Chapter 9

Norway: An Insider Outside – or an Outsider Inside European Civil Justice

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1. The EU, the EEA Agreement and Norwegian Law

Norway has stood on the doorsteps of the European Union (then the European Communities (EC)) for more than four decades. In 1960, Norway became one of the seven original members of the European Free Trade Association (EFTA), a trade-bloc-alternative to the European Economic Community (EEC).[1] The Norwegian people voted against EC-membership in 1972 and 1994. In the late 1980's, a plan to create a single market including both EC and EFTA member states was launched. It resulted in the agreement on the European Economic Area (EEA), which extends the single market and the free movement of goods, persons, services and capital to non-EU EEA member states. Since 1995, EEA has only three member states: Iceland, Liechtenstein and Norway.

The EEA Agreement is limited in scope: It does not include inter alia justice and home affairs. For EU legislation to become EEA law, the EEA Joint committee must unanimously agree on including it to the EEA agreement.[2] The EEA has its own institutions, including the EFTA Court, which has a similar function as the European Court of Justice.[3] National courts in the EEA states can request advisory opinions on the interpretation of the EEA Agreement.[4] The goal of the EEA is homogeneity and effectiveness, meaning equal and effective application of law in the EEA region. Effective application of substantive law often requires changes in the civil justice system.[5]

Despite being outside EU, Norway participates in some aspects of judicial cooperation. It is a party of the Lugano Convention[6] on jurisdiction and recognition and enforcement judgments in civil and

[1] The other members were Austria, Denmark, Portugal, Sweden, Switzerland and the United Kingdom. Finland became an associate member in 1961 and a full member in 1986, Iceland became a member in 1970 and Liechtenstein in 1991. Denmark, Portugal and the United Kingdom left EFTA for EC membership, in 1973 respectively 1986.

[2] Consequently, not all directives and regulations marked as EEA relevant by the Commission are included in the EEA Agreement, and some directives and regulations become part of the EEA Agreement although the Commission has not identified them as EEA relevant.

[3] Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement), art. 31-37.

[4] ibid art. 34.

[5] Halvard Haukeland Fredriksen, 'The EFTA Court 15 Years On' (2010) 59 International and Comparative Law Quarterly 731; John Temple Lang, 'The Duty of National Courts to Provide Access to Justice in the EEA' in EFTA Court (ed), *Judicial Protection in the European Economic Area* (German Law Publishers 2012); Halvard Haukeland Fredriksen and Christian N. K. Franklin, 'Of pragmatism and principles: The EEA Agreement 20 years on' (2015) 52 Common Market Law Review 629.

[6] The Convention of Lugano on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988 (Lugano Convention 1988) [1988] OJ L319/9.

commercial matters of 1988, revised in 2007[7], and the Schengen Agreement[8]. To enlarge judicial cooperation, the Norwegian government seeks to establish a parallel convention to the regulation on service of documents[9] and the regulation on taking of evidence.[10] The Norwegian civil procedure system is consequently far from unaffected by European law.

Norway, as a rule, rejects EEA relevance of EU legislation based on article 81 TFEU[11], judicial cooperation in civil matters. As a principle, Norway also rejects legislation based on article 114 TFEU on approximation of laws to ensure the functioning of the internal market, if the content is primarily procedural. For instance, the Intellectual Property Rights Enforcement Directive[12] has not been incorporated to EEA law due to Norwegian resistance. However, chapter 28 A on special rules on intellectual property rights was added to the Dispute Act[13] (the Norwegian Civil Procedure Act) in correspondence with the directive. The approach is self-contradictory: the government desires to stress the limited scope of EEA Agreement, yet it in practice recognises the need for approximation of procedural rules and the need for a single judicial area for enforcing the law regulating the single market.

The EFTA Court has an important role of filtering both substantive and procedural law from the EU to the EEA system. The Court achieves this by closely following the case law of the Court of Justice of the European Union (CJEU). The case law of the CJEU is not binding for the EFTA Court, but to obtain homogeneity, the EFTA Court generally applies CJEU case law as if it were binding. [14]

Directives do not have direct effect in the EEA; they have to be transformed to national law to be valid.[15] Regulations are applicable even before they are translated to Norwegian.[16] According to the Norwegian EEA Act[17] section 2, Norwegian acts and decrees of law implementing EEA obligations have primacy over other national legislation. Norwegian courts strive to interpret national legislation in conformity with EEA law. The Supreme Court has numerous times stated that EEA case law has

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[7] The Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, done at Lugano on 30 October 2007 (Lugano Convention) [2007] OJ L339/3.

[8] The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L239/13.

[9] Parliament and Council Regulation (EC) 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) [2007] OJ L324/79.

[10] Council Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/1.

[11] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/1.

[12] Parliament and Council Directive 2004/48/EC on the enforcement of intellectual property rights [2004] OJ L195/16.

[13] Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes (The Dispute Act). It is the Civil Procedure Act of Norway.

[14] Halvard Haukeland Fredriksen, 'One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area' (2010) 79 Nordic Journal of International Law 481.

[15] Agreement of the European Economic Area [1994] OJ L1/572 art 7 (a).

[16] The Danish version of regulations are already available, and as the languages are quite similar, it is possible to use the Danish versions.

[17] Act on implementation to Norwegian Law of the main part in the Agreement of the European Economic Area etc. (EEA-Act) Act no. 109 of 27 November 1992. «Provisions of Acts of Parliament which serve to fulfil Norway's obligations under the Agreement shall in case of conflict prevail over other provisions which regulate the same matter..." Translation from Henrik Bull, 'The EEA Agreement and Norwegian Law' (1994) European Business Law Review 291, p. 295.

decisive weight when interpreting Norwegian law. [18] In *Finanger I*[19], the Supreme Court rejected direct effect in case of inadequate implementation of a directive. Yet in *Finanger II*[20], the Supreme Court ruled for state liability for inadequate implementation of directives, although Norwegian law has no provision for such liability.[21] *Finanger II* illustrates the impact on EEA law on Norwegian law and on Norwegian courts.

This paper disseminates the impact of European law on Norwegian civil procedure by looking at three different topics. The first topic is the role of the Lugano Convention in Norwegian law. The second topic is the role of other EU legislation, soft law and case law on Norwegian civil procedure. The third topic covers the relationship between the Norwegian Supreme Court and the EFTA Court, and the impact of the relationship on development of Norwegian procedural law. The final part of the paper discusses the outlooks.

2. The Lugano Convention

The Lugano Convention, a parallel instrument to the Brussels Convention[22] and its successor the Brussels I Regulation[23], extends the area for jurisdiction and recognition and enforcement of judgments to EFTA states, not including Liechtenstein. According to *Kohler*, it is "an essential component of the judicial structure of the EEA".[24] The Regulation and the Convention are parallel, which refers to (almost) identical texts and interpretation of the instruments. When the Brussels regime has been amended, the Lugano Convention has so far been subsequently amended to restore parallelism. The CJEU has a pivotal role in interpreting the instruments, although courts in non-EU member states may not request preliminary rulings. In Norway, the Lugano Convention has the status of law and replaces the national rules on international jurisdiction as lex specialis.

The application and interpretation of the Lugano Convention has become more complex over the years. Firstly, when the Brussels I recast[25] entered into force *parallelism is lost* between the two instruments. The discrepancies are currently limited to a few issues, but subsequent amendments to

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[18] See *inter alia Paranova AS v Merck & Co Inc, Merck, Sharp & Dohme B.C. and MSD (Norge) AS* [2004] Rt. (Norsk Retstidende) 2004 p. 904, para. 67; *A v The State by the Justice department* [2005] Rt. 2005 p. 1365, para 51; *Norsk Lotteri- og Automatbransjefrbund v The State by the Norwegian ministry of Church and Culture* [2007] Rt. 2007 p. 1003, para. 79; *Pedicele AS v The State by the Ministry of Health and Care Services* [2009] Rt. 2009 p. 839, para. 7; *STX OSV AS and Others v The State by Tariffnemnda* Rt. 2013 p. 258.

[19] *Storebrand Skadeforsikring AS v A* [2000] Rt. 2000 p. 1811, the court was split. The minority of five (out of 15) justices gave direct effect to EEA law.

[20] *A v The State by the Justice Department* [2005] Rt. 2005 p. 1365.

[21] The EFTA Court President and the CJEU argue that there is direct effect in EEA law, see Carl Baudenbacher, 'The EFTA Court Ten Years On' in Carl Baudenbacher, Per Tresselt and Thorgeir Orlygsson (eds), *The EFTA Court Ten Years On* (Hart Publishing 2005) 24-25; Carl Baudenbacher, 'If Not EEA State Liability, Then What? Reflections Ten Years after the EFTA Court's Sveinbjörnsdóttir Ruling' (2009) 10 Chicago Journal of International Law 333.

[22] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/32.

[23] Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2001] OJ L12/1.

[24] Christian Kohler, 'Homogeneity or Renationalisation in the European Judicial Area? Comments on a Recent Judgment of the Norwegian Supreme Court' in The EFTA Court (ed), *The EEA and the EFTA Court Decentered Integration* (Hart 2014).

[25] European Parliament and Council Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) (Brussels I bis Regulation) [2012] OJ L351/1.

the Regulation could change the situation if parallelism is not restored. Secondly, *the relationship between the two instruments is complex*. Article 64 of the Lugano Convention includes a disconnection clause, but it is not clear whether the clause should be interpreted narrowly or widely. Eurosceptics tend to advocate a narrow interpretation giving the Convention primacy and emphasising the consequent difficulties. Adrian Briggs has described the combined effect of lack of parallelism and the unclear relationship between the documents as a situation which is trickier than the ideal would be.[26] Thirdly, the *interpretation of the Lugano* Convention is essentially in the hands of the CJEU according to the Protocol 2[27] on interpretation of the Convention. The courts of the Lugano States, including the CJEU, have an obligation to "pay due account to the principles laid down by any relevant decision" from courts in other states. In practice, both the CJEU and Court in EU member states go directly to the corresponding provision in the Brussels I Regulation.[28] In theory, interpretation should be a two-way street where the CJEU studies Icelandic, Norwegian and Swiss case law, but in practice, it is a one-way street.[29]

The CJEU has used the Brussels I Regulation to develop the "single justice area" and to enforce the policy of mutual trust. The Brussels I Regulation has become a foundational element of the internal market procedure, which forms a self-contained regime[30] with autonomous concepts. From a Norwegian point of view, this development is troublesome, as the EEA Agreement does not cover judicial cooperation. The question is if, and to which extent Norwegian courts are allowed to depart from CJEU case law in the application of the Lugano Convention. For example, the *absolute* duty of the second court to stay proceedings[31] could be less absolute for Lugano-only states allowing for exceptions in torpedo cases.

The Supreme Court has so far been loyal to CJEU case law when interpreting the Lugano Convention. However, in the periphery of area covered by the Convention, the Supreme Court has taken a more restrictive view than the CJEU. In *Trico Subsea* (Rt. 2012, s. 1951), the defendant was domiciled in Norway, but otherwise the case had no connection to Norway. The question was if the Lugano Convention was applicable as the Convention primarily regulates situations between the contracting

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[26] Adrian Briggs, *Civil Jurisdiction and Judgments* (6th edn, Routledge 2015) 25. The earlier stage of lack of parallelism was described as "a set of jurisdictional rules which, in their combined effect is a legal minefield and a public disgrace" Adrian Briggs, *Civil Jurisdiction and Judgments* (4th edn, Norton Rose 2005) 24.

[27] Protocol 2 on the uniform interpretation of the Convention and on the Standing Committee.

[28] See Case C-456/11 *Gothaer Allgemenine Versicherung and Others v Samskip GmbH* [2012] ECLI:EU:C:2012:719 and Alegria Borrás, Irene Neophytou and Fausto Pocar, '13th Report on National Case Law Relating to the Lugano Conventions' (May 2012). https://www.bj.admin.ch/dam/data/bj/wirtschaft/privatrecht/lugjurispr-13-e.pdf (accessed 9 March 2016).

[29] Cf. Carl Baudenbacher, *Judicial Dimensions of the European Neighbourhood Policy* (College of Europe, Department of EU International Relations and Diplomacy Studies 2013) 7. Domej notes that the CJEU should meet the Lugano-only courts at "eye level", as equals, see Tanja Domej, 'Das EU-Zivilprozessrecht und die Schweiz' in Christoph Busch, Christina Kopp, Mary R. McGuire and Martin Zimmermann (eds), *Jahrbuch Junger Zivilrechtswissenschaftler 2009: Europäische Methodik: Konvergenz und Diskkrepanz europäischen und nationalen Privatrechts* (Richard Boorberg Verlag 2009).

[30] Cf. Burkhard Hess, *Europäisches Zivilprozessrecht: ein Lehrbuch* (Hüthig Jehle Rehm 2010) 153.

[31] Richard Fentiman, 'Section 9: Lis pendens - related actions' in Ulrich Magnus, Peter Mankowski and Alfonso Luis Calvo Caravaca (eds), *Brussesl I regulation* (2 nd. rev. ed. edn, Sellier European Law Publishers 2012). Case 144/86 *Gubisch Maschinenfabrik KG v Giulio Palumbo* [1987] ECR I-4871, paras 14-19; Case C-406/92 *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"* [1994] ECR I-5439 paras 42 ff.; Case C-111/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* [2003] ECR I-4207, paras 30-32; Case C-39/02 *Mærsk Olie & Gas A/S v Firma M. de Haan en W. de Boer* [2004] ECR I-9657.

states, not the relationship to third states. Referring to the CJEU decisions in *Group Josi*[32] and *Owusu*[33], the minority of two justices found that the Lugano Convention was applicable and Norwegian courts had jurisdiction. The majority of three justices differentiated *Owusu* from the case at hand and concluded that the Lugano Convention was not applicable, as the claimant was not domiciled in a Lugano state, nor had the case any other connection to a Lugano state. The argumentation of the majority of three judges is not very convincing, and has been criticised.[34]

In the Samsung case (Rt. 2015, p. 1040), CKT Marine Services, a Netherlands company, was to deliver a helipad and a housing block for an oil platform. In oil contracts, the parties must choose Norwegian law as the law of the contract. Samsung and CKT Marine Services designated Stavanger as the place for arbitration. A Belgian financial undertaking, Nationale, gave a bond on behalf of CKT Marine Services. The choice-of-court clause in the contract between CKT Marine Services and Nationale designated Stavanger District Court as the forum. When CKT Marine Services and Samsung were not able to agree on adjustment, Samsung requested that Nationale pay the bond. CKT Marine Service requested interim measures against both Samsung and Nationale in the Oslo District Court. Samsung denied that Norwegian courts have jurisdiction, but Nationale did not. The Supreme Court surprisingly decided the case without any reference to the Lugano Convention, even though Norway has jurisdiction on the main question and Nationale did not oppose Norwegian jurisdiction. By reference to the Dispute Act, section 4-3, requiring “a sufficiently strong connection to Norway” for Norwegian jurisdiction the Court decided that the threshold was particularly high for interim measures in commercial cases.

These cases illustrate a certain reluctance towards the Lugano Convention. Although the Norwegian Supreme Court as a rule applies the Lugano Convention and actively uses CJEU case law in interpreting the convention, there are signs of the court favouring the Dispute Act in cases on the periphery of the Convention. The Court stresses Norwegian sovereignty, not legal certainty and the need to uniform application of the rules on jurisdiction and enforcement of judgments. Giving preference to Norwegian law and concepts creates a gap between the Lugano Convention and the Brussels I Regulation. Together the loss of parallelism and different interpretation of the rules weaken legal certainty and the role of the Convention.

3. Impact of EEA law on Norwegian civil procedure

EU legislation creating a European civil procedure has received only limited attention in Norway. Particularly laws on creating specific proceedings for certain types of cross-border cases have had no impact on Norwegian civil procedure. The Consumer ADR Directive[35] and the Consumer ODR

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[32] Case C-412/98 *Group Josi Reinsurance Company SA v Universal General Insurance Company* [2000] ECR I-5925.

[33] Case C-281/02 *Andrew Owusu v N.B. Jackson, trading a ‘Villa Holidays Bal-Inn Villas’ and others* [2005] ECR I-1383.

[34] Torstein Frantzen, ‘Tvisteloven og Luganokonvensjonen. En duplikk til Skoghøy’ [2012] 51 Lov og Rett 573; Kohler [n 24]. There was an intensive Norwegian debate on the issue, see Jens Edvin A. Skoghøy, ‘Tvisteloven og Lugano-konvensjonen’ [2012] 51 Lov og Rett 193; Torstein Frantzen, ‘Tvisteloven og Luganokonvensjonen. En replikk til Skoghøy’ [2012] 51 Lov og Rett 379; Jens Edvin A. Skoghøy, ‘Tvisteloven og Lugano-konvensjonen - en duplikk til Frantzen’ [2012] 51 Lov og Rett 438.

[35] Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63.

Regulation[36] are examples of the opposite. Norway is currently implementing them as part of the revision of Norwegian law on consumer dispute resolution, although these have so far not been incorporated in the EEA. Other pieces of EU secondary law could be used as benchmark for improving Norwegian law.[37] While the front door of Norwegian civil procedure remains closed for Europeanisation, the back door is ajar.

Procedural autonomy is the leading principle in EEA law as well as in EU law.[38] Due to the limited scope of the EEA, procedural autonomy is presumably larger for EEA states than EU Member States. However, the requirement of effective application of EEA law and the goal of homogeneity have had a significant impact on procedural law. In *Swiss life,* the EFTA Court stated that "access to justice and effective judicial protection are essential elements in the EEA legal framework" and that EEA nationals and economic operators must "enjoy equal access to the courts".[39] National procedural rules must be "no less favourable than those governing similar domestic actions (principle of equivalence), and they must "not render practically impossible or excessively difficult the exercise of the rights conferred by EEA law".[40] The language resembles CJEU case law reducing the procedural autonomy of member states. However, the consequent argumentation of the EFTA Court shows that EFTA member states have more autonomy. [41] The extent of the difference is not manifest.

EEA law influences Norwegian civil procedure in many different ways. Three examples illustrate the development: the rules on *locus standi*, the question of judicial guidance and the question of *ex officio* application of consumer law.[42]

In *Allseas*[43] the Norwegian Supreme Court admitted that EEA law could have an impact on national civil procedure law. The question was if the employees of Allseas had *locus standi* in a case about taxation of the company. According to Norwegian law, they clearly did not, but the Supreme Court discussed if they had so according to EEA law. The Court found against the employees, but it stated *obiter dicta* that the rules on *locus standi* are more lenient in cases where EEA law is applied.

EEA law also has an impact on the right or duty for *judicial guidance* (*materielle Prozessleitung* in German). Norwegian judges have a duty to encourage the parties to clarify factual and legal issues, Dispute Act section 11-5 (3), and to encourage a party to take a position on factual and legal issues

[36] Regulation (EC) 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2012] OJ L165/63, p. 1.

[37] Anna Nylund, 'Europeanisation of Norwegian Civil Procedure?' in Volker Lipp and Halvard Haukeland Fredriksen (eds), *Reforms of civil procedure in Germany and Norway* (Vol. 83, Mohr Siebeck 2011); Anna Nylund, 'European Integration and Nordic Civil Procedure' in Laura Ervo and Anna Nylund (eds), *The Future of Civil Litigation Access to Courts and Court-annexed Mediation in the Nordic Countries* (Springer 2014).

[38] See e.g. Diana-Urania Galetta, *Procedural autonomy of EU Member States: paradise lost?: a study on the" functionalized procedural competence" of EU Member States* (Springer Science & Business Media 2010).

[39] Case E-11/12 *Beatrix Susanne Koch, Lothar Hummel, and Stefan Müller v Swiss Life (Liechtenstein) AG* [2013] EFTA Ct. Rep. 272, para 117.

[40] *Swiss Life* (n 39) para. 121

[41] Cf. Halvard Haukeland Fredriksen, 'Tvisteloven og EØS-avtalen' [2008] 121 Tidskrift for Rettsvitenskap 289, 330-331; Erik Eldjarn, *Materiell prosessledelse* (2015) 222-225

[42] Other areas of civil procedure have also been affected including rules on evidence, time limits and rules on legal costs.

[43] *Arie Christian Poot, Frank Bergmann and Pasqual Dozo Gondar v The State by The Central Office for Foreign Tax Affairs* Rt. 2005. p. 597, para 36 et seq.

that appear to be of importance for the case, Dispute Act section 11-5 (4).[44] To ensure the effectiveness of EEA law – and to contribute to legally "correct" judgments, judges have a duty, not merely a right, to give guidance to the parties by raising the question of applicability of EEA law. The exact extent of the enhanced duty to give guidance on EEA law remains under debate.[45]

Another important question is if Norwegian courts have a duty to apply EEA law *ex officio* in cases that have a character of *ordre public,* specifically in areas of consumer and competition law. The answer seems to be in the affirmative: *de facto* identical application of rules is a requisite for homogeneity. Norwegian courts already have a duty to apply national laws in some limited areas *ex officio,* thus extending the duty to corresponding EEA law is natural.[46] Courts have to apply the law in its own motion (*iura novit curia* and *da mihi factum dabo tibi ius)*, Dispute Act section 11-3. The principle of *ne ultra petita* restricts the *ex officio* application of law, Dispute Act section 11-2 (1). The claims made and the main factual basis of the case restricts which provisions the court may base its decision on. However, especially in consumer law, protection of the weaker party permeates Norwegian legal thinking. Although consumer cases as such are classified as contentious, the rules are mandatory and the courts have a stronger duty to ensure that consumer rights are protected and consequently a limited duty to *ex officio* application of EEA law.[47]

In practice, judges are not always aware of the relevance of EEA law. Some judges seemingly believe it is the task of the parties (their legal counsel) to raise the question of EEA law and, when necessary, ask the court to request an advisory opinion form the EFTA Court. In view of the principle of *iura novit curia* and the right (or duty) to provide judicial guidance, this approach is false. The Dispute Act and doctrine stresses the duty of the court to provide for substantially and legally correct judgments by *inter alia* judicial guidance.[48] To raise the question if EEA law is applicable does not make a judge partial. The parties choose whether they want to invoke EEA law, and whether they want to adjust the claims and the facts invoked in the case.

The CJEU has *inter alia* developed a European concept of identity of cases in respect to *lis alibi pendens*[49] and *res judicata*[50]*.* In the future, the coexistence of European and national concepts of the identity of the case and *res judicata* may "irritate" national concepts. The project on model "European Rules of Civil Procedure" may unfold as a trigger for further approximation of national civil procedure both by voluntary national measures and by EU institutions. Norway is not immune to these developments. Thus, the Norwegian legislator, courts and scholars must vigilantly keep track with and participate in the processes creating and developing European law. Norwegian law is not –

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[44] Cf. Anna Nylund, 'Preparatory Proceedings in Norway - Efficiency by Flexibility and Case Management' in Laura Ervo and Anna Nylund (eds), *Current Trends in Pre-Trial Proceedings* (Springer forthcoming).

[45] Anne Robberstad, 'Norske dommeres plikt til å veilede om EØS-retten'(2002) Lov og Rett 195; Fredriksen [n 41] 328-333; Eldjarn [n 41] 222-225. For a similar argumentation from a Swedish perspective, see Anna Wallerman, *Om fakultativa regler. En studie av svensk och unionsrättslig reglering av skönsmässigt beslutsfattande i processrättsliga frågor* (Iustus förlag 2015) 165 ff.

[46] Cf. Fredriksen [n 41], 324-325; Anne Robberstad, *Sivilprosess* (3 edn, Fagbokforlaget 2015), 311-312; Tore Schei and others, *Tvisteloven. Kommentarutgave Bind I*, vol 1 (2nd edn, Universitetsforlaget 2012) 403-404; Jens Edvin A. Skoghøy, *Tvisteløsning* (2 edn, Universitetsforlaget 2014) 577-580.

[47] Fredriksen [n 41] 326-328; Eldjarn [n 41] 208-212.

[48] Robberstad [n 46]; Schei and others [n 47] 525 ff.; Skoghøy [n 47] 558-568; Robberstad [n 47] 12-14, 189-192.

[49] Fentiman [n 31].

[50] *Gothaer Allgemeine Versingerung* [n 28].

and should not be – an island. By participating in the European development of law, Norway can advance its civil procedure system, and influence the development of European civil procedure.

4. The Norwegian Supreme Court and the EFTA Court: A turf war or dialogue?

Norwegian courts, including the Supreme Court, habitually apply EEA law in a faithful manner and interpret statutory law in light of EEA law and case law from the Luxembourg courts. Nevertheless, the relationship between the Supreme Court and the EFTA Court has been strenuous for many years. There are two main reasons for the disagreements between the courts: different attitudes interpretations of the character of advisory opinions and of the EEA agreement.

4.1 Advisory opinions

The turf war originates significantly from different views on the character of advisory opinions: is there a duty to request advisory opinions and what is the effect of advisory opinions. Where a question on the interpretation of the EEA Agreement "is raised before any court or tribunal in an EFTA State, that court or tribunal *may,* if it considers it necessary to enable it to give judgment, request the EFTA Court to give [an advisory] opinion"(emphasis added here).[51] The highest courts do not have a duty to request opinions. The EFTA Court continually attempts to establish an obligation for highest courts to refer cases by citing the obligation of loyalty.[52]

Norwegian (and Icelandic) court reject this view, and they are often reluctant to request opinions. As the EFTA Court opinions are advisory in their nature, courts feel less obliged to refer cases. [53] Since the financial crisis in 2008 Icelandic courts have made a significant number of requests. A comparison of Nordic countries in table 1 shows that Norwegian courts have made very few requests both in absolute numbers and per one million inhabitants.[54] Requests to the EFTA Court are not fully comparable to requests to the CJEU, as the latter has a far wider jurisdiction and making requests is mandatory and the answers binding. Establishing what the proper amount of requests is difficult,[55] but an expected number could be set at approximately half of Nordic EU member states. Sweden does not serve as an example as the number of request has been so low that the Commission has

[51] Surveillance and Court Agreement art. 34.
[52] Case E-18/11 *Irish Bank Resolution Corporation Ltd v Kaupþing hf* [2012] EFTA Ct. Rep. 592, para 58 et seq.; Case E-2/12 *HOB-vín and The State Alcohol and Tobacco Company of Iceland* [2013] EFTA Ct. Rep. 816, para 11; Case E-3/12 *The Norwegian State, represented by the Ministry of Labour and Stig Arne Jonsson* [2013] EFTA Ct. Rep. 138, para 60; *Swiss Life* [n 39] para 116.
[53] For an overview of Norwegian requests until 2011, see Halvard Haukeland Fredriksen, 'The Two EEA Courts' in EFTA Court (ed), *Judicial Protection in the European Economic Area* (German Law Publishers 2012) 200-201. For an Icelandic perspective, see Páll Hreinsson, 'The Interaction between Iceland Courts and the EFTA Court' in EFTA Court (ed), *Judicial Protection in the European Economic Area* (German Law Publishers 2012); Davíd Thór Björgvinsson, 'Application of Article 34 of the ESA/Court Agreement by Icelandic Courts' in Mario Monti and others (eds), *Economic Law and Justice in Times of Globalisation Festschrift for Carl Baudenbacher* (Nomos Verlag 2007); Thorgeir Örlygsson, 'Iceland and teh EFTA Court: Twelve Years of Experience' in Mario Monti and others (eds), *Economic Law and Justice in Times of Globalisation Festschrift for Carl Baudenbacher* (Nomos Verlag 2007).
[54] For figures until 2009, see Halvard Haukeland Fredriksen, *EU/EØS-rett i norske domstoler* (Europautredningen Utvalget for utredningen av Norges avtaler med EU, 2011) 90.
[55] Morten Broberg and Niels Fenger, 'Variations in Member States' Preliminary References to the Court of Justice - Are Structural Factors (Part of) the Explanation?' [2013] 19 European Law Journal 488.

interfered.[56] The number of Norwegian requests is half of that of Sweden and a quarter of the number of Denmark and Finland, thus the number is remarkably low.

Table 1 Cases referred to the Luxembourg courts by Nordic courts

	Referred cases total until 2014, ECJ or EFTA-court[57]	Referred cases 2010-2014	Referred per 1 million inhabitants per year in 2010-2014
Denmark	165	40	1.4
Finland	91	33	1.2
Sweden	114	33	0.7
Norway	46	9	0.35
Iceland	27	15	9

The Norwegian Supreme Court has been particularly reluctant to request advisory opinions. Between *Paranova*[58] in 2002 and *Holship*[59] in 2015 the Norwegian Supreme Court did not request a single advisory opinion. The total is three referrals, and a withdrawn referral, in 21 years.[60] The Icelandic Supreme Court has made six requests, but considering the Icelandic population is less than 10 % of the Norwegian population, the numbers cannot be directly compared.[61]

Table 2 References to the Luxembourg courts from different Nordic courts

	Supreme Court(s)	Special courts	Other courts and tribunals	Total
Denmark	35 (21 %)	3 (2 %)	127 (77 %)	165
Finland	61 (67 %)	3 (3 %)	27 (30 %)	91
Sweden	48 (42 %)	8 (7 %)	58 (51 %)	114
Norway	2 (4 %)	5 (11 %)	39 (85 %)	46
Iceland	6 (22 %)	0	21 (78 %)	27

Justice Bårdsen has cited several grounds for not requesting advisory opinions: the parties must raise the question of application of EEA law; parties do not want the court to make a request; making a request and waiting for the opinion takes time and is costly.[62] Considering the principle of *iura novit curia* and the duty of the judge to promote legally sound judgments, these reasons are neither understandable from the perspective of homogenous application of EEA law, nor from the perspective of Norwegian civil procedure law.[63]

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[56] For more details, see Wallerman in this volume.

[57] The table include references to the CJEU by Denmark from 1973, for Finland and Sweden from 1995 to the end of 2014. For Iceland and Norway, the table includes references to the EFTA Court from 1994 to the end of 2014.

[58] Case E-3/02 *Paranova AS v Merck & Co. Inc. and Others* [2003] EFTA Ct. Rep. 101.

[59] Case E-14/15 *Holship Norge AS v Norsk Transportarbeiderforbund* (the case is still pending).

[60] Case E-1/99 *Storebrand Skadeforsiking AS mot Veronika Finanger* [1999] EFTA Ct. Rep. 119.

[61] For criticism of the Icelandic courts, see Hreinsson [n 54].

[62] Arnfinn Bårdsen, 'Noen refleksjoner om Norges Høyesterett og EFTA-domstolen' [2013] 52 Lov og Rett 535.

[63] Similarly Fredriksen [n 54].

The role of the CJEU as a *de facto,* although not *de jure,* master of the EEA Agreement is a significant factor of low number of requests. The EFTA Court follows CJEU case law closely. When the CJEU has not settled a question, the EFTA Court tries to anticipate how the CJEU would rule.[64] The Norwegian Supreme Court sometimes sidesteps the EFTA Court and interprets directly case law of the CJEU. It does so sometimes even if the content of EU law is not clear and one of the parties wants an advisory opinion.[65] The Supreme Court considers itself in the position to do independent evaluations of how the CJEU would solve the case or how the case should be solved in light of CJEU case law. [66] Lower courts follow the example of the Supreme Court.

The *STX* case (Rt. 2013 p. 258) brought the relationship between the Supreme Court and the EFTA Court to a freezing point. The Borgarting Court of Appeal requested an advisory opinion from the EFTA Court if universally applicable, and thus mandatory, terms and conditions of collective employment agreements were compatible with EEA law.[67] The EFTA Court found that requiring the employer to pay certain forms of compensation were not compatible with EEA law. The parties appealed to the Supreme Court. The Supreme Court, citing *Finanger I,* held that it has the right and duty to decide to which extent the advisory opinion is binding. The advisory opinion has significant weight as a legal source.[68] Having analysed recent case law from the CJEU, the Supreme Court found that the opinion of the EFTA Court was wrong. Chief Justice Schei was one of the five judges deciding the case, thus the case could be understood as the Supreme Courts general attitude towards the EFTA Court. The EFTA Court answered rapidly in *Jonsson*[69] by upholding its earlier stance. Instead, the Supreme Court could have requested a new advisory opinion or requested the EFTA Court to clarify its judgment. In doing so, the EFTA Court would have got an opportunity to back from its earlier position due to subsequent case law from the CJEU.[70]

In 2015, the relationship between the courts has improved. In particular, the request for an advisory opinion in *Holship*[71] has been beneficial. However, should the relationship between the courts have been better, and the Supreme Court requested advisory opinions more often, the incident could be characterised as a mishap, or as an opening of a discussion on balancing workers' rights with free movement. The Supreme Court must recognise that it is the task of the EFTA Court to develop and ensure uniformity in EFTA law. If the Supreme Court takes charge of development of EEA law, homogenous application will be inevitable lost.

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[64] See inter alia Henrik Bull, 'European Law and Norwegian Courts' in Peter-Christian Müller-Graff and Erling Selvig (eds), *The Approach to European Law in Germany and Norway* (Berliner Wissenschafts-Verlag 2004) 105-108; Baudenbacher [n 21]; Vassilios Skouris, 'The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions' in Carl Baudenbacher, Per Tresselt and Thorgeir Örlygsson (eds), *The EFTA Court Ten Years on* (Hart Publishing 2005); Fredriksen [n 5]; Fredriksen [n 14].

[65] Fredriksen,[n 55] 91-92; Fredriksen [n 54] 196-199.

[66] Cf. Bull [n 65] 111-113; Fredriksen [n 55]. 95-96.

[67] Case E-2/11 *STX Norway Offshore AS and Others v The Norwegian State, represented by the Tariff Board* [2012] EFTA Ct. Rep. 4.

[68] *STX OSV AS and Others v The State by Tariffnemnda* Rt. 2013, p. 258, para 93 and 94.

[69] *Jonsson* (n 52).

[70] See Carl Baudenbacher, 'EFTA-domstolen og dens samhandling med de norske domstolene' [2013] 52 Lov og Rett 515; Bårdsen [n 63]; Catherine Barnard, 'Reciprocity, Homogeneity and Loyal Cooperation: Dealing with Recalcitrant National Courts?' in The EFTA Court (ed), *The EEA and the EFTA Courts Decentered Integration* (Hart 2014).

[71] *Holship* (n 59).

4.2 The nature of the EEA Agreement - dynamic or static?

Another issue of controversy is the interpretation of the EEA Agreement. The main problem is the widening gap between the EEA Agreement and the EU. The EEA was modelled to fit the European landscape of the 1990's and the Maastricht treaty, not the post-Lisbon European of the 2010's. Thus, the EFTA court (and the CJEU) have had the challenge to interpret the EEA Agreement in congruence with development of EU law. The EFTA Court has managed to side-step delicate issues, such as citizenship and the EU Fundamental Rights Charter, yet it has largely managed to introduce the same concepts through interpretation of other legislation and legal principles or through judge made law.[72] The EFTA Court doctrine on stressing the objective of homogenous interpretation makes in fact the CJEU the master of EEA law.[73] Consequently, concepts from EU law migrate to EEA law.

Although Norwegian courts have so far applied EEA law steadfastly, many Norwegian lawyers complain about the judicial activism and pro-EU stance of the EFTA Court. The pro-EU writings of EFTA Court President Carl Baudenbacher have irritated Norwegian lawyers.[74] Although dynamic interpretation of the EEA Agreement is necessary to keep the Agreement relevant two decades after its conclusion and to bridge the gap between EEA and the EU, the interpretations are sometimes difficult to accept from a Norwegian perspective, where state sovereignty is central. In the opinion of many Norwegian citizens and lawyers, the EFTA Court appears to be too activist.[75]

Judicial dialogue is a current "hype" and the Supreme Court actively uses case law from the European Court of Human Rights (ECtHR) in its argumentation. The Supreme Court has in controversial judgments made significant changes to the jury system used in criminal justice[76] and introduced a duty for Courts of Appeal to give reasons when they dismiss appeals clearly lacking merit.[77] Compared to other Nordic Supreme Courts, the Norwegian Supreme Court uses case law from the ECtHR more extensively – both as to the number of cases and to the depth of argumentation – in its argumentation.[78] The dialogue with Strasbourg is in sharp contrast with the silent relationship to Luxembourg.

Having a meaningful conversation with the EFTA Court is an art and requires know-how. It takes time to learn to talk to European courts,[79] to recognise cases where EEA law may be relevant and to write

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[72] Fredriksen and Franklin [n 5].

[73] Niels Fenger, Michael Sanchez Rydelski and Titus van Stiphout, *European Free Trade Association (EFTA) and European Economic Area (EEA)* (Wolters Kluwer 2012) 68-69; Fredriksen and Franklin [n 5] 673.

[74] Halvard Haukeland Fredriksen, 'Bridging the Widening Gap between the EU Treaties and the Agreement on the European Economic Area' [2012] 18 European Law Journal 868. For an example of controversial ideas see e.g. Carl Baudenbacher, 'Some Thoughts on the EFTA Court's Phases of Life' in EFTA Court (ed), *Judicial Protection in the European Economic Area* (German Law Publishers 2012); Fredrik Sejersted and others, *EØS-rett* (3 edn, Universitetsforlaget 2011), 172-173. Sejersted characterises the EFTA Court as more Catholic than the Pope and the role of the court as highly problematic.

[75] See also Fredriksen and Franklin [n 5] 675-676.

[76] *A v The Public Prosecutor* Rt. 2009, p. 773.

[77] This applies both to criminal cases (*A v The Public Prosecutor* Rt. 2008, p. 1764) and civil cases (*Avante AS v Finsbråten Eiendom AS* Rt. 2009, p. 1118).

[78] Anne Lise Kjær, 'European Legal Concepts in Scandinavian Law and Language' [2011] 80 Nordic Journal of Human Rights 321. The Norwegian Supreme Court made references to ECtHR case law 3.5 times as many as the Swedish Supreme Courts and 4 times as many as the Danish Supreme Court.

[79] Michal Bobek, 'Learning to talk: preliminary rulings, the courts of the new member states and the court of justice' [2008] 45 Common Market Law Review 1611. In this context, one could even argue that Icelandic courts are «shouting» at the EFTA Court in the wake of the financial crisis. See Michal Bobek, 'Talking Now?

good requests for advisory opinions. The answer from the EFTA Court may depend on how the court frames and articulates the question and on which information it supplies to the EFTA Court. Learning the necessary skills is indispensable for participating in a judicial dialogue.

The Supreme Court may feel threatened by the position of the EFTA Court, and by its own role being reduced.[80] The Court may also desire to engage in a dialogue with the CJEU, but it is barred from it. Yet, a constructive dialogue, which naturally does not exclude disagreement, with the EFTA Court is the road to development of EEA law. Elucidation of the extent of the primacy of EEA law, procedural autonomy in EEA law and *ex officio* application of EEA law requires national courts to request advisory opinions. By engaging in a dialogue with the EFTA Court, Norwegian courts can influence the development of EEA law and thus increase foreseeability of EEA law. Norwegian courts are EFTA courts, but their task is not to develop EEA law; it is the task of the EFTA Court.

5. Consequences of a Janus-faced approach to the EU and EEA

Norway faces the challenges of two-speed integration[81] of European civil procedure law; Simultaneously, it is both inside and outside the core of Europe. The tension between the desire to on the one hand participate in the single market and on the other hand stress the sovereignty of the state creates unpredictable, and sometimes contradictory, approaches. The Janus-faced approach of the Supreme Court towards Europeanization of law and toward the Strasbourg court and the EFTA Court is detrimental. The ambiguity in application of European law, especially when the solution depends on whether the stance is principled or pragmatic, results in less predictability. The interpretation and development of European aspects of Norwegian civil procedure is arbitrary rather than coherent, depending on inter alia which Justices decide a case.

The turf war between the EFTA Court and the Supreme Court is unfortunate. It has been pernicious for the development of the EEA law, but also for the discussion on how EEA law affects Norwegian (civil procedure) law. The line of argumentation stressing state sovereignty blurs the perspective of the parties and the rationale of the EEA Agreement: access to and participation in a single European market. Norwegian businesses and their business partners must be able to trust homogenous and equal application of EEA law. Legal certainty is important for economic prosperity of Norway. Citizens and traders must know which rules are applicable, and that the rules are applied in the same way throughout the EEA area. The promise of homogenous application of EEA law and the promise of parallelism between Brussels I bis Regulation and the Lugano Convention should be taken seriously. The voice of the Norwegian government should not overcome the perspectives of private parties.

In the famous book The Hitch Hikers Guide to the Galaxy by Douglas Adams, we learn why a towel is useful tool: “[you can] wrap it round your head to … avoid the gaze of the Ravenous Bugblatter Beast of Traal (a mindboggingly stupid animal, it assumes that if you can’t see it, it can’t see you – daft as a brush, but very very ravenous).”[82]. The Norwegian discussion on EEA law, especially voices stressing the sovereignty of the Norwegian state and the wish to keep national law intact, is similar to the

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Preliminary Rulings in and from the New Member States’ [2014] 21 Preliminary Rulings in and from the New Member States.

[80] Hans Petter Graver, ‘Dømmer Høyesterett i siste instans?’ [2014] Jussens Venner 265, 267, 279; Fredriksen [n 55] 94-95.

[81] Burkhard Hess, ‘Abgestufte Integration im Europäischen Zivilprozessrecht’ in Rolf Stürner and others (eds), *Festschrift für Dieter Leipold zum 70 Geburtstag* (Mohr Siebeck 2009).

[82] Douglas Adams, *The Hitchhiker's Guide to the Galaxy* (Orion Publishing 2011 (1979)) 21.

Beast of Traal. If you only resist a European civil procedure in principle, it will go away and you have no more worries. However, the resistance towards Europeanisation hampers the ability to analyse soberly the emergence and development of European civil procedure. European civil procedure is no longer statutory law equivalent to traditional supranational cooperation: indeed, it is a growing web of increasingly interconnected pieces of European law. European civil procedure is not a candy store where one can pick and choose – instead the pieces are increasingly woven together. In sum, Europeanisation permeates Norwegian civil procedure and will increasingly continue to do so.