle of EEA law that requires effective enforcement in national courts, it is strongly related to the notion of justiciability and access to justice for individuals and economic operators and to the principle of loyalty (Article 3 EEA Agreement) for the EEA signatory States and to the Protocol 35 of the EEA Agreement (quasi-primacy, authority and effect of EEA law in national legal dualistic systems). Recital 8 of the preamble to the EEA Agreement even emphasizes the important role that individuals will play in the EEA through the exercise of the rights conferred on them and through the judicial defense of such rights. This principle of

[5] The use of ECJ is preferred in the article rather than Court of Justice of European Union (CJEU).

[6] Mendez-Pinedo, M.Elvira. "The principle of effectiveness of EU law: a difficult concept in legal scholarship", *Juridical Tribune – Tribuna Juridica*, Volume 11, Issue 1, March 2021, pp. 5-29.

[7] Baudenbacher, Carl, "The EFTA Judicial System Reaches the Age of Majority – Accomplishments and Problems". Speech given at the EEA Seminar of the EFTA Secretariat of 19 January 2012 in Brussels available online at: https://eftacourt.int/wp-content/uploads/2019/04/CB_The_EFTA_Judicial_System_reaches_the_Age_of_Majority_final.pdf.

[8] See Pall Hreinsson, General Principles, 2016, *op. cit.*, at p. 376.

[9] See Ólafur Ísberg Hannesson and Ciarán Burke, '*Gunnarsson*…. Citizenship by the back door? *Common Market Law Review*, Issue 4, 2015, vol. 52, pp. 1111-1133 and Pall Hreinsson, General Principles, 2016, *op. cit.*

effectiveness is studied in section 3.

Last but not least, there is a more restrictive use of the principle of effectiveness, when used in parallel to the principle of equivalence. Both work as patrolling principles controlling the content, scope and limits of the procedural autonomy of Member States vis-a-vis EEA law (requirement of remedies for EEA rights). This concept is the one most often referred to by the EFTA Court and EEA law scholars and is presented in section 4.

2. General effectiveness and other unwritten general fundamental principles of EEA law

The concepts of effectiveness, direct effect and primacy as interpreted by the CJEU are strongly interrelated and interlinked in EU law[10]. Von Bogdandy has referred to effectiveness as a fundamental keystone pillar of EU law describing it as: "a source from which virtually all judicial concepts (e.g. direct effect, primacy, effective and uniform application and State liability for breach of EU law) are derived", a source that constitutes the very nature of EU law and the public authority of the European Union itself"[11]. By analogy, the same could be said in the EEA legal order where effectiveness is a concept that underlies the construction of fundamental unwritten principles of EEA law[12], even though there is no primacy nor direct effect under the EEA Agreement.

a. Authority ("Quasi primacy") and effect ("quasi direct effect") of EEA (implemented) law over other national law. The principles of "primacy" and "direct effect" of EU law were not made part of the EEA Agreement due to the fact that no transfer/share of legislative powers was done to the EEA institutions by dualist-tradition States. The authority of EEA law is secured instead through a different set of provisions. Article 3 EEA Agreement (principle of loyalty and/or sincere cooperation) requires the EFTA-EEA States to take all appropiate measures to guarantee the authority and effectiveness of EEA law[13]. This applies to legislative, executive and judicial powers which must secure that the application and enforcement of EEA law is effective in their national legal orders.

Regarding what is sometimes called "quasi primacy"[14] or the need to secure the authority of EEA law vis-a-vis conflicting national law; we have to look to two other

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[10] Tridimas, Takis, *The general principles of EU law*, 2nd edn. Oxford University Press, Oxford, 2006, pp. 418 and 421; Hreinsson, General Principles, 2016, op. cit. at p. 376; and Urska Sadl, 'The role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence From the Citation Web of the Pre-accession Case-Law of the Court Of Justice of the European Union'. *8 European Journal of Legal Studies 18, 2015, p. 23.*

[11] Armin von Bogdandy and Jürgen Bast (eds). *Principles of European Constitutional Law*, 2nd edn Hart/Beck 2011, 29. See also Łukasz Stępkowski, 'The Notion of Effectiveness in the Law of the European Union'. *Studia nad Autorytaryzmem i* Totalitaryzmem, 2016, vol. 38(2) at pp. 81, 82.

[12] Méndez-Pinedo M. Elvira. *EC and EEA law. A comparative study of the effectiveness of European Law*. Europa Law Publishing. Groningen, Netherlands, 2009.

[13] Article 3 EEA Agreement provides: "The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement.". See also EFTA Court, Case E-2/ 10 *Þor Kolbeinsson* [2010] EFTA Ct. Rep. 234, para. 46.

[14] Mendez-Pinedo, M. Elvira, EC and EEA law, *op. cit*., 2009.

provisions: Article 7 and Protocol 35 of the EEA Agrement. Article 7 EEA describes how substantive EEA-law (selective acquis communautaire or acts referred in the annexes of the Agreement or by later decisions of the EEA Joint Committee) must be made part of the internal legal orders of the EFTA-EEA States.[15] It is clear therefore that EEA law has no primacy and potential direct effect as EU law. On the other hand, in order to compensate for this, a Protocol 35 was annexed to the Agreement with the same binding force[16] to secure the authority and effect of EEA law in the national legal orders[17]. The sole Article of Protocol 35 EEA obliges the EFTA-EEA States to guarantee the priority/primacy/precedence of application of nationally implemented EEA rules within their own legal systems. This obligation is viewed by the EFTA Surveillance Authority both as a rule of conflict and a rule of interpretation[18].

As regards to "quasi-direct effect" of EEA law[19], or the rights to invoke EEA provisions before national courts; we have to look to the first judgement of the EFTA Court which clarified the meaning and scope of the same Protocol 35 EEA Agreement. In the case *Restamark*, the Court established to be inherent in its nature that, in cases of conflict, individuals and economic operators must be entitled to invoke and claim, at the national level, any rights that can be derived from the provisions of the EEA Agreement that have been made part of the national legal order, if they are unconditional and sufficiently precise[20].

It was in the later EFTA Court judgment *Einarsson*[21], where the EFTA Court referred to a sort of "quasi primacy" or precedence of application of EEA (implemented) law over other conflicting national law[22]. Later on, the EFTA Court has repeatedly held that it follows from Protocol 35 EEA that EEA rules, which have been implemented into national law, must prevail over other conflicting national provisions, provided that the

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

[16] Article 119 EEA Agreement reads as follows: The Annexes and the acts referred to therein as adapted for the purposes of this Agreement as well as the Protocols shall form an integral part of this Agreement.

[17] Protocol 35 EEA Agreement provides: "Whereas this Agreement aims at achieving a homogeneous European Economic Area, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the European Economic Area; and Whereas this consequently will have to be achieved through national procedures; Sole Article 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."

[18] See letters EFTA Surveillance Authority (ESA) to Iceland from 2017 and 2020 at bibliography.

[19] See 'the main features of the EEA Agreement' in Mendez-Pinedo, M. Elvira, EC and EEA law, op. cit. 2009 and Olafur I. Hannesson and Maria Elvira Méndez-Pinedo, *The authority of European law: Exploring primacy of EU law and effet of EEA law from European and Icelandic perspectives.* Lagastofnun. Codex Publishing, 2012, pp. 196-206, with specific focus on p. 205.

[20] EFTA Court, Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, para. 77.

[21] EFTA Court, Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep 1, para. 50

[22] Ibid. In this case, the Reykjavík District Court raised the question of whether the EEA Agreement contained any provisions dictating which rules should apply if the relevant Icelandic law was deemed incompatible with the EEA Agreement. The EFTA Court ruled that if a provision of national law is incompatible with implemented EEA law, "... a situation has arisen which is governed by the undertaking assumed by the EFTA States under Protocol 35 to the EEA Agreement, the premise of which is that the implemented EEA rule shall prevail."

former are unconditional and sufficiently precise[23]. It has found that EEA States are required that directives, which have been implemented and satisfy certain conditions, prevail over conflicting national law[24].

The interaction between Articles 3, 7 and Protocol 35 EEA Agreement regarding the nature and effects of EEA law over national laws has been therefore settled by the EFTA Court.

As a representative case it is important to refer to case *Criminal Proceedings against A* (case *A*)[25] from 2007, where the authority and effect of EEA law are clearly established vis-a-vis national law on the basis of those provisions. In more recent cases *Wahl*[26] and *ESA v Iceland*[27], the EFTA Court has confirmed this doctrine:

"Article 3 EEA requires the EEA States to take all measures necessary, regardless of the form and method of implementation, to ensure that a directive which has been implemented and satisfies the conditions set out above ["sufficiently precise and clear"] prevails over conflicting national law and to guarantee the application and effectiveness of the directive."

In these cases *Wahl* [28] and *ESA v Iceland*[29], the loyalty obligation in Article 3 of the EEA Agreement becomes a fundamental pillar in order to require national courts to give effect to this principle of priority of implemented EEA law.

During last decade, the Court has firmly consolidated its previous rulings. In *HOB-vín*[30], *Beatrix Koch* (case *Koch*) [31] and *ESA v Norway*[32], it has confirmed that the effectiveness and priority of implemented EEA rules over other national law is an inherent part of the EEA Agreement.

In the case *Wahl*[33], the Court has also explained how EFTA-EEA States have a choice of form and method of implementation when making an act (corresponding to Directive 2004/38/EC) part of their internal legal order[34].

The more recent case *Fjarskipti*[35] clarifies and explains how to construct a different sort of "quasi direct effect" in EEA law. In this case the Court reiterates that Article 3 of the EEA Agreement does not amount to direct applicability, nor is there an inferred recognition of direct effect of EEA law expressly relying on ECJ case-law in

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[23] EFTA Court, Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep 1, para. 50; Case E-2/12 *HOB-vín ehf.* [2012] EFTA Ct. Rep 1092, para. 122; Case E-11/12 *Koch and Others* [2013] EFTA Ct. Rep 272, para. 119; Case E-6/12 *EFTA Surveillance Authority v Norway* [2013] EFTA Ct. Rep 618, para. 66; Case E-15/12 *Wah*l [2013] EFTA Ct. Rep. 534, para. 54 and Case E-12/13 *EFTA Surveillance Authority (ESA) v Iceland* [2014], EFTA Ct. Rep. 58, para. 73.

[24] EFTA Court, Case C-15/12 *Wahl* [2013] EFTA Ct. Rep. 534 para 54. More recently, Case E-13/15 *Bautista v. Liechtensteinische Gesellschaft*, [2015] EFTA Ct. Rep. 720, para 73.

[25] EFTA Court´s case C-01/07 *Criminal proceedings against A*, [2007] EFTA Ct. Rep. 24, para 5.

[26] EFTA Court, case C-15/12 *Wahl* [2013] EFTA Ct. Rep. 534 para 54.

[27] Case E-12/13 *EFTA Surveillance Authority (ESA) v Iceland* [2014], EFTA Ct. Rep. 58, para. 73.

[28] EFTA Court, case C-15/12 *Wahl* [2013] EFTA Ct. Rep. 534 para 54.

[29] Case E-12/13 *EFTA Surveillance Authority (ESA) v Iceland* [2014], EFTA Ct. Rep. 58, para. 73.

[30] Case E-2/12 *HOB-vín ehf.* [2012] EFTA Ct. Rep. 1092.

[31] Case E-11/12 *Beatrix Koch and others* [2013] EFTA Court Report 272 para 132.

[32] Case E-6/12 *EFTA Surveillance Authority v Norway* [2013] EFTA Court Report 618.

[33] EFTA Court, Case C-15/12 *Wahl* [2013] EFTA Ct. Rep. 534 para 54.

[34] Depending on the legal context, it is stated that the implementation of a directive did not necessarily require legislative action, as long as it was implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty.

[35]EFTA Court, Case E- 6/17 *Fjarskipti and Siminn* [2018] EFTA Court Report.

comparing the EEA Agreement to the EU Treaties.[36] However, since the main part of the EEA Agreement has become part of the internal legal order of all EEA States, the Court adds that: "it is therefore possible for an individual, in an action before a national court, to rely upon a provision of the main part of the EEA Agreement, as it is, or has been made, part of domestic law as long as the provisionis "sufficiently clear, precise and unconditional" to be relied upon directly by individuals.

The judgments of the EFTA Court on the interpretation and application of Articles 3 and Protocol 35 EEA Agreement are therefore very clear. The Protocol requires the EFTA States to ensure that EEA rules, which have been implemented into national law and which are unconditional and sufficiently precise, take precedence over other, conflicting, national legislation that is not derived from EEA law. The principle of loyalty (Article 3 EEA A.) supports this obligation.

b. Indirect effect (consistent interpretation of national law) and State liability for breaches of EEA law. Having discussed how the primacy and direct effect principles of EU law are incorporated and adapted to the EEA legal order in order to secure the effect and authority of European rules; we must explain now how the concept of effectiveness lies behind other seminal principles of EU-EEA law: conform or consistent interpretation of national law and State liability for breaches of EEA law. These principles are essential for the EEA legal order. The EFTA Court has referred to Article 3 EEA Agreement as a rationale for creating and developing the seminal principle of State liability in EEA law[37] and the principle of consistent interpretation (sometimes referred as indirect effect for national courts)[38].

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[36] EFTA Court, Case E- 6/17 *Fjarskipti and Siminn* [2018] EFTA Court Report, in particular para 23-27, "23 Article 3 EEA obliges the Contracting Parties to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the Agreement. However, this does not entail that EEA law is directly applicable in domestic proceedings. 24 Furthermore, it is well established that there is no recognition of direct effect under the EEA Agreement. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts (see Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraphs 28 and 29). In order for individuals to be able to invoke an EEA provision in domestic proceedings, that provision must be, or have been made, part of domestic law in the EEA States in accordance with their constitutional and legal traditions. 25 In Liechtenstein and the EU Member States, the EEA Agreement is considered an integral part of domestic law without further action (see, respectively, EFTA Court, Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 35, and the judgment of Court of Justice of European Union in case *Opel Austria*, T-115/94, EU:T:1997:3, paragraph 102. However, in Iceland and Norway, specific implementing measures are required. Both States have incorporated the main part of the EEA Agreement, in authentic language versions, into Icelandic and Norwegian law. 26 Consequently, the main part of the EEA Agreement is part of the internal legal order of all EEA States. It is therefore possible for an individual, in an action before a national court, to rely upon a provision of the main part of the EEA Agreement, as it is, or has been made, part of domestic law. 27 However, not all provisions in the main part of the EEA Agreement are framed in a manner capable of creating rights that individuals and economic operators can invoke before national courts. It has been established that for the provisions of the EEA Agreement to have such effect, they must be unconditional and sufficiently precise (see, inter alia, EFTA Court, Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092, paragraph 122 and ECJ, case *Opel Austria*, cited above, paragraphs 101 and 102. These requirements are necessary to ensure that a provision is sufficiently operational for a court to give effect to it.

[37] Hreinsson, Pall, General Principles, 2016, op. cit., p. 359. See also EFTA Court, Case E-9/97 *Erla María Sveinbjörnsdóttir*, [1998] EFTA Ct. Rep. 95, para. 35 and 61 and case E-2/10 *Þór Kolbeinsson* [2010] EFTA Ct. Rep. 234 para. 85.

[38] See, for example, EFTA Court´s seminal case E-1/07 *Criminal proceedings against A*, [2007] EFTA Ct. Rep. 245, para 39.

It is therefore evident, that EEA law -as interpreted by the EFTA Court - requires to be effective at the national level as EU law is effective in the other twin pillar. This is essential for the protection of individual rights[39] and is a requirement of the principles of homogeneity and reciprocity that sustain the EEA Agreement.

As the principles of consistent interpretation and State liability are not expressly outlined in the EEA Agreement, the Court often concurrently relies upon them referring to other general principles of EEA law such as the principles of homogeneity[40]; legitimate expectations and legal certainty; loyalty or sincere co-operation; and equivalence and effectiveness. These seldom stand alone and are not self-contained, thus reliance on the principles alone (specifically Article 3: loyalty/sincere co-operation) may not give rise to the effective application of EEA law. Nonetheless, it is clear that Article 3 EEA Agreement underpins the concept of consistent interpretation and is considered the rationale for State liability.[41]

c. Principle of consistent interpretation. The EFTA Court has often recognised and emphasised the principle, of conform interpretation[42] stating that national courts "must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule" (case *A*[43] followed up by case *Granville*[44] *and Wahl*. This is found to be inherent in the objectives of the EEA Agreement of establishing a dynamic and homogeneous market and grounded on Article 3 EEA and the duty on the EEA States to take all measures necessary to guarantee the application and effectiveness of EEA law.

In the most recent cases *Engilbertsson*[45] and *Liechtensteinische Gesellschaft*[46], the Court has explained how effectiveness of EEA law and consistent interpreation of national law law go hand in hand (referring to previous cases *Irish Bank*[47] and *Creditinfo*[48]*).*

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[39] In case *HOB-vín*, the EFTA Court held: "It is inherent in the nature of the EEA Agreement that, in cases of conflict between implemented EEA rules and national statutory provisions, individuals and economic operators must be entitled to invoke and to claim at the national level any rights that can be derived from provisions of the EEA Agreement, as being or having been made part of the respective national legal order, if they are unconditional and sufficiently precise." See Case E-2/12 *HOB-vín ehf.* [2012] EFTA Ct. Rep 1092, para. 122. The same approach lies behind the cases *Koch* and *ESA v Norway*, where the EFTA Court states that the EEA Agreement requires that implemented EEA rules shall prevail in cases of possible conflict with other national provisions. EFTA Court, Case E-11/12 *Koch and Others* [2013] EFTA Ct. Rep 272, para. 119 and Case E-6/12 *EFTA Surveillance Authority v Norway* [2013] EFTA Court Report 618, para. 66.

[40] On the principles of homogeneity and recibrocity, see recitals 4, 6 and 15 and Article 1 (1) EEA Agreement. See also See Pall Hreinsson , General Principles, 2016, op. cit., at p. 350-355.

[41] EFTA Court, Case E-2/ 10 *Þor Kolbeinsson* [2010] EFTA Ct. Rep. 234, para 85 and Case E-9/97 *Erla María Sveinbjörnsdóttir*, [1998] EFTA Ct. Rep. 95, para. 61.

[42] The principle of conform interpretation was first established by the Court of Justice of the European Union (CJEU or ECJ) in Case C-14/83 *Von Colson*, EU:C:1984:153.

[43] EFTA Court, Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 245, para. 39.

[44] EFTA Court, E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, para 52.

[45] EFTA Court Case E-25/13 *Gunnar V Engilbertsson v Íslandsbanki hf.* [2014] EFTA Ct. Rep. 524 para 159.

[46] EFTA Court, Case E-13/15 *Bautista v. Liechtensteinische Gesellschaft* [2015] EFTA Ct. Rep. 720.

[47] EFTA Court, Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592.

[48] See in Case E-25/13 *Gunnar V Engilbertsson v Íslandsbanki hf.* in para 159: "Article 3 of the EEA Agreement requires the EEA States to take all measures necessary to guarantee the application and effectiveness of EEA law. It is inherent in the objectives of the EEA Agreement that national courts are

Two limitations apply in this regard. In the first place, in light of Article 7 and Protocol 35 of the EEA Agreement, the Court conceded in *Case A*[49] that only implemented (therefore not the case for non-implemented or incorrectly implemented) EEA rules prevail if in conflict with other domestic law. Secondly, the terminology 'as far as possible'[50] implies some discretion on behalf of the domestic courts whilst acknowledging the option of incompatibility and obligation to have due regard for the general principles of EEA law such as legitimate expectation, legality, and certainty. Therefore, in the interest of ensuring effectiveness and providing a consistent interpretation in conformity with the EEA provision, the State can opt to directly apply the non-implemented EEA rule to the case in question in order to avoid conflict (if that is possible in the domestic system).[51] Or, as the EFTA Court has indicated, go beyond the limits of strict dualism and adopt a more friendly/conform interpretation of national provisions since it was long established in case *Karlsson* that "when interpreting national law, national courts will consider any relevant element of EEA law, whether implemented or not[52]. The same conclusion is reached in case *Wahl*[53]. In view of the EFTA Court, the domestic courts ought to interpret national law in light of both implemented and non-implemented EEA law, thus whilst there is no express duty regarding non-implemented EEA rules the Court infers the necessity of consistent interpretation in the interest of homogeneity.[54]

Consequently, the domestic courts hold broad judicial discretion as to the method of interpretation adopted in endeavouring to go 'as far as possible' to reach the effectiveness of EEA law (ie. a Directive). Under the umbrella of "as far as possible" and 'what lies within the domestic competency' the courts may assess: the semantics, intentions, or purposes of a Directive; general principles of EEA law inclusive of homogeneity, equivalence and effectiveness, and legal certainty; and any other nationally recognised method of interpretation.

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bound, as far as possible, to interpret national law in conformity with EEA law. Consequently, they must, as far as possible, apply the methods of interpretation recognised by national law in order to achieve the result sought by the relevant rule of EEA law". The same paragraph is repeated in case E-3/15 *Bautista v. Liechtensteinische Gesellschaft*, para 74, with further references to previous case-law: "In any case, it is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law in conformity with EEA law. National courts are bound by EEA law to apply, as far as possible, the methods of interpretation recognised by national law in order to achieve the result sought by the relevant rule of EEA law, and consequently comply with Articles 3 and 7 EEA and Protocol 35 EEA (see, for example, Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 123, and Case E-7/13 *Creditinfo Lánstraust* [2013] EFTA Ct. Rep. 970, paragraph 47)."

[49] The EFTA Court, Case E-1/07 *Criminal proceedings against A*[2007] EFTA Ct. Rep. 246, para. 28, 33, 36, 38-41…. dismisses the presence of primacy, direct applicability, and direct effect in EEA law.

[50] See EFTA Court, Joined Cases E-9/07 and E-10/07, *L'Oréal* [2008] EFTA Court Report 258 for discussion of criterion for 'as far as possible'. See also case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, where domestic courts ought to „"do whatever lies within their competence in order to achieve results sought by the Directive, see para 108.

[51] EFTA Court, case E-01/07 *Criminal proceedings against A*, [2007] EFTA Ct. Rep. 245 at para 41 and Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592

[52] EFTA Court Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, para 28 and Case E-12/13 *EFTA Surveillance Authority v Iceland* [2014] EFTA Ct. Rep. 58, para. 74.

[53] In case *Wahl* the Court refers to the judicial defence and enforcement of the rights of individuals, as well as in the public international law principle of effectiveness. EFTA Court, Case E-15/12 *Wah*l [2013] EFTA Ct. Rep. 534, para 54.

[54] EFTA Court Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, para 28-30.

Regarding the interaction of the duty of consistent interpretation and the principle of State liability, the EFTA Court has found in case *Engilbertsson*[55] that national courts ought to first attempt to reach a means of compatible interpretation of national law before turning to arguments about State liability for breaches of EEA law and awarding compensation damages for individuals.[56]. This will be restated in case *Merill Lynch*[57].

d. State liability for breaches of EEA law. Although there is no express reference to State liability in the EEA Agreement; it must be said that the EFTA Court in its judgments in Cases E-9/97 *Erla María Sveinbjörnsdóttir*[58] (from now on *Erla María*), E-4/01 *Karlsson*[59], E-8/07 *Celine Nguyen*[60], case *A*[61], and E-2/12 *HOB-vín ehf*[62] has recognised the principle of State liability for breaches of EEA law[63]. In the first place, the EEA States are oblidged to provide for compensation for loss and damage caused to individuals as a result of breaches of the obligations under the EEA Agreement. Second, it remains to be settled whether the general principle of State liability under the EEA Agreement extends to liability for judicial breaches as the leading Case E-2/10 *Kolbeinsson*[64] makes an unclear reference to the case *Köbler* from the CJEU[65] in an obiter dicta.

The leading case *Erla María* showed similarities to the *Francovich*[66] doctrine of State liability in the EU; but the Court remained adamant that it be distinguishable, rooted in EEA law (noting Articles 3, 7 and Protocol 35), and founded upon the principles of homogeneity and equality as prominently reiterated throughout the EEA Agreement.[67] As the EFTA Court has long repeated ever since, the purpose of the Agreement is to benefit individuals and economic operators, thus protection is necessary in order to secure the ability to effectively rely upon rights contained within.[68]

Consequently, tautologically the Court infers that a State may be liable to

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[55] EFTA Court, Case E-25/13 *Gunnar V Engilbertsson v Íslandsbanki hf.* [2014] EFTA Ct. Rep. 524 para 163. In that regard, it is for the referring court to ascertain what the national rules applicable to the dispute before it are and to do whatever lies within its jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that Article 6(1) of the Directive is fully effective and achieving an outcome consistent with the objective pursued by it (see, to that effect, CJEU, Case C-282/10 *Dominguez*, judgment of 24 January 2012, ECLI:EU:C:2012:33, paragraph 27, and case law cited, and ECJ, Case C-618/10 *Banco Español de Crédito*, judgment of 14 July 2012, EU:C:2012:349, paragraph 58.

[56] This is in alignment with the ECJ case of *Dominguez*, ECLI:EU:C:2012:33.

[57] EFTA Court, Case E-28/13 *Merrill Lynch* [2014] EFTA Ct. Rep. 970, para 45.

[58] EFTA Court, Case E-9/97 *Erla María Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95.

[59] EFTA Court, Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240.

[60] EFTA Court, Case E-8/07 *Celine Nguyen* [2008] EFTA Ct. Rep. 224.

[61] EFTA Court, Case E-01/07 *Criminal proceedings against A*, [2007] EFTA Ct. Rep. 245.

[62] EFTA Court, Case E-2/12 *HOB-vín ehf.* [2012] EFTA Ct. Rep. 1092.

[63] In the case *Erla María Sveinbjörnsdóttir* the Court referred briefly to effectiveness as a principle underpinning state liability in EEA law without elaborating. Case E-9/97 *Erla María Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, para 65.

[64] Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234, para 77.

[65] ECJ, Judgment in *Köbler*, C-224/01, EU:C:2003:513.

[66] The general principle of state liability for breaches of EU law was first established in the *Francovich* judgment in 1991 (*Francovich v. Italy*, Joined Cases C-6/90 and C-9/90 EU:C:1991:428), a ruling by the Court of Justice, before the date of signature of the EEA Agreement.

[67] EFTA Court, Case E-9/97 *Erla María Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, para 61-63.

[68] Ibid, para 57-59.

compensate for the "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"[69]. The Court furthers this in regards to incorrect implementation, in essence claiming that the principle of effectiveness essentially underpins the notion of State liability in EEA law.[70] Finally, much the same as under EU law, three core conditions are expressly laid out for the State to be held liable, they are as follows: there must be an intention to confer rights, the State's breach must be sufficiently serious, and there must be a causal connection between the obligation and resulting loss suffered. The first requirement is assessed as per the *Restamark*[71] 'unconditional and sufficiently precise' criterion, whilst the second element is premised on whether the State had "manifestly and gravely disregarded the limits on its discretion."[72]

In 2007 the Court in *Nguyen*[73] extended the scope of the second element of State liability as to include civil liability regarding seeking redress for the non-economic injury of 'pain and suffering'; subject to the fulfilment of the aforementioned conditions, specifically highlighting the sufficient gravity clause, of 'manifest and grave disregard' for the scope of legislative competencies.[74] As such, domestic provisions "cannot therefore deprive the Directives of their effectiveness"[75], inherently, indirectly connecting the principles of consistent interpretation, State liability, and effectiveness.

As clarified later in the case of *Karlsson*[76] the third element of the State liability test is for the domestic courts to assess, taking into consideration mitigating conditions per se.[77] The Court therein outlined the principle of State liability as an integral part of the EEA Agreement, overtly stating that State liability is not synonymous to direct effect, illuminating that the latter is not present in the EEA rules.

Although both doctrines of conform interpretation and State liability were both summarized a decade ago in the seminal case *Criminal proceedings against A*[78]; it is the more recent case *Kolbeinsson*[79] that is the most pertinent regarding the topic of breaches of EEA law because it shows the scope and limits of the approach taken by the EFTA Court. In *Kolbeinsson* the EFTA Court used Article 3 EEA in order to conclude that, even if a Directive does not provide any penalty for an infringement, it is up to the EEA States to guarantee the application and the effectiveness of EEA law[80].

Unfortunately in the follow up of this case, it will become later on more clear that the lack of EU-style direct effect in EEA law may lead to a situation where the damage suffered by an individual due to the breach of both legislative and judicial powers and the non-recognition of a EEA-right is not justiciable under national law for lack of specific procedural remedies. And this is what happened unfortunatly for Þór Kolbeinsson. Although there is an obligation under EEA law to pay due account to the

[69] Ibid, para 62.
[70] Ibid, para 65.
[71] EFTA Court, Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, para. 77.
[72] EFTA Court, Case E-9/97 *Erla María Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, para 66-68.
[73] EFTA Court, Case E-8/07 *Celine Nguyen* [2008] EFTA Ct. Rep. 224, para 20-35.
[74] Ibid, para 33.
[75] Ibid, para 24.
[76] EFTA Court Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 24, para 25-30, 32, 36-48.
[77] Ibid, para 36,47.
[78] EFTA Court case E-01/07 *Criminal proceedings against A*, [2007] EFTA Ct. Rep. 245
[79] EFTA Court, Case E-2/10 *Þór Kolbeinsson v the Icelandic State* [2009-2010] EFTA Ct. Rep. 234.
[80] Ibid, para 46.

principles laid down by the ruling of the EFTA Court, unfortunately Iceland did never provide effective judicial protection for this citizen (neither a remedy nor a substantive outcome of justice)[81], in spite of the infringement procedure that ESA initiated against Iceland[82].

3. The principle of effectiveness. General considerations. What does it mean? Definition, method and selection of cases

Apart from the notion of general effectiveness as a fundamental pillar of other general principles of EEA law studied above; it is difficult to define and conceptualize the principle of "effectiveness" in EEA law for three main reasons: 1) there is no direct clear legal basis in EEA written law (EEA Agrement), 2) the EFTA Court uses the principle in different lines of jurisprudence and, 3) last but not least, both the EFTA Court and EEA law scholarship (in English) have avoided to create a full comprehensive legal theory with an explanation and clarification of its different meanings[83].

The interpretative methodology followed by the EFTA Court is the same which the ECJ applies when it interprets EU law. This is a direct consequence of the objective to integrate the EEA EFTA states into the EU internal market. This is beyond criticism regarding most of substantive internal market rules[84]. However, it has been noted that the EFTA Court has extended its use of the ECJ's methodology to other parts of EEA law as well. This is particularly true for the Court's decisions on the legal effect of EEA law in the national legal orders of the dualist EFTA states (now only Iceland and Norway)[85].

On the method, Fredriksen has explained how the Court has in fact relied on a functional conception of the homogeneity objective of the EEA Agreement (effect-related or, in fact, effectiveness)[86]; and how this has led to the objective of a judicial protection of EEA rights which is similar to the one offered at the EU pillar, with

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[81] ESA. Reasoned Opinion 20 January 2016 on case Kolbeinsson available at https://www.eftasurv.int/cms/sites/default/files/documents/gopro/2405-775380.pdf The ESA concludes that: "by excluding, under national provisions, such as the provisions in Article 116 of Act no. 91/1991 on Civil Procedure (lög um meðferð einkamála), any State liability for damages caused to individuals by breaches of EEA law by a court adjudicating at last instance, Iceland has failed to fulfil its obligations arising from the general principle of State liability for breaches of EEA law under the EEA Agreement".

[82] Ibid. See also Sigrún Ingibjörg Gísladóttir, 'The Saga of Þór Kolbeinsson', Master's thesis. Faculty of Law, University of Iceland School of Social Sciences, Reykjavík, 2012.

[83] Méndez-Pinedo, María Elvira and Corrigan, Elizabeth. Efectiveness of EEA law and other general principles: some thoughts after a literature review. *Europarättslig Tidskrift (ERT, Swedish Journal of European Law)*, 2021, no. 1, forthcoming.

[84] Fredriksen, Halvard Haukeland. "The EFTA Court." Chapter. In *The Legitimacy of International Trade Courts and Tribunals*, edited by Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein, and Michelle Q. Zang, 138–18. Studies on International Courts and Tribunals. Cambridge: Cambridge University Press, 2018, at p. 160, doi:10.1017/9781108335690.004.

[85] Ibid, at p. 161.

[86] Fredriksen, Halvard Haukeland. "The EFTA Court." 2018, *op. cit.* at p. 163: "From a methodological perspective, the essence of *Sveinbjörnsdóttir* is that the EFTA Court applied the fact that the EEA Agreement as such confers rights on individuals[86] and the fact that Article 3 EEA reproduces almost verbatim the loyalty clause of the EU Treaties (now found in Article 4(3) TEU) to support a *functional* (or *effect-related*) conception of the homogeneity objective: the objective of homogeneity does, *as a matter of a legal principle* (not only as a political goal), embrace the question of the effect of EEA law in the legal orders of the Contracting Parties."

structural consequences for the whole legal system[87].

However, the influence of the CJEU´s case-law on effectiveness has been also more limited since the EFTA Court has not explicitly such an extensive use of the principle of effectiveness as the CJEU in the last decade, with some notable exceptions. This may be due to the different number of cases that make its way up to these two courts but not only.

The selection of judgments of the EFTA Court for the purpose of illustraing the use of the principle of effectiveness (and all their meanings) is somehow tricky. A recent search in the EFTA Court database on May 2021 using the keyword "effectiveness" results in only six cases during the whole history of the court[88], most of them relating to the last strand and meaning of effectiveness (as a tes tor limit to national procedural autonomy studied in section 4 below). None of the cases that the EFTA Court considers most relevant in their database explains or clarifies fully what effectiveness means as a fundamental principle of EEA law and why it has different meanings and it is used in different contexts and strands of jurisprudence.

A search using indirect sources (doctrinal work) gives somehow different and wider findings. According to Ólafur Ísberg Hannesson[89] (writing in 2015), the case *Gunnarsson* is the perfect example of this concept. Hannesson says three important things: 1) "the underlying rationale in *Gunnarsson* is the principle of effectiveness"[90]; 2) "references to the principle of effectiveness are found throughout the Court's case law[91]" and 3) the principle has, of late, been of growing importance in the context of rights protection in the EEA"[92].

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[87] Fredriksen, Halvard Haukeland. "The EFTA Court.", 2018, *op. cit*. at pp. 163-164: "This functional conception of homogeneity has consequences far beyond the question of state liability, as it establishes *a general presumption for judicial protection of EEA-based rights, which, in effect, equals the protection offered in EU law*. One such consequence is the EEA-based duty of national courts to do whatever lies within their competence to interpret and apply national law in conformity to obligations under the EEA Agreement; another is the EEA-based duty of administrative authorities to do likewise; a third is the EEA-based obligation to repay charges levied in breach of EEA law and a fourth is what the EFTA Court more recently has described as the procedural branch of homogeneity. At the same time, however, the EFTA Court acknowledged the limits of its dynamic approach to questions of the legal effect of EEA law when it held that the rather clear wording of Article 7 EEA and Protocol 35 EEA hinders the deduction of an unwritten EEA law principle of direct effect equalling that which exists under EU law. It remains to be seen if the EFTA Court will attempt to remedy this through the imposition of strict liability in cases where the lack of EU-style direct effect is a sine qua non for the loss suffered by an individual. The Court has not yet had the opportunity to express itself on the matter, but the by now well-established functional conception of homogeneity does suggest an answer in the affirmative.".

[88] When effectiveness is not used as a keyword but as a general term used in the text of the rulings, the results went up to 83 cases (as consulted on 10 May 2021). The six cases where effectiveness is a key issue (keyword) for the EFTA Court are the following ones (in reverse chronological order): case E-10/17 *Nye Kystlink AS v Color Group AS and Color Line AS*; Case E-16/16 *Fosen-Linjen AS v AtB AS*; case E-3/15 *Bautista v. Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde* Vaduz; case E-25/13 *Gunnar V. Engilbertsson v Íslandsbanki hf*.; case E-24/13 *Casino Admiral AG v Wolfgang Egger* and case E-11/12 *Beatrix Koch, Dipl. Kfm. Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein)* AG.

[89] Hannesson, Ólafur Ísberg, Comment on case Gunnarsson, 2015, *op. cit*., p. 1119.

[90] Ibid, p. 1118.

[91] EFTA Court, Case E-9/97 *Erla María Sveinbjörnsdóttir* [1998] EFTA Ct Rep. 95. para 58

[92] See discussion in Guðmundsóttir, Dóra. Note on Case E-3/11*Sigmarsson*, *Common Market Law Review*, 2012, no. 49, 2019. Recent cases referring to the principle include: Case E-8/07, *Celina Nguyen*, [2008] EFTA Ct. Rep. 224, para 24; Case E-11/12 *Beatrix Koch and Others* [2013] EFTA Ct. Rep. 272, para 132; Case E-1/11, *Dr A*, [2011] EFTA Ct. Rep. 484, para 74; Case E-12/10 *ESA v. Iceland* [2011] EFTA Ct. Rep.

A year later, Pall Hreinsson also refers to the principle of effectiveness in the case-law of the EFTA Court and seems to agree with the selection of cases done by Hannesson in his study of the general principles of EEA law done in 2016[93]. Hreinsson ads the seminal case *Kolbeinsson*[94] to the list as a perfect example of "effectiveness" in practice as well as mentioning other cases[95].

Both cases *Gunnarsson* and *Kolbeinsson* refer to the strong protection of individual rights that EEA law must provide at the end. Apart from these two authors who a make a selection of most relevant cases in 2015 and 2016; no other study of EEA law has treated or focused directly on the use of the principle of effectiveness by the EFTA Court in the last five years.

Last but not least, when the published Reports of the EFTA Court are consulted for years 2016, 2017, 2018, 2019 and 2020[96]; the number of relevant cases mentioning the principle of "effectiveness" is also very limited[97].

Taking into account the diversity of empirical data (judgments from the EFTA Court and most relevant scholarship on effectiveness); a selection and comment on cases has been done following their general relevance to our research questions: what does effectiveness mean for the EFTA Court? when is effectiveness important for the outcome of a case?

Regardless of whether this unwritten part of EEA law is considered an original EEA indepently constructed principle or as a EU law principle also applicable in the EEA legal order (derived from EEA Agreement); any study of EEA law would be incomplete if limited to written law and ignoring unwritten principles of this legal order created by the EFTA Court.

117, paras. 40 and 60; Case E-2/11 *STX Norway Offshore AS and Others* [2012] EFTA Ct.Rep.4, paras. 29 and 76; Case E-4/11 *Arnulf Clauder* [2011] EFTA Ct. Rep. 216, paras. 34 and 46; Case E-3/12 *Stig Arne Jonsson* [2013] EFTA Ct. Rep. 136, para 75and Case E-6/12 *ESA v. Kingdom of Norway* [2013] EFTA Ct.Rep .618, para 112. Hannesson, Ólafur Ísberg, Comment on Gunnarsson, 2015, *op. cit*. p. 1119 and Hreinsson, Pall, General Principles, 2016, *op. cit*..

[93] They rely on similar line of case-law but Hannesson refers to para 132 and Hreinsson refers to para 75-78 of this EFTA Court case E-11/12, *Beatrix Koch and Others*,[2013] EFTA Ct. Rep. 272.

[94] EFTA Court, Case E-2/ 10 *Þor Kolbeinsson* [2010] EFTA Ct. Rep. 234, para. 46 and also later on Case E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, para 52.

[95] EFTA Court, Case E-15/12 *Jan Anfin Wahl* [2013] EFTA Court Report 534, para. 54; Case E-6/13 *Metacom AG* [2013] EFTA Ct Rep 856 para 69; Case E-12/13 *ESA v. Iceland* [2014], EFTA Ct. Rep. 58, para 73.

[96] See all reports from EFTA Court for years 2005-2020 available internet at: https://report.eftacourt.int/.

[97] See Report 2016: principle of effectiveness (rights under certain Directives) is found in case E-17/15 *Ferskar Kjötvörur*, para 96 of the judgement; in case E-28/15 *Jabbi*, para 4; in cases E-15/15 and E-16/15 *Franz-Josef Hagedorn v Vienna-Life Lebensversicherung AG AND Rainer Armbruster v Swiss Life (Liechtenstein) AG*. In case E-24/15 *Walter Waller* the Court refers to a general effectiveness of EEA law (para 41). On the contrary, on case E-19/15 *EFTA Surveillance Authority v the Principality of Liechtenstein*, the EFTA Court refers to a different issue which is the effectiveness of fiscal supervision. See Report 2017: the general effectiveness of EEA law is mentioned in case E-11/16 *Mobil Betriebskrankenkasse*, para 38; the case E-16/15 *Fosen-Lijnen I* refers to principles of effectiveness and equivalence and the case E-19/16 *Thorbjorn Selstad* refers to effectiveness of Directive 2003/88. See Report 2018: we find reference to twin principles of effectiveness and equivalence in case E-6/17 *Fjárskipti* (para 55 and 90) ; case E-10/17 *Nye Kystlink* (para 110 and final ruling) and in case E-8/17 *Henrik Kristofferssen*. See Report 2019: reference is made to case E-7/18 *Fossen-Lijnen II* (effectiveness and equivalence) and case E-2/19 *D and E vs. Liechtenstein* (rights for citizens). See Report 2020: reference is made to case E-4/19 *Campbell v. The Norwegian Government, represented by the Immigration Appeals Board (Utlendingsnemnda – UNE).* Here the Court refers to effectiveness and homogeneity (and supports its finding in previous case E-28/15 *Jabbi*).

For the purposes of this study, we will define three strands and meanings of the principle of effectiveness which are all intended to provide for the best protection of individual rights:

1) Effectiveness as "effet utile" (general efficacy) of the EEA Agreement (international treaty);

2) Effectiveness as effective protection, application, enforcement and judicial review of EEA rights under the EEA Agreement;

3) Effectiveness principle as a twin to principle equivalence as a limit to national procedural autonomy (tests for national laws guaranteeing EEA rights).

These strands mirror the EU development of the principle and originate not directly in the EEA Agreement but in the case-law of the EFTA Court, also located in Luxembourg, and have been commented by scholarship in diverse writings, as studied in next sections 3 and 4 below.

4. Effectiveness as "effet utile" and effective enforcement of EEA law in national courts

As stated in the introduction, apart from a general concept of effectiveness lying behind fundamental principles of EEA law; there are two other more precise ways to understand and conceptualize the principle of effectiveness. One has been used in international law and it refers to the "effet utile" or general efficacy and actual observance of an international treaty, in this case the EEA Agreement[98]. According to Hreinsson, the first time the EFTA Court used this principle in case *Karlsson*, more than one decade ago; the Court referred to the meaning given to it in international law, although the reference was not explained in the judgment[99]. As Baudenbacher has also noted[100], the Court explicitly acknowledged the principle of effectiveness (effet utile) in cases *Clauder*[101]; *Sigmarsson*[102] and STX *Norway Offshore*[103].

The other meaning, still strongly related to effet utile in EU law[104], requires the effective protection, application, enforcement and judicial review of EEA rights under the EEA Agreement; both at national and European level[105]. Understood as general unwritten principle originating in EU law, this conception of effectiveness means, at the end, justiciability of rights and access to justice for individuals (mostly regarding substantive outcomes or effect of EEA law in practice)[106]. Hannesson had previously

[98] Pall Hreinsson, General principles of EEA law, 2016, *op. cit.*, p. 376.

[99] Ibid. See also EFTA court, Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, para 28. Hreinsson refers later on to the case C-15/12 *Wahl* [2013] EFTA Ct. Rep. 534 para 5.

[100] Baudenbacher, Speech 2012, Brussels, *op. cit*.

[101] EFTA Court, case E-4/11 *Arnulf Clauder* [2011] EFTA Ct. Rep. 216, paras. 34 and 46.

[102] EFTA Court, Case E-3/11*Sigmarsson*, see comment by Dóra Guðmundsdóttir, 2012, *op. cit.*

[103] EFTA Court, Case E-2/11 *STX Norway Offshore AS and Others* [2012] EFTA Ct.Rep.4, para. 29 and 76.

[104] Urska Sadl, "The role of Effet Utile", 2015. *op. cit*., 23.

[105] See Hannesson, Ólafur Ísberg, Gunnarsson, *op. cit*., 2015 and Pall Hreinsson, General principles, *op.cit*. 2016.

[106] Although this conclusion is only indirect in Hreinsson´s writings since he follows the definition of Tridimas. Hannesson refers simply to "access to justice". See Tridimas, General Principles, 2006, *op. cit.* pp. 418 and 421 and Hannesson, Ólafur Ísberg, The authority of EU and EEA law, 2012, *op. cit.*, pp. 238-244.

defined effectiveness in a similar way[107] and his definition is in line with the one later adopted by Hreinsson[108]. More recently, it has been summarized it as, *inter alia*, effective protection of EEA rights and effective enforcement of EEA law in national courts[109] (efficacy of law).

From 2007 onwards, Hreinsson notes that "the EFTA Court has more or less refered to the general principle of effectiveness as applied in EU law, *so long* as it is not irreconcilable with the provisions and characteristics of the EEA Agreement".[110] And, in his view, the legal basis of this principle of effectiveness derives and is partly inherent in Article 3 EEA Agreement and the obligation of loyalty for the EEA signatory States, as exemplified by the *Kolbeinsson* case[111], also a private individual who defends his EEA rights in Iceland, with little success.

More recently, Hannesson and Runnarsson refer to effectiveness in their contribution to the FIDE Conference 2020 in The Hague[112]. They mention the principle of effectiveness regarding two issues. One, making reference to the ongoing infringement procedure against Iceland for breach of the EEA Agreement (ESA letter 2017 on Protocol 35 EEA Agreement and case-law of the Supreme Court[113]); and, secondly, in relation to the case *Merril Lynch*[114], where the principle of effectiveness

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[107] Hannesson, Ólafur Ísberg, *Gunnarsson*, 2015, op. cit. p. 1118. "The principle requires the effective protection of EEA law rights and, more generally, the effective enforcement of the rights they derive from EEA law (before the national courts but also, where relevant, before the EFTA Court".

[108] Hreinsson, Pall, General principles, 2006, *op. cit*., p. 376.

[109] Dystland MKF, Finstad, FB and Sørebø I, "Article 7. Binding effect and implementation of EU legal acts. Part II. The Agrement on the European Economic Area. Part I: Objectives and Principles", in Arnesen, Finn, Fredriksen, Harvard Haukeland, Graver, Hans Peter, Mestad, Ola og Vedder, Christoph (eds.). *Agreement on the European Economic Area: A commentary*. C. H. Beck – Hart - Nomos, Munchen, 2018, pp. 248-270, specially on p. 264, http://dx.doi.org/10.5040/9781509922413.

[110] Pall Hreinsson, General Principles, 2006, *op. cit*., p. 376 who refers to case C-8/07 *Celine Nguyen* [2008] EFTA Ct Rep. 224, para 24.

[111] Para 46 of Kolbeinsson (findings of the Court) states: "Neither Directive contains provisions addressing specific forms of sanctions for employers in case they do not provide a safe working environment as required by the Directives. However, Article 3 EEA requires the Member States to take all measures necessary to guarantee the application and effectiveness of European law. This is so even where a directive does not specifically provide any penalty for an infringement or refer for that purpose to national laws, regulations and administrative provisions". See later EFTA Court, Case E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, para 52.

[112] Hannesson, Ólafur Ísberg and Berg Runarsson, Ómar. National Courts and the Enforcement of EU Law - Topic 1 - FIDE XXIX Congress, The Hague, 2020, contribution to Conference (Norway, Iceland and Liechtenstein). In Franklin, Christian; Hannesson, Ólafur Ísberg; Berg Rúnarsson, Ómar; Baur, Georges; Steiner, Enya (2020. *National Courts and The Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order*. The Hague: The XXIX FIDE Congress in The Hague, 2020 Congress Publications, Vol. 1, S. 337-383 available in internet at https://fide2020.eu/wp-content/uploads/2020/09/FIDE_OA_vol_1.pdf

[113] ESA letter to Iceland 2017. In this letter, the EFTA Surveillance Authority (ESA) refers to the relevant case-law of the EFTA Court concerning Protocol 35 and finds this Court has confirmed the effectiveness and priority of implemented EEA rules over other national law as an inherent part of the EEA Agreement. Furthermore, the ESA finds that the EFTA Court has relied on the loyalty obligation in Article 3 of the EEA Agreement to require national courts to give effect to EEA law (principle of priority of implemented EEA law over national law). Last but not least, ESA notes that Protocol 35 has been wrongly implemented by Article 3 of the EEA Icelandic Act and, as a consequence, by the Icelandic Supreme Court in some relevant cases. See also Hannesson, Ólafur Ísberg, "Advisory Opinions in the EEA: The Icelandic Supreme Court and the EFTA Court", *European Law Review* no 6, 2018, pp 858-879.

[114] EFTA Court, Case E-28/13, *Merrill Lynch* [2014] EFTA Ct. Rep. 970 para 42.

supports, in their opinion, the principle of consistent interpretation in EEA law.

In their view, there are serious problems of effectiveness of EEA law in Iceland due to the wrong implementation of Protocol 35 EEA Agreement in Article 3 of the Icelandic EEA Act 2/1993. The current legislation and practice of the Supreme Court make very difficult the application of EEA implemented norms if/when in conflict with later statutory provisions of national law and/or questions settled by firm domestice line of jurisprudence. These authors agree with ESA (Letter 2017) that this is not only a problem of interpretation/and choice of rule of conflict but a question that even leads to denial of access to justice for lack of referral to the competetent EFTA Court of national cases via advisory opinions (reference requests asked by one of the parties denied by the Supreme Court). In practice, they find that this exclusion of the effect of EEA law in Iceland in some cases leads to the development of a dangerous line of Icelandic authority contrary to the Agreement. In this regard it must be noted that a second letter has been sent in September 2020 to Iceland by the ESA where the same line of argumentation is confirmed concerning the effect of EEA law in Iceland.[115]

As regards the case *Merril Lynch*[116], they find that the EFTA Court follows the ECJ (case *Dominguez*[117]) by declaring that consistent interpretation should be used first by national courts in order to ensure the effectiveness of EEA law, before venturing into the principle of State liability.

The most important conclusions of the study done by Hannesson and Runnarsson regarding effectiveness of EEA law in Iceland are as follow: "indeed, it seems that the Icelandic legislation and practice poses great risks to the effectiveness of EEA law in Iceland. It makes it very difficult to uphold not only theAgreement but also implemented directives and regulations, because the domestic courts are prevented from applying such laws as soon as the provisions of such implemented directives and regulations are contradicted by subsequent national laws. The cases identified by the ESA show that the Supreme Court deems the applicability of EEA norms as irrelevantat the outset if it is in conflict with subsequent unambiguous Icelandic statutory norms."[118]

"[….] Lastly, it should be noted that despite the fact that the Supreme Court often disregards EEA law in its reasoning on the merits, this does not necessarily mean that EEA law has not been given a particularly influential role in the outcome of a case before the Supreme Court. In a number of cases, the Supreme Court seems to determine that its domestic solution does not violate EEA law by relying on the black letter of national law. This raises suspicions of the unspoken interpretation of Icelandic law in light of EEA law, and that EEA law is left out of the litigation in order to not be required to deal with complicated EEA law issues or to make a reference to the EFTA Court. One could argue that this is unproblematic as such a disguised form of giving effect to EEA law allows the court to rule in favour of a litigant whose EEA rights have been violated without for that sake having to expressly touch upon sensitive and complicated EEA law issues. On the other hand, avoiding EEA law neutralises the effectiveness of EEA law

[115] ESA. Letter to Iceland 2020. See bibliography. This letter to Iceland from 2020 is not examined in Hannesson and Runnarsson´s publication (contribution to FIDE 2020) since it was sent after the research project finished.

[116] EFTA Court. Case E-28/13, *Merrill Lynch* [2014] EFTA Ct. Rep. 970 para 40-45 and specially on para 42.

[117] ECJ. Case C-282/10 *Dominguez*, judgment of 24 January 2012, para 27. ECLI:EU:C:2012:33.

[118] Hannesson and Berg Runnarsson, Norway (including Iceland and Liechtenstein), 2020, *op. cit*., p. 350.

beyond the case at hand. Thereby, even though the Supreme Court may reach the materially correct decision, this will not necessarily provide the appropriate precedent for future litigants."[119]

Another final clarification must be done as well regarding the compilation of cases where effectiveness is constructed/understood as "effet utile". Some might argue that there are seminal cases where the doctrine of effectiveness is the underlying rationale and justifying argument for a dynamic interpretation of EEA law that provides most rights to citizens; even though the Court might not use the term or principle of effectiveness in the rulings. This line of argumentation is arguable and worth mentioning in this study, although it is difficult to prove.

Some examples of this line of cases related to free movement of citizens and Directive 2004/38/EC in the EEA legal order might help to understand why. As stated above, Hannesson finds that the case *Gunnarsson*[120] is a paramount example of the effectiveness of EEA law understood as a method of interpretation that provides, at the end, for a similar protection of European rights in the EEA pillar (in spite of the lack of legal concept of EEA citizenship)[121].

In this regard, it is also important to refer to case *Jabbi*[122], and more recently, to cases *D and E*[123] and *Campbell*[124]. In all these "controversial" cases the EFTA Court decides to protect the free movement of persons within the EEA by all means -since this right is at the heart of European integration[125] - despite the limits of Directive 2004/38/EC[126] in the EEA legal order and reservations done by Iceland and Liechtenstein against the import of European citizenship concept into this other pillar[127].

In *Jabbi*[128], effectiveness is only referred the pleadings of ESA but not in the final findings of the Court (see para 43) "despite the fact that Union citizenship does not exist under the EEA Agreement, ESA argues for a result that ensures homogeneity. The scope of free movement rights granted to EFTA nationals should be the same as for EU nationals. The lack of a citizenship concept in the EEA Agreement entails that the Directive should be accorded a more important role in the EEA context. Its scope must

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[119] Ibid, p. 366.

[120] EFTA Court. Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep 254.

[121] In this case, however, the term effectiveness is only used by the Icelandic State referring to "the effectiveness of fiscal supervision in Iceland".

[122] EFTA Court. Case E-28/15 *Jabbi* [2016] EFTA Ct. Rep. 575.

[123] EFTA Court. Case E-2/19 *D and E*. Judgment from 13 November 2019, not yet reported.

[124] EFTA Court. Case E-4/19 *Campbell and Norwegian Government*. Judgement from 13 May 2020, not yet reported.

[125] In all this cases a different interpretion of Directive 2004/38/EC is done on the basis of the operation of this legal instrument in the EEA legal order even though and the EU law concept of Union Citizenship (Article 20 ff. TFEU) is missing in the EEA pillar. See comment on cases *Jabbi* and *Campbell* by Neier, Christina. "The right to come home – within or outside the scope of the EEA Agreement?" Blog entry 20 May 2020 at https://www.efta-studies.org/post/the-right-to-come-home.

[126] 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**.** OJ L 158, 30.4.2004, p. 77–123**.**

[127] Joint Declaration by the Contracting Parties to Decision No. 158/2007 incorporating Directive 2004/38/EC into the EEA Agreement.See also Article also Fredrikssen, Harvard H., The EFTA Court, 2020, *op. cit*., p. 167 et seq.

[128] EFTA Court. Case E-28/15 *Jabbi* [2016] EFTA Ct. Rep. 575.

therefore be broadened on the basis of the principle of effectiveness."[129]

In cases *D and E*[130] and later on in recent case *Campbell*[131], the principle of effectiveness is not explicitly found, but a similar extensive interpretation of the Directive 2004/38/EC is done. Here the question is whether the EFTA Court is doing a far too dynamic extensive interpretation of EEA law (relying on homogeneity and effectiveness principles) without openly disclosing the rationale.

Last but not least,it must be said that the EFTA Court has recognised the principle of effective judicial protection, including the right to a fair trial, as a general principle of EEA law. It has done so by explicit reference to Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), to which all of the EEA States are parties[132]. However, this recognition seems to focus more on the formal aspects of the right of access to a court (justiciability of rights or formal access to justice) rather than on outcomes of substantive access to justice (judges go beyond settling disputes and integrate objective EU-EEA policy concerns).

Having mentioned all these cases where effectiveness is established either as effet utile or as a principle securing enforcement of EEA law; it is important to conclude this section with a provisional finding. In the first place, the EFTA Court has not explained nor clarified in a yet convincing theoretical way how the effectiveness of EEA law must be constructed in all its different and multiple meanings. Secondly, it has also failed to explain how these two strands of effectiveness:"effet utile" and the effective judicial protection of individual rights relate and integrate with each other and with general theories of both formal and substantive access to justice[133]. This is maybe a missed opportunity since Recital 8 of the EEA Agreement also stresses the fact that it is an international agreement for the benefit of both public States and private individuals/economic operators[134] and could be referred to more often.

5. The twin principles of effectiveness and equivalence (tests for national procedural laws guaranteeing EEA rights)

As stated early on in this contribution, there is also a a more particular and restrictive meaning of the principle of effectiveness, when used as a test in parallel to the principle of equivalence regarding the scope and limits of the procedural autonomy of

[129] Ibid. In the ESA pleadings, as they figure in the EFTA Court Report of Cases (2016) we find the following text and selection of cases: regarding the principle of effectiveness, reference is made to Case E-17/15 *Ferskjar kjötvörur*, judgment of 1 February 2016, not yet reported, paragraph 66, *case E-4/11 Clauder*, [2011] EFTA Court Report 216, paragraphs 34 and 46, and Case E-15/12 *Jan Anfinn Wahl* [2013] EFTA Ct. Rep. 534, paragraph 54.

[130] EFTA Court. Case E-2/19 *D and E*. Judgment from 13 November 2019, not yet reported.

[131] EFTA Court. Case E-4/19 *Campbell and Norwegian Government*. Judgement from 13 May 2020, not yet reported.

[132] Hreinsson, General Principles, 2016, *op. cit*., p. 378 and EFTA Court, Case E-2/03, *Ásgeirsson* [2003] EFTA Court Report 185, para. 23. See also case E-2/02 *Bellona*, [2003] EFTA Court Report 236 para 36; case E-15/10 *Posten Norge AS* [2012] EFTA Court Report 246 para 84; case C-14/11 *DB Schenker I* [2012] EFTA Court Report 1178 para 123 and case E-11/12 *Beatrix Koch and others* [2013] EFTA Court Report 272 para 117.

[133] See Cappelletti, Mauro (General editor): *The Florence Access-to-Justice project*, vols. 1-4, Giuffré, Milan, 1978; and, more recently, Francioni, Francesco. *Access to Justice as a Human Right* (Collected Courses of the Academy of European Law, European University Institute), Oxford University Press, 2007.

[134] Hreinnsson, General Principles, 2016, *op. cit*., p. 378.

Member States vis-a-vis EEA law[135]. This is the meaning as understood by Franklin in his most recent study[136].

As Hreinsson summarizes the issue: "in the absence of EEA rules in a particular field of law, it is for the domestic legal system of each EEA state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which EFTA and EU citizens and economic operators derive from EEA law. Such national rules must comply with the dual requirement of the general principles of equivalence and effectiveness"[137]. This phrase is also found regularly in the case-law of the EFTA Court.[138]

These twin principles derive from EU law and mean and require that domestic national procedural provisions to exercise European rights must be similar and not be less favourable than those governing comparable domestic actions and to not render, in practice, the exercise of rights conferred by EU law excesivelly difficult or practically impossible[139]. In EU law, procedural autonomy is the general rule and effectiveness (and equivalence) is the exception to the rule. In practice, the ECJ first affirms the principle of procedural autonomy, and then considers derogations.[140]

Homogeneity between EU and EEA law lead to these principles being imported into EEA law wich more or less the same content and scope and a similar line of argumentation (although with a contextual application in a different legal system as the EFTA Court has declared in some seminal cases).[141]

In the case *Beatrix Koch*,[142] the Court offers a perfect example of its interpretative method. It starts by linking the principles of equivalence and effectiveness with homogeneity, developing the former principle in parallel to the EU legal order[143] and declaring that "the objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EEA/EFTA and EU nationals and economic operators enjoy, relying upon EEA law, the same rights in both the EU and EFTA pillars of the EEA."[144] The Court further acknowledges the concepts of effective judicial protection and access to justice as fundamental elements in the EEA legal framework.

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[135] See Ólafur Ísberg, *Gunnarsson*, 2015 op. cit. and Pall Hreinsson, General Principles, 2016 op. cit.

[136] Franklin, Christian NK. "Article 3. Principle of loyalty", in Arnesen, Finn, Fredriksen, Harvard Haukeland, Graver, Hans Peter, Mestad, Ola og Vedder, Christoph (eds.). *Agreement on the European Economic Area: A commentary*. C. H. Beck- Hart- Nomos, Munchen, 2018, pp. 180-196 available at http://dx.doi.org/10.5040/9781509922413 See also Franklin Christian NK (ed.), *The Effectiveness and Application of EU and EEA Law in National Courts – Principles of Consistent Interpretation*, Intersentia, 2018, pp. 19-23.

[137] Hreinsson, General Principles, 2016, *op. cit*., p. 377.

[138] See for instance EFTA Court, Case E-13/15 *Bautista v. Liechtensteinische Gesellschaft* [2015] EFTA Ct. Rep. 720, para 82 and Case E-24/13 *Casino Admiral*, [2014] EFTA Ct. Rep. 732 para 69 and case-law cited.

[139] Hreinsson, General Principles, 2016, *op. cit*., p. 377. See also EFTA Court case E-10/17 *Nye Kystlink* , para 73 referring to previous case E- 6/17 *Fjarskipti and Siminn* [2018] EFTA Court Report para 31.

[140] In EU law see cases from the ECJ, Case 51-54/71 *International Fruit Company* for principle of procedural autonomy. ECLI:EU:C:1971:128 ; case C- 33/76 *Rewe* [1976] ECR 1989 for equivalence and case C-261/95 *Palmisani* **[***1997*] ECR *I-04025.* for a definition of effectiveness.

[141] EFTA Court. See Case E-2/10, *Kolbeinsson* [2009–2010] EFTA Ct. Rep. 234, para. 46-47; Case E-11/12, *Koch* [2013] EFTA Ct. Rep. 272, paras. 121–25, para 132; Case E-07/13, *Creditinfo Lánstraust* [2013] EFTA Ct. Rep. 970, para. 45 and 46; and case C-15/12 *Wahl* [2013] EFTA Ct. Rep. 534 para 129 and 130.

[142] EFTA Court. Case E-11/12 *Beatrix Koch and others* [2013] EFTA Court Report 272 para 132.

[143] EFTA Court. Case E-11/12 *Beatrix Koch and others* [2013] EFTA Court Report 272, para 34,76,112-125,132.

[144] EFTA Court. Case E-11/12 *Beatrix Koch and others* [2013] EFTA Court Report 272, para 116.

And, last but not least, the Court explains how the application of this effectiveness works in practice every time a national court must make an assessement: "as regards application of the principle of effectiveness, every case in which the question arises as to whether a national procedural provision makes the application of EEA law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure" (para 132). This strand of effectiveness as a test of national procedural laws is the most usual in the case-law of the EFTA Court. Particular mention must be made of recent controversial *Fosen-Linjen* saga consisting of *Fosen-Linjen I*[145] and *Fosen-Linjen II*,[146] (in relation to a public procurement process in Norway), where the term "effectiveness" deployed its full potential, being mentioned by all litigants of the case on many different occasions as a key concept when discussing rights and obligations in EEA law for all parties involved in legal proceedings.

Two issues are important regarding this saga in connection to our study: one refers to the standard of liability in public procurement law (vis-a-vis general State liability for breaches of EEA law); and the other relates to the requirements (rights, damage, causal link, rules of evidence/proof) applicable to a claim of public liability for loss of profit (positive interest) and tendering costs (negative interest) following a public procurment process.

To make a long story short, the EFTA Court in *Fosen-Lijnen II*[147] made a sort of U-turn and reversed its earlier position on the liability threshold for procurement damages claims and the interpretation of Article 2(1)(c) of (Remedies) Directive 89/665/EEC[148], which it had previously established in *Fosen Lijnen I*[149], a judgment strongly criticised by some scholars such as Sanchez-Graells[150]. The difficult question was that the first judgement had led to a situation of a more strict standard of State/public liability in the area of public procurement law and Remedies Directive than the one long

[145] EFTA Court. Case E-. 16/16 *Fosen-Linjen AS v AtB AS* (*Fossen Lijnen I*) [2017**]** EFTA Ct. Rep. at para 34, 51-58, 64,70-77,82, 89-94.

[146] EFTA Court. Case E-7/18 *Fosen-Linjen AS v AtB AS (Fosen-Linjen II*) [2019] EFTA Ct. Rep at para 38, 48,49,56, 87,108,109, 114-121.

[147] EFTA Court. Judgment of 1 August 2019 in *Fosen-Linjen AS, supported by Næringslivets Hovedorganisasjon (NHO) v AtB AS* (case E-7/18 *Fosen-Lijnen II*) [2019] EFTA Ct. Rep.

[148] This Article states that "Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to: (c) award damages to persons harmed by an infringement."

[149] EFTA Court. Judgment of 31 October 2017 (case E-16/16 *Fosen-Lijnen I*) [2017**]** EFTA Ct. Rep.

[150] Sanchez-Graells, Albert. 'You Can't Be Serious: Critical Reflections On The Liability Threshold For Damages Claims For Breach Of EU Public Procurement Law After The EFTA Court's Fosen-Linjen Opinion' [2018*] Nordic Journal of European Law*, 1-23; Sanchez-Graells, Albert, 'The EFTA Court's Fosen-Linjen Saga on the Liability Threshold for Damages Claims for Breach of EU Public Procurement Law: A There and Back Again Walk' (September 16, 2019) forthcoming in a special issue of the European Procurement & Public Private Partnership Law Review. Available at https://ssrn.com/abstract=3455213 accessed 24th November 2020; and Albert Sanchez-Graells 'Liability Threshold for Damages in Public Procurement: The EFTA Court's Fosen-Linjen Saga' available at https://ssrn.com/abstract=3455222 accessed 20th April 2021.

ago consolidaded and accepted general of State liability for breaches of EEA law[151].

A second referral was done regarding this case by the Norwegian Supreme Court's to the EFTA Court for a second opinion seeking clarification concerning the applicable standard of liability for the "positive contract interest" (loss of profits)[152].

While in *Fosen-Linjen I*[153], the EFTA Court controversially found that "a simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of Directive 89/665/EEC, provided that the other conditions for the award of damages are met, including, in particular, the condition of a causal link (E-16/16, para 82)."

In a turn or reversal of jurisprudence, in *Fosen-Linjen II*, the EFTA Court decides to (re)align EEA law with EU law in the area of (State) liability in damages for breaches of public procurement law (similar standard will apply between general doctrine and Article 2(1) of Remedies Directive). And, it has declared that: "... article 2(1)(c) of the Remedies Directive does not require that any breach of the rules governing public procurement in itself is sufficient to award damages for the loss of profit to persons harmed by an infringement of EEA public procurement rules (E-7/18, para 121)."

The EFTA Court also deals with the principle of effectiveness and offers guidance on the standard of burden of proof in relation to claims seeking compensation for loss of profit (third question resolved in para 88-94). It starts by referring to national procedural autonomy limited by the twin principles of effectiveness and equivalence that apply to this question[154]. Most interestingly, the Court defines and describes an effectiveness test "ad hoc" for the national court to follow (para 92-93): "92 the principle of effectiveness precludes a national rule making it impossible or excessively difficult to obtain damages for the loss of profits. However, requiring that a tenderer must provide proof with "clear, that is, qualified preponderance" that the tenderer would have been awarded the contract had public procurement law not been breached, does not by itself

[151] See most important cases on State liability for breaches of EEA law from EFTA Court: case E-9/07 *Erla María*, case E-4/01 *Karlsson*, case E-8/07 *Celine Nguyen* and, last but not least case E-2/10 *Þór Kolbeinsson*.

[152] The admissibility of two references on the same case is unusual yet justifiable if the situation is unclear, "when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law, or when it submits new considerations which might lead to a different answer to a question submitted earlier." In conformity with the *acte éclairé* doctrine outlined in the *CILFIT* and *CIBA* case, this is not to challenge or invalidate the prior opinion.

[153] EFTA Court. Case E-16/16 *Fosen-Lijnen I* [2017] EFTA Ct. Rep. at 34, 51-58, 64,70-77,82, 89-94.

[154] See para 89-991 of case E-7/18 *Fosen-Lijnen II* [2019] EFTA Ct. Rep , not yet reported: "89 In the absence of specific EEA provisions on the requirement of causation it is for the legal order of each EEA State to lay down the respective conditions in this respect, which are subject to the principles of equivalence and effectiveness. The rules governing causation and the burden of proof must thus be no less favourable than those governing similar domestic actions and they must not render practically impossible or excessively difficult the exercise of the right to damages under Article 2(1)(c) of the Remedies Directive. 90 It follows from the principle of effectiveness and the right to damages under Article 2(1)(c) of the Remedies Directive that a person harmed by an infringement of public procurement law must, in principle, be able also to seek compensation for loss of profit. Nevertheless, there is a clear distinction between an award of damages based on the costs of bidding and an award based on the loss of profit. The third question appears to relate predominately, as both ESA and the Commission submitted, to the burden of proof in relation to an alleged loss of profit. 91. It is a prerequisite for the fulfilment of the requirement of a direct causal link that the aggrieved tenderer has suffered an actual loss of profits. Such a loss could not exist where the aggrieved tenderer had no valid claim to the contract.".

fail the test of effectiveness. 93. It is for the referring court to assess whether the requirement under the disputed national rule complies with the principle of effectiveness."

And concludes regarding rules of burden of evidence/proof with the assertion that national procedural autonomy is the norm but it is limited by principles of equivalence and effectiveness[155].

Also recently, we find the case *Nye Kystlink*[156] concerning a damages claim based on a breach of EEA competition law established by an ESA decision which has become final. Here we see the interpretation of the principles of equivalence and effectiveness in the context of national rules on the limitation period for claims for damages in cases where fines have been imposed under Articles 53 and 54 EEA Agreement. As in previous cases *Fjárskipti*[157] and *Casino Amiral*[158], the EFTA Court refers to effectiveness as a constraint, derogation and derogation to national procedural autonomy and finds that: "110. The principle of effectiveness entails that national procedural rules governing actions for safeguarding rights, which individuals and economic operators derive from EEA law, must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (see *Fjárskipti*, cited above, paragraph 31 and *Casino Admiral*, cited above, paragraph 69 and case law cited). 111. It is settled case law that the question of whether a national procedural provision makes the application of EEA law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure (see *Koch and Others*, cited above, paragraph 132 and case law cited)."

Finally, it rules in para 122 that "the principle of effectiveness does not restrict the EEA States' right to apply a limitation period of three years for bringing an action for damages for infringement of Articles 53 and 54 EEA" in some circumstances "as long as such a limitation period does not make it impossible or excessively difficult to bring an action for damages for infringement of EEA competition rules."

All these cases show how, at the end of the day, the key role that effectiveness plays in the legal order. It has become much more than a simple exception or derogation of the general rule of national procedural autonomy. As a general unwritten principle originating in EU law but established independently by the EFTA Court as inherent in the EEA Agreement, this conception of effectiveness is also related, at the end, with

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[155] See case *Fosen-Lijnen II* in para 94 and 108: "The Remedies Directive does not preclude a requirement according to which the award of damages is conditional on the aggrieved tenderer proving with clear, that is, qualified preponderance of evidence, that he should have been awarded the contract had the contracting authority not committed the error, as long as the principles of equivalence and effectiveness are respected." (para 94, regarding third question submitted to the Court). […] "The Remedies Directive does not govern the burden of proof in an aggrieved tenderer's claim for damages. It is therefore, in principle, for the legal order of each EEA State to determine the rules on the burden of proof, subject to the principles of equivalence and effectiveness." (para 108, fourth question submitted to the Court).

[156] EFTA Court. Case E-10/17 *Nye Kystlink AS v Color Group AS and Color Line AS* [2018] EFTA Ct. Rep, see especially para 110.

[157] EFTA Court. Case E-6/17 *Fjárskipti* [2018] EFTA Ct. Rep. at para 55 and 90.

[158] EFTA Court. Case E-24/13 *Casino Amiral* [2014] EFTA Ct. Rep. 732.

justiciability of rights and access to justice for individuals (but focuses more on the existence and adequacy of national remedies under the general rule of national procedural autonomy than on substantive outcomes)[159].

6. Conclusions

The general principle of effectiveness is an unwritten principle in EEA law (constructed on the basis of the Agreement on an European Economic Area (EEA) signed in 1992 (entry into force in 1994). This study explores how it has been applied in practice by the EFTA Court (a twin court working in paralell to the Court of Justice of the European Union) during last decade.

In general, effectiveness is required under the EEA Agreement by the general principle of homogeneity (Article 1(1) EEA A.) and the loyalty principle (Art. 3 EEA A). Both principles are necessary to make sure this internal market works for EU Member States (27) and for EFTA-EEA States (3), providing similar rights for citizens and economic operators in both pillars of this hybrid legal system.

As it is the case in EU law, in a broad general sense; effectiveness is strongly related to other seminal principles of this legal order (authority and effect of EEA law over national law, consistent interpretation of domestic law and State liability for breaches of EEA law).

The study of the case-law shows that the EFTA Court has confirmed the principle in the EEA legal order in multiple occasions and refers to effectiveness in three different strands of jurisprudence:

1) as "effet utile" (general efficacy) of the EEA Agreement;

2) as effective protection, application, enforcement and judicial review of EEA rights before the courts; and

3) as a test and limit for national autonomous procedural laws guaranteeing EEA rights (twin principles of effectiveness and equivalence).

Having the homogeneity principle in the background, it can be noted that the EFTA Court has developed this EEA principle along much the same general lines established by the ECJ. On the other hand, it is also important to observe that it has not elaborated a general theory on the concept. It has not defined, clarified or elaborated on the meaning, content, scope and limits of this important principle. A table of most important case-law of the EFTA Court is to be found here below. Most cases adjudicated during the last decade reiterate that the principle is inherent in the EEA Agreement.

EFFECTIVENESS EEA LAW– MOST RELEVANT CASE-LAW EFTA COURT 2010-2020

1.General effectiveness and unwritten principles of EEA law	
A.Authority or "Quasi-primacy" EEA law	Authority and effect EEA law over national law settled in earlier decade, ie. case *A* (2007)
B.Effect or "Quasi-direct effect" EEA law	

[159] Although Hreinsson follows the definition of Tridimas and Hannesson, and refers simply to "access to justice". See Tridimas 2006, pp. 418 and 421 and Hannesson (2012) pp. 238-244.

	HOB-Vín (2012) *Wahl* (2013) *Koch* (2013) *ESA v. Norway* (2013) *ESA v. Iceland* (2014) *Fjárskipti* (2018)
C. Consistent interpretation national law in light of EEA law (indirect effect)	*Granville* (2012) *Irish Bank* (2012) *Wahl* (2013) *CreditInfo* (2013) *Engilbertsson* (2014) *Merril Lynch* (2014) *Liechtensteinische* (2015)
D. State liability for breaches of EEA law	*Kolbeinsson* (2010) *HOB-Vín* (2012) *Engilbertsson* (2014) *Merril Lynch* (2014)
2. Effectiveness as "effet utile" (general efficacy EEA Agreement)	*Clauder* (2011) *Sigmarsson* (2012) *STX Norway* (2012)
3. Effectiveness as application, enforcement and judicial review of EEA individual rights	*Kolbeinsson* (2010) *Clauder* (2011) *Wahl* (2013) *Gunnarsson* (2014)* *Jabbi* (2016) * *Ferskar Kjótvörur* (2016) *Mobil B.* (2017) *D and E* (2019)* *Campbell* (2020)* * Attention: principle of effectiveness not mentioned directly in the final ruling of the Court
1. 4. Effectiveness and equivalence (twin principles that provide exceptional supervision and derogation of national procedural autonomy rule) 2.	*Koch* (2013) *Casino Amiral* (2014) *Fosen-Lijnen I* (2017) *Fjárskipti* (2018) *NyeKystlink* (2018) *Fosen-Lijnen II* (2019)

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