The Inapplicability of the *Bosphorus* Presumption to the European Economic Area Agreement: A Risk for the Coherence of Legal Systems in Europe

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The European Court of Human Rights holds that the *Bosphorus* presumption of equivalent protection cannot apply to the European Economic Area (EEA) Agreement – Its reasons focus on EEA Agreement's lack of primacy, direct effect and adequate enforcement mechanisms – Not applying *Bosphorus* presumption to EEA Agreement results in the indirect review of EU law by the Strasbourg Court, given that EEA and EU law are substantially identical – Court's arguments are open to strong criticism – However, its conclusions are correct – They are substantiated by two considerations, which were overlooked by the Court – First, EEA law is to be considered 'freely entered into' international law under the *Matthews* case law – Second, the EFTA Court lacks the power to strike down EEA law breaching upon fundamental rights – Both these consideration are the corollary of the fundamental premises of the EEA Agreement: the retention by EFTA states of sovereign decision-making powers – Refusal to apply *Bosphorus* presumption to EEA Agreement will likely determine a growing inconsistency between the Convention, EU and EEA law – This entails serious systemic problems

Introduction

Does the *Bosphorus* presumption of equivalent protection apply to the European Economic Area (EEA) Agreement?[1] More precisely, does it apply to those states

[1]Agreement on the European Economic Area, 2 May 1992, OJ L 1, 3 January 1994, p. 3.

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party to the European Free Trade Association (EFTA)[2] which are party to the EEA Agreement (EFTA states)[3] while giving execution to EEA law?[4]

The European Court of Human Rights in two recent decisions – *Holship* of May 2021 and *Konkurrenten.no* of November 2019 – held that it does not, because EEA law does not feature sufficient human rights safeguards, in particular due to shortcomings in the supervisory mechanisms.[5]

Such findings pose several problems of a systemic nature. First, they are likely to place EFTA states at the crossroads between contrasting international obligations, thus harming international cooperation, an interest the Court recognises as worthy of protection.[6] Second, although the *Bosphorus* doctrine 'shields' significant portions of EU law from the Strasbourg Court's scrutiny,[7] the establishment of its jurisdiction over EEA law opens the door to an indirect review thereof. Specifically, under the EEA Agreement, EU market-relevant law is incorporated into the EFTA Pillar, being therein interpreted and applied consistently with the case law of the Court of Justice. Irrespective of the merits of allowing the European Court of Human Rights to exert jurisdiction over EU law, an issue well beyond the scope of this article,[8] doing so in such a surreptitious manner poses relevant problems.

Thus, due to the serious systemic consequences of the non-application of the *Bosphorus* doctrine to the EEA system just pointed out and the scant attention the

[2]Established by the Convention Establishing the European Free Trade Association, 4 January 1960, https://www.efta.int/Legal-Text/EFTA-Convention-1152, visited 4 August 2023.

[3]The term 'EFTA states' is used to refer only to those EFTA states which are party to the EEA Agreement (Iceland, Liechtenstein and Norway). In this regard, a caveat is in order: Switzerland, although party to the EFTA Convention, is not party to the EEA Agreement.

[4]Correctly understood, EEA law means the law regulating the European Economic Area (comprising both Pillars thereof: the EU and the EFTA states). For the purposes of this article, 'EEA law' shall mean the EEA Agreement, including its Annexes and its Protocols, i.e. EEA law in the EFTA Pillar of the EEA.

[5]ECtHR 10 May 2021, No. 45487/17, *Norwegian Confederation of Trade Unions (LO)* v *Norway*, para. 106-108 (hereinafter *Holship*); ECtHR 5 November 2019, No. 47341/15, *Konkurrenten.no AS* v *Norway*, para. 42 ff.

[6]ECtHR 30 June 2005, No. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* v *Ireland*, para. 150 ff.

[7]*Bosphorus* v *Ireland*, *supra* n. 6. In the following, the *Bosphorus* doctrine is presented and its most relevant aspects for the purposes of this article are discussed. For a comprehensive analysis, *see* E. Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine* (Brill Nijhoff 2017).

[8]Many of the issues discussed here would be overcome were the EU to accede to the Convention. However, although negotiations are quite advanced, the accession is still far from close. Thus, such an eventuality should not be considered (accession negotiations can be monitored at https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights, visited 4 August 2023).

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issue has received in the literature,[9] a deeper analysis is needed. In particular, this article argues that, especially because of their systemic importance, the conclusions of the Court should be substantiated by compelling arguments. However, they are not; rather, the Court's reasoning is open to rebuttal and criticism.[10] Nonetheless, the conclusion it reaches is correct. In particular, two arguments, which were overlooked by the Court, are advanced to support such a finding: (a) the fact that the EEA law is 'freely entered into' international law;[11] and (b) the lack of any power by the EFTA Court to strike down EEA law enacted within the EFTA Pillar which is found to breach fundamental rights. Both objections trace back to structural features of the Agreement, namely that EFTA states maintain their sovereignty perfectly intact: consequently, it is unlikely that such difficulties will be overcome.

The article proceeds as follows. The first section provides the relevant background to the main argument by analysing the Court's decisions in *Holship* and *Konkurrenten.no* and discussing the framework of the EEA Agreement. The second section develops the core argument of the article by considering whether EEA law is 'freely entered into' international law and whether the conditions for the fulfilment of the equivalent protection presumption are met in the context of the EEA Agreement. The concluding section addresses the systemic consequences of the impossibility of applying the *Bosphorus* presumption to the EEA Agreement.

The European Court of Human Rights' decisions in *Holship* and *Konkurrenten.no* as a backdoor to the *Bosphorus* presumption

The European Court of Human Rights first dealt with the issue of the applicability of the *Bosphorus* presumption to the EEA Agreement in *Konkurrenten.no*, a case brought by a bus company which had lodged before the EFTA Surveillance

[9]H.H. Fredriksen and S.Ø. Johansen, 'The EEA Agreement as a Jack-in-the-Box in the Relationship Between the CJEU and the European Court of Human Rights?', 5 *European Papers* (2020) p. 707, arguing for the applicability of the *Bosphorus* presumption to the EEA Agreement. Less recently, and before the Court's judgments, the topic was discussed by D.T. Björgvinsson, 'Fundamental Rights in EEA Law', in EFTA Court (ed.), *The EEA and the EFTA Court: Decentred Integration* (Hart Publishing 2014) p. 263, arguing against the applicability of the *Bosphorus* presumption; for the opposite view *see* C. Baudenbacher, 'Fundamental Rights in EEA Law or: How Far from Bosphorus is the European Economic Area Agreement?', in S. Breitenmoser et al. (eds.), *Human Rights, Democracy and the Rule of Law. Liber amicorum Luzius Wildhaber* (Nomos 2007) p. 58.

[10]For some convincing criticisms of the Court's reasoning, *see* Fredriksen and Johansen, *supra* n. 9. As will be argued, however, their conclusion, i.e. that the *Bosphorus* presumption should be applied to EEA law, is less agreeable.

[11]ECtHR 18 February 1999, No. 24833/94, *Matthews* v *United Kingdom*, para. 33.

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Authority a complaint of state aid allegedly benefittng its competitors. Upon the Authority's refusal to investigate its complaint, Konkurrenten brought the case before the EFTA Court, which dismissed it because it deemed that the applicant lacked *locus standi*. Thus, in the following proceedings before the European Court of Human Rights, the issue was not whether Norway had breached the Convention by implementing EEA law, but rather whether it was responsible for the alleged denial of access to a court because of the EFTA Court's dismissal of the applicant's case. Consequently, *Konkurrenten.no* falls in the *Gasparini* line of case law[12] rather than in the *Bosphorus* one,[13] as the Court itself observes.[14] Therefore, the Court's holding that the basis for the *Bosphorus* presumption is in principle lacking in the context of the EEA Agreement due to a lack of both substantive fundamental rights guarantees and procedural mechanisms aimed at their protection is an *obiter dictum*.[15]

The Court was again faced with the question of the applicability of the equivalency doctrine to the EEA Agreement in *Holship*. This case, closely reminiscent of *Viking*,[16] was brought by two Norwegian dockworkers unions alleging that the Norwegian Supreme Court had violated their right to collective action under Article 11 of the Convention by holding that the boycott they initiated was unlawful given that it breached Holship's (a shipping company) freedom of establishment protected under Article 31 of the EEA Agreement, the equivalent of Article 49 TFEU. In this context, the Court stated that 'for the purposes of this case the *Bosphorus* presumption does not apply to EEA law'.[17] Revisiting its previous dictum in *Konkurrenten.no*, the Court conceded, correctly, that the EEA Agreement features substantive fundamental rights guarantees[18]

[12]ECtHR 12 May 2009, No. 10750/03, *Gasparini* v *Italy and Belgium*. *See* T. Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights', 10 *Human Rights Law Review* (2010) p. 529.

[13]As observed by Fredriksen and Johansen, *supra* n. 9, p. 716.

[14]ECtHR, *Konkurrenten.no* v *Norway*, supra n. 5, para. 42.

[15]Ibid., para. 43.

[16]ECJ 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP*. It should be noted that, although it did not find any violation of the Convention, the Strasbourg Court criticised the reasoning of the Court of Justice in *Viking* (*see* ECtHR, *Holship*, *supra* n. 5, para. 117): on this point *see* H. Ellingsen, 'Reconciling Fundamental Social Rights and Economic Freedoms: The ECtHR's Ruling in LO and NTF v. Norway (the Holship Case)', 59 *Common Market Law Review* (2022) p. 583 at p. 593 ff.

[17]*Holship*, *supra* n. 5, para. 108. In the context of the proceedings before it, the Supreme Court asked the EFTA Court for an Advisory Opinion under Art. 34 Surveillance and Court Agreement, which it then followed loyally (Supreme Court of Norway 16 December 2016, HR-2016-2554-P, *Holship Norge AS* v *Norwegian Transport Workers' Union*; EFTA Court 19 April 2016, E-14/15, *Holship Norge AS* v *Norsk Transportarbeiderforbund*).

[18]*Holship*, *supra* n. 5, para. 107.

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yet still found that it provides insufficient procedural safeguards. This, the Court argued, is because EEA law does not enjoy direct effect and primacy, and because ordinary courts in the EFTA states are under no obligation to request advisory opinions from the EFTA Court; furthermore, advisory opinions are not deemed binding on the referring judge as to the interpretation of EEA law.[19]

Although the findings of the Court in both *Holship* and *Konkurrenten.no* are not definitive as to the general non-applicability of the presumption to the EEA Agreement – in *Holship* the Court expressly limited its findings on the matter to the case at hand and in *Konkurrenten.no* it held so in an *obiter dictum* –, still they represent strong indications of its stance on the matter, very likely influencing future deliberations and thus making it relevant to discuss them.[20] It is worth noting in passing that the same issue might be discussed again in the context of a recently communicated case against Norway – *Knihinicki* v *Norway* – concerning the execution of a European Arrest Warrant issued by Polish authorities, whereby the applicant complains of a violation of his right to a fair trial on grounds relating to the risk of a flagrant denial of justice in Poland upon being surrendered.[21]

The refusal by the Court to apply the *Bosphorus* presumption to the EEA Agreement is discussed further in the next section. This section provides a brief analysis of the 'EEA system', resulting from the interaction of the EEA Agreement and the closely related Surveillance Authority and Court Agreement,[22] concluded between EFTA states only.[23] Thus, clarification is provided on why the Strasbourg Court considered applying the *Bosphorus* presumption to EEA law at all.

The EEA Agreement, concluded between the EU, its member states and EFTA states, aims to provide the 'fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to

[19]Ibid., para. 108.

[20]The same position was reportedly maintained by the then President of the Court Spano in his speech on the occasion of the visit to the Court of EFTA Court's judges on 6 October 2022: *see* https://eftacourt.int/events-past/president-robert-spano-october2022/, visited 4 August 2023.

[21]ECtHR No. 36356/22, *Knihinicki* v *Norway*, communicated on 21 March 2023. European Arrest Warrants are applicable in Norway and Iceland due to the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, 28 June 2006, OJ L 292, 21 October 2006, p. 2.

[22]Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, May 2, 1992, OJ L 344, Jan. 31, 1994, p. 3, hereinafter 'Surveillance and Court Agreement'.

[23]For a general overview, *see* C. Baudenbacher (ed.), *The Fundamental Principles of EEA Law* (Springer International Publishing 2017); C. Baudenbacher (ed.), *The Handbook of EEA Law* (Springer International Publishing 2016).

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the EFTA states'.[24] Accordingly, the principle of homogeneity,[25] requiring that the law concretely applied in both Pillars of the EEA (namely the EU and EFTA states) be the same, is the fundamental principle of the EEA Agreement. Said principle is further developed by the two principles of legislative and interpretative homogeneity, which respectively require that EU market relevant legislation is transposed in the EFTA states and that such legislation is interpreted consistently with the case law of the Court of Justice.[26]

As to the principle of legislative homogeneity, whereas EU primary law provisions are reproduced in the main body of the Agreement, secondary EU legislation is incorporated into the Annexes. As new EU secondary legislation is enacted, the Annexes are updated by Decisions of the Joint Committee, a body made up of representatives of the EU and of the EFTA states. It is their task to determine, by unanimous agreement, which EU legislation is actually relevant to the functioning of the internal market and therefore to be incorporated into the Agreement.[27] EFTA states are subsequently under an obligation to transpose such provisions in their domestic systems.[28]

Regarding the principle of interpretative homogeneity, a 'two Pillar solution' was adopted on the interpretation of the Agreement, whereby the Court of Justice and the EFTA Court were given this task within the EU and EFTA Pillars respectively.[29] Although the two Courts are mutually independent, the EFTA Court is required to follow the interpretation of the Court of Justice insofar as the provisions of the Agreement it is called to interpret are substantially identical to EU law provisions.[30]

[24]ECJ 23 September 2003, Case C-452/01, *Ospelt* v *Schlössle Weissenberg*, para. 29. *See also*, analogously, EFTA Court 14 December 1994, E-1/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark*, para. 32.

[25]Art. 1 EEA Agreement.

[26]*See* respectively, D.W. Holter, 'Legislative Homogeneity', in Baudenbacher (2017), *supra* n. 23, p. 1; P. Speitler, 'Judicial Homogeneity as a Fundamental Principle of the EEA', in Baudenbacher (2017), *supra* n. 23, p. 19.

[27]Art. 92–94 of the EEA Agreement.

[28]Art. 7 EEA Agreement; H. Bull, '"Shall Be Made Part of the Internal Legal Order": The Legislative Approaches', in EFTA Court (ed.), *supra* n. 9, p. 203.

[29]This was mainly due to ECJ 14 December 1991, Opinion 1/91, *EEA Agreement*. This solution was then 'validated' by the ECJ 10 April 1992, Opinion 1/92, *EEA Agreement*. *See* B. Brandtner, 'The "Drama" of the EEA Comments on Opinions 1/91 and 1/92', 3 *European Journal of International Law* (1992) p. 300.

[30]*See* Art. 6 EEA Agreement, setting the duty for the EFTA Court to interpret the Agreement in conformity with the Court of Justice's decisions given prior to the signature of the Agreement, and Art. 3, para. 2 Surveillance and Court Agreement, requiring the EFTA Court to pay due account to the principles laid down by the subsequent case law of the Court of Justice. The difference as to the object of the requirements set by the two provisions (that of interpreting in conformity and that of paying due account) was never developed by the EFTA Court, which instead consistently

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Overall, as a result of the principles of legislative and interpretative homogeneity, a significant portion of the national legislation in the EFTA states is substantially comprised of EU law, incorporated through the framework of the EEA Agreement and interpreted according to the case law of the Court of Justice. Therefore, in many cases, such as in *Holship*, the applicable law is the result of the fulfilment by national authorities of EFTA states' obligations under the EEA Agreement.

Now, the rationale of the *Bosphorus* presumption is that of realising a 'compromise between the [European Court of Human Right's] control of the human rights standard in Europe and the smooth functioning of international cooperation'.[31] Against this background, the reason why in *Holship* the parties to the dispute, as well as the Court, considered applying the presumption of equivalent protection to the EEA system should be clear. Indeed, the above-mentioned tension between abiding by EU law obligations and protecting fundamental rights appears to be reproduced under the EEA system. Furthermore, given that EEA law is substantially identical to EU law, one would be tempted to make the case that, if EU law offers an equivalent level of protection, so does EEA law. Teleological arguments are also relevant, as applying the *Bosphorus* presumption to the EEA would ensure consistency between the legal orders involved, whereas failing to do so would result in systemic problems.

However, as argued in the next section, the issue at hand is far from this straightforward and requires deeper examination.

The Impossibility of Applying the *Bosphorus* Presumption to the European Economic Area Agreement

As the European Court of Human Rights stated, the *Bosphorus* presumption of equivalent protection is intended:

> to ensure that a State Party is not faced with a dilemma when it is obliged to rely on the legal obligations incumbent on it as a result of its membership of an international organisation which is not party to the Convention and to which it has transferred part of its sovereignty, in order to justify its actions or omissions arising from such membership vis-à-vis the Convention.[32]

interpreted the Agreement in conformity with the case law of the Court of Justice : *see* EFTA Court 8 July 2008, Joined Cases E-9/07 and E-10/07, *L'Oréal Norge AS* v *Per Aarskog AS*, para. 28 ff; C.N.K. Franklin and H.H. Fredriksen, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On', 52 *CMLR* (2015) p. 629 at p. 631 ff; V. Skouris, 'The Role of the Court of Justice of the European Union in the Development of the EEA Single Market: Advancement through Collaboration between the EFTA Court and the CJEU', in EFTA Court (ed.), *supra* n. 9, p. 5.

[31]Ravasi, *supra* n. 7, p. 69 ff. *See also Bosphorus* v *Ireland*, *supra* n. 6, paras. 150-154.

[32]ECtHR 6 December 2012, No. 12323/11, *Michaud* v *France*, para. 104.

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Thus, insofar as the state's conduct is required by international obligations stemming from its membership in an international organisation in whose favour states party to the Convention have limited their sovereignty, the Court will generally refuse to review the merits of the case, on condition that the international organisation at issue provides a level of protection of human rights equivalent to that ensured under the Convention, having regard for both the available substantial safeguards for fundamental rights and effective enforcement mechanisms thereof. The Court, however, reserves the prerogative to fully review the merits of the case if it finds that, in the concrete case at hand, Convention rights were granted a manifestly deficient protection.[33]

In the following, to attempt to answer the question of whether the *Bosphorus* presumption can apply to the EEA system, the question of whether EFTA states giving execution to EEA law in the domestic legal order can be deemed to act in observance of international obligations flowing from their membership to an international organisation and that of whether the EEA system ensures an equivalent level of protection to that provided under the Convention, will be discussed separately.

It should be noted that the Court, both in *Konkurrenten.no* and *Holship*, appeared not to consider the first issue, focusing only on the latter one.[34]

EEA Law as 'Freely Entered Into' International Law

As already mentioned, the rationale of the *Bosphorus* doctrine consists in a 'compromise' between the duty of the Court to enforce the Convention and the need not to obstruct international cooperation, deemed an interest worthy of protection.[35] Indeed, if the Court were to fully review state action which is the result of a previous transfer of sovereign rights to an international organisation, this would often give states parties to the Convention a dilemma on which international obligation to comply with. Thus, if the international organisation at issue provides a comparable protection of human rights to that ensured under the Convention, the Court lowers the intensity of its scrutiny, limiting it to manifest breaches only, thus favouring international cooperation among states parties. Therefore, that state action is the result of a previous transfer of sovereign rights to

[33]C. Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', 1 *Human Rights Law Review* (2006) p. 87; S. Peers, 'Bosphorus – European Court of Human Rights: Limited Responsibility of European Union Member States for Actions within the Scope of Community Law. Judgment of 30 June 2005, Bosphorus Airways v. Ireland, Application No. 45036/98', 3 *EuConst* (2006) p. 443.

[34]Fredriksen and Johansen, *supra* n. 9, p. 735 note that the Court 'overlooked' such an issue in *Konkurrenten.no*; the same also holds true for *Holship*.

[35]Ravasi, *supra* n. 7, p. 50-52; Peers, *supra* n. 33, p. 451 ff.

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an international organisation is also the precondition for the application of the equivalency doctrine.[36] Indeed, when state action – also on the international plane, for example by 'freely entering into' international treaties[37] – is not the consequence of a previously undertaken obligation there is no countervailing interest to protect by reducing the standard of review: consequently the *Bosphorus* presumption does not apply and the Court exercises its full scrutiny. This – it is argued – is exactly the case with the EEA Agreement.

In order to clarify what is to be understood as state action taken 'in compliance with its obligations flowing from its membership of an international organization to which it has transferred part of its sovereignty'[38] it is useful to contrast the state of affairs in the context of the EEA Agreement, which is discussed in the following, with that in the context of the EU.

If one considers the EU context, it is undisputed that member states, for as long as they remain members of the Union, have transferred part of their sovereign rights to the Union.[39] Here, the transfer of sovereignty can be appreciated at the stage of the creation of new 'secondary' legislation and at that of its application in the domestic legal order.

Indeed, both the creation of secondary law and its subsequent application is the result of a previous limitation of sovereignty by member states, realised by ratifying the EU Treaties: new legislation is passed by EU organs according to procedures established in the Treaties and without member states consenting thereto each and every time, and it is subsequently applied in the domestic legal orders without member states being able to legitimately refuse to do so. In contrast, member states remain responsible for violations of the Convention deriving from primary EU law, as the Treaties are 'international instruments [. . .] freely entered into' by member states, and not the product of any previous international obligation.[40]

Whereas the finding that EU member states have transferred part of their sovereign rights to the Union holds true abstractly and generally, thus explaining why the Strasbourg Court has never elaborated much on this aspect of the equivalency doctrine, it might well be that in the concrete case EU member states are allowed some discretion and that the law regulating a case is not entirely determined by EU law: this often happens, for example, in incorporating

[36]ECtHR 5 May 2016, No. 17502/07, *Avotiņš* v *Latvia*, para. 101; *Michaud* v *France*, *supra* n. 32, paras. 102-104; ECtHR 21 January 2011, No. 30696/09, *M.S.S.* v *Belgium*, para. 338; *Bosphorus* v *Ireland*, *supra* n. 6, paras. 150-157; *Matthews* v *United Kingdom, supra* n. 11, para. 33.

[37]*Matthews* v *United Kingdom*, *supra* n. 11, para. 33. *See also* ECtHR 30 January 1998, No. 19392/92, *United Communist Party of Turkey* v *Turkey*, para. 29.

[38]*Bosphorus* v *Ireland*, *supra* n. 6, para. 154.

[39]*See*, *e pluribus*, ECJ 15 July 1964, Case C-6/64, *Costa* v *Enel*, E.C.R. 1964/585, p. 593.

[40]*Matthews* v *United Kingdom*, *supra* n. 11, para. 33.

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Directives. In such cases, if the violation of Convention rights is derived from the state exercising its discretion, the *Bosphorus* presumption will not apply.[41]

Turning to the EEA system, whereas EEA law, once enacted through Joint Committee Decisions, is binding upon the EFTA states, which are required to give full effect thereto in their national legal orders,[42] the question of whether EFTA states have limited their sovereignty in favour of an international organisation as to the 'making' of new EEA law is a more complicated one and is to be answered in the negative.

As to this question, it is doubtful whether the EEA Agreement sets up an international organisation, in particular due to specific features of the Joint Committee, as it reaches its decisions by unanimous agreement,[43] thus resembling more a treaty body than an organ of international organisation endowed with its own will and distinct from that of the member states.[44]

However, it is premature to draw the conclusion that the *Bosphorus* presumption cannot apply to the EEA system based on these considerations. Dogmatic approaches are of little assistance in the context of the EEA system due to its particular complexity and to the conceptualisation, by the EFTA Court, of the nature of the EEA Agreement in *sui generis* terms and, noticeably, a *sui generis* nature different from that of the EU,[45] a notion already deemed of little explanatory value.[46] Therefore, it is more useful to address the question of whether EFTA states have transferred sovereign powers – in particular legislative ones – to EEA institutions by concluding the EEA Agreement.

Regarding this question, it is widely accepted that 'the EEA Agreement does not entail a transfer of legislative powers'.[47] Indeed, the negotiating history of the

[41]ECtHR 25 March 2021, Joined Applications No. 40324/16 and 12623/17, *Bivolaru* v *France*, para. 98; *Avotiņš* v *Latvia*, *supra* n. 36, para. 116, *Michaud* v *France*, *supra* n. 32, paras. 112-116; *Bosphorus* v *Ireland*, *supra* n. 6, para. 157.

[42]M. Andenas, 'Sovereignty', in Baudenbacher (ed.) (2017), *supra* n. 23, p. 91.

[43]Art. 93, para. 2 EEA Agreement.

[44]*See*, diffusely, Fredriksen and Johansen, *supra* n. 9, at p. 739-41; for the opposite view, *see* K. Schmalenbach, 'International Organizations or Institutions, General Aspects', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2014) para. 18. Other aspects are also relevant, for example, the lack of a Secretariat.

[45]EFTA Court 10 December 1998, E-9/97, *Sveinbjörnsdóttir* v *Iceland*, para. 59. *See also* EFTA Court 31 October 2007, E-1/07, *Criminal Proceedings against A*, para. 37; EFTA Court 12 December 2003, E-2/03, *Ásgeirsson*, para. 28; EFTA Court 30 May 2002, E-4/01, *Karlsson* v *Iceland*, para. 25.

[46]R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) p. 58-60.

[47]*Karlsson*, *supra* n. 45, para. 25. *See also* Opinion 1/91, *supra* n. 29, para. 20.

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Agreement,[48] and several provisions thereto – especially the last recital of the Preamble and Protocol No. 35 – clarify that the aim of the Agreement is that of achieving homogeneity in the law regulating the market while preserving the sovereign decision-making power of the EFTA states.[49]

Coherently, decisions of the Joint Committee amending the Annexes to the EEA Agreement and incorporating EU legal acts are to be considered international agreements concluded in a simplified form, thus requiring the consent of all the Parties to the Agreement.[50] Therefore, although the Parties usually agree as to the incorporation of the relevant EU acts into the Agreement, it is entirely possible that such agreement is lacking: EFTA states have a veto power on the adoption of decisions by the Joint Committee.[51]

In this regard, Article 102, paragraph 5 of the EEA Agreement confirms the free nature of the EFTA states' choice to consent to the adoption of said decisions by providing for the procedure to be followed in the event that no agreement among the Parties can be found. This finding is further confirmed by Article 103 of the Agreement, which addresses the eventuality whereby the national constitutional law of EFTA states allows for decisions by the Joint Committee to be binding only after the fulfilment of constitutional requirements – namely, parliamentary ratification. Indeed, if EFTA states were under an obligation to consent to decisions of the Joint Committee incorporating EU law, this would make Article 103 EEA Agreement completely moot as parliaments would be called upon to vote on something already binding upon the state as a matter of

[48]S. Norberg and M. Johansson, 'The History of the EEA Agreement and the First Twenty Years of Its Existence' in Baudenbacher (ed.) (2016), *supra* n. 23, p. 3.

[49]Holter, *supra* n. 26, para. 8 'Homogeneity and Sovereignty'; T. van Stiphout, 'Homogeneity vs. Decision-Making Autonomy in the EEA Agreement', 9 *European Journal of Law Reform* (2007) p. 431; H.P. Graver, 'Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement', 7 *European Foreign Affairs Review* (2002) p. 73.

[50]EFTA Court 9 October 2002, E-6/01, *CIBA Speciality Chemicals Water Treatment Ltd* v *Norway*, para. 33.

[51]Franklin and Fredriksen, *supra* n. 30, p. 631; *see*, for the opposite view, K. Almestad, 'The Notion of "Opting Out"', in Baudenbacher (ed.) (2016), *supra* n. 23, p. 85. Almestad maintains the existence of a 'duty to include new relevant legislation' (as in the title of para. 3), meaning that the Contracting Parties 'should [not] be left with a right to a certain leeway to "opt out" or reserve themselves in instances of particular political sensitivity, let alone that they have retained for themselves a general right to block the inclusion of a certain legal act at will' (at p. 88), by invoking the duty of loyal cooperation under Art. 3 EEA Agreement (at p. 94), and specific duties incumbent on the Parties under Art. 99, para. 4, 102, para. 1, and 102, para. 3 EEA Agreement. However, a general duty of agreeing to subsequent incorporation of relevant EU legislation cannot be read into the duty of loyal cooperation; moreover, the provisions mentioned above create specific obligations pertaining to the negotiating phase leading up to the adoption of Joint Committee Decisions but not to their adoption itself, which remains, ultimately, free : *see* Fredriksen and Johansen, *supra* n. 9, fn. 135.

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international law. Finally, the practice of the Joint Committee reinforces the conclusion that its decisions are to be considered freely entered into international agreements. Indeed, the Committee has a certain backlog, which, in some cases, is determined by EFTA states' opposition to the incorporation of the relevant EU legal acts. In rare but significant cases, delays may even last years:[52] the incorporation of the Data Retention Directive[53] was halted for as long as it was in effect until the Court of Justice struck it down in *Digital Rights Ireland*.[54] The case of the Citizenship Directive, whose incorporations proved extremely complex and lengthy, is also telling in this regard.[55]

It has recently been argued that, despite the considerations above, the *Bosphorus* presumption should apply to EEA law rather than the latter falling under the *Matthews* case law.[56] In particular, it is argued that 'while there is no legal obligation to accept new EU legislation into the EEA Agreement, its object and purpose depend on this being done' and that 'in the 25 years that the EEA Agreement has been in operation, there is still no clear example of a "veto" by the EEA/EFTA states against new EU legislation of EEA relevance'.[57]

These arguments, however, are unconvincing. It is certainly true that the EEA Agreement's object and purpose depends on EU law being timely and regularly incorporated in the Agreement. This, however, is absolutely compatible with the retention by EFTA states of their sovereignty and with the possibility that, if they were persuaded that a distinct piece of EU law breached individuals' fundamental rights, they could legitimately – i.e. without breaching any international obligation – prevent its incorporation. In summary, although it is certainly true that the Agreement functions well mainly because 'EFTA States have come to accept [. . .] life under the hegemony of the EU',[58] this is a political issue; from a legal perspective, EFTA states maintain their sovereignty intact.[59]

In conclusion, given that decisions by the Joint Committee are international agreements, to which it is necessary that every Party to the Agreement freely

[52]Holter, *supra* n. 26, p. 13 ff; Franklin and Fredriksen, *supra* n. 30, at p. 657 ff.

[53]Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006, OJ L 105/54.

[54]ECJ 8 April 2014, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd* v *Minister for Communications*.

[55]Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, OJ L 158/77. Regarding its incorporation process, *see* T. Burri and B. Pirker, 'Constitutionalization by Association? The Doubtful Case of the European Economic Area', 32 *Yearbook of European Law* (2013) p. 207 at p. 217-220.

[56]Fredriksen and Johansen, *supra* n. 9.

[57]Ibid., p. 740 ff.

[58]Franklin and Fredriksen, *supra* n. 30, p. 633. *See also* E.O. Eriksen and J.E. Fossum (eds.), *The European Union's Non-Members: Independence under Hegemony?* (Routledge 2015) Part II.

[59]Holter, *supra* n. 26, para. 8.

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consents, EEA law is to be considered 'freely entered into' international law for the purposes of *Matthews*, thus calling for the European Court of Human Rights to exert its full jurisdiction. This conclusion is only reinforced by the consideration (below, next section) that the EFTA Court cannot strike down any provision of the Agreement, Annexes included, for breach of fundamental rights. If the EFTA states were deemed bound to consent to the incorporation of EU legislation violating individuals' fundamental rights, the EEA Agreement would be seriously lacking in the protection of fundamental rights given the absence of an effective judicial review system.

The European Economic Agreement Does Not Provide a Level of Protection of Fundamental Rights Equivalent to That under the Convention

The considerations made above should be sufficient to maintain that the *Bosphorus* presumption cannot be applied to the EEA system. However, as already observed, they were fundamentally overlooked by the Court; furthermore, objections to the application of the *Bosphorus* presumption such as those raised above could be deemed unconvincing or overcome. It is not moot, therefore, to discuss whether the EEA system can be deemed to offer an equivalent protection to that ensured under the Convention, and specifically whether it encompasses sufficient substantial safeguards and mechanisms for their enforcement.

Regarding substantial fundamental rights guarantees, the EEA system surely affords an equivalent level of protection to that offered by the Convention, as the Court appeared to acknowledge in *Holship*. Indeed, as widely observed,[60] the EFTA Court has long recognised the status of fundamental rights as general principles of EEA law, guiding the interpretation of EEA law, in particular by referring to the Convention as interpreted by the Strasbourg Court.[61] Furthermore, the EFTA Court is required to interpret EEA law consistently with the case law of the Court of Justice: given that the latter interprets EU law in light of fundamental rights, and in particular of the EU Charter of Fundamental Rights, this means that the interpretation of EU law that the EFTA Court is

[60]R. Spano, 'The EFTA Court and Fundamental Rights', 13 *EuConst* (2017) p. 475; Björgvinsson, *supra* n. 9, p. 263.

[61]EFTA Court 9 July 2014, Joined Cases E-3/13 and E-20/13, *Olsen* v *Norway*, paras. 224-227; EFTA Court 18 April 2012, E-15/10, *Poste Norge* v *EFTA Surveillance Authority*, para. 85 ff; EFTA Court 16 July 2011, E-4/11, *Clauder*, para. 49. The relevance of fundamental rights in EEA law was already recognised in very early cases by the EFTA Court: *see* 12 June 1998, E-8/97, *TV 1000 Sverige AB* v *Norway*, para. 26; 19 June 2003, E-2/02, *Technologien Bau- und Wirtschaftsberatung GmbH* v *EFTA Surveillance Authority*, para. 36 ff; Case E-2/03, *Ásgeirsson*, *supra* n. 45, para. 23.

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required to follow is already informed by fundamental rights.[62] Finally, in the very few cases in which it has not followed the Court of Justice's lead in interpreting EEA law, the EFTA Court has done so to ensure that the fundamental rights of the individuals concerned were fully secured.[63]

Concerning the supervisory mechanisms available within the EEA system, as already mentioned, the European Court of Human Rights in *Holship*, building on its previous decision in *Konkurrenten.no*, refused to apply the *Bosphorus* presumption 'given [. . .] the absence of supremacy and direct effect, added to which is the absence of the binding legal effect of advisory opinions from the EFTA Court'.[64] As anticipated, this reasoning is unconvincing.

As to primacy and direct effect, the Strasbourg Court appears to overemphasise their relevance in a manner inconsistent with its case law on the *Bosphorus* doctrine.[65] In particular, in its most recent decisions, the attention of the Court is mainly devoted to the 'deployment of the full potential of the supervisory mechanism provided for by European Union law',[66] fundamentally referring to the preliminary ruling mechanism under Article 267 TFEU: direct effect and the primacy of EU law are hardly mentioned.[67] Furthermore, and also due to the Court's lack of motivation on the point, it is difficult to understand the relevance

[62]C. Lebeck, 'General Principles' in EFTA Court (ed.), *supra* n. 9, p. 259 ff; W. Kälin, 'The EEA Agreement and the European Convention for the Protection of Human Rights', 3 *European Journal of International Law* (1992) p. 341 at p. 347 ff. Regarding the indirect relevance of the Charter, *see* N. Wahl, 'Uncharted Waters: Reflections on the Legal Significance of the Charter under EEA Law and Judicial Cross-Fertilisation in the Field of Fundamental Rights', in EFTA Court (ed.), *supra* n. 9, p. 281.

[63]To secure the individuals' rights to family life, the EFTA Court interpreted Art. 7, para. 1, lett. b of the Citizenship Directive (as incorporated in the EEA Agreement) as granting rights of residence for third-country nationals, spouses of citizens of EEA State who had resided in another EEA State and wished to return to their home state: EFTA Court 13 May 2020, E-4/19, *Campbell* v *Norway*; EFTA Court 21 September 2016, E-28/15, *Yankuba Jabbi* v *Norway*. Conversely, the ECJ has consistently held that such rights cannot be derived from the Citizenship Directive, making recourse instead to Art. 21 TFEU, which has no corresponding provision in the EEA context: ECJ 5 June 2018, Case C-673/16, *Coman* v *Inspectoratul General pentru Imigrări*, para. 20; ECJ 10 May 2017, Case C-133/15, *Chavez-Vilchez* v *Raad van bestuur van de Sociale verzekeringsbank*, para. 53; ECJ 12 March 2014, Case C-456/12, *O* v *Minister voor Immigratie, Integratie en Asiel*, paras. 37-43. On this point, *see* U. Lattanzi, 'Cittadinanza Europea e Circolazione delle Persone nell'Area Europea di Libero Scambio', 6 *Federalismi.it* (2021) p. 42.

[64]*Holship*, *supra* n. 5, para. 108.

[65]Indeed, in *Bosphorus* v *Ireland*, *supra* n. 6, para. 164, the Court addressed them only in passage and mainly to highlight the role of the Court of Justice in the development of core EU law doctrines: Fredriksen and Johansen, *supra* n. 9, p. 723.

[66]*Avotiņš* v *Latvia*, *supra* n. 36, para. 105.

[67]*Bivolaru* v *France*, *supra* n. 41, paras. 96-103; ECtHR 17 April 2018, No. 21055/11, *Pirozzi* v *Belgium*, paras. 62-64; *Avotiņš* v *Latvia*, *supra* n. 36, paras. 104-112; *Michaud* v *France*, *supra* n. 32, paras. 107-115.

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of primacy and direct effect as to the protection of fundamental rights in the context of the review of EU member states' actions in strictly implementing EU obligations. Indeed, whereas 'direct effect can [. . .] be defined as the capacity of a norm of Union law to be applied in domestic court proceedings [and] primacy (or supremacy) denotes the capacity of that norm of Union law to overrule inconsistent norms of national law in domestic court proceedings',[68] the precondition for the application of the *Bosphorus* presumption, as discussed above, is that states' conduct consists of them strictly giving effect to their international obligations, irrespective of why they do so. In a way, direct effect and primacy address problems which have already been 'solved' as the state has been deemed to have acted strictly in execution of its international obligations. In particular, if the reference to primacy and direct effect is aimed at affirming the particular 'bindingness' they supposedly convey to EU law, it is well established that the availability of more or less effective enforcement mechanisms does not affect the binding nature of an international law obligation.[69] Thus, EFTA states are no less bound by EEA law than their EU counterparts are with respect to EU law due to the absence of the principles of direct effect and primacy in the EEA system.

More generally, however, the soundness of requiring the EEA system to encompass doctrines which are very specific to EU law, such as those of primacy and direct effect, in order to be considered as securing an equivalent protection to that ensured under the Convention is doubtful. This is because the assessment of equivalence should be centred upon the question of whether the EEA system, with its own peculiarities, is comparable to the Convention system, and not on whether it shows identical features to that of the EU.

Once such a perspective is adopted, it must be acknowledged, for example, that the concrete effect of the so-called principle of statutory primacy, requiring EFTA states to enact through ordinary legislation a provision whereby EEA law is to prevail over contrasting ordinary legislation, though not allowing for primacy over constitutional norms,[70] has worked well in providing for consistency between national and EEA legal orders. It is argued that this is demonstrated by the fact that, over the entire period the Agreement has been in place, no significant clashes between national legal orders and the EEA one have been registered.[71]

[68]B. de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press 2021) p. 187.

[69]G.G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', 19 *Modern Law Review* (1956) p. 1. For a recent contribution, *see* B. Çali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (Oxford University Press 2015).

[70]P. Hreinsson, 'General Principles' in Baudenbacher (ed.) (2016), *supra* n. 23, p. 349 at p. 383-388.

[71]Franklin and Fredriksen, *supra* n. 30, p. 667.

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Apart from the lack of primacy and direct effect, the Strasbourg Court finds the supervisory mechanism established in the EEA system insufficient given that: (a) national courts of last instance are under no obligation to refer interpretative questions to the EFTA Courts;[72] and (b) advisory opinions rendered by the EFTA Court are not binding upon referring courts. Under both these aspects, the preliminary ruling mechanism enacted under Article 34 of the Surveillance and Court Agreement surely presents serious shortcomings, as held by the European Court of Human Rights.[73]

Many arguments have been proposed to substantiate a duty for national courts of last instance to refer interpretative questions to the EFTA Court. These have drawn on the principle of loyalty enshrined in Article 3 of the EEA Agreement,[74] that of homogeneity – as the refusal to put the matter before the EFTA Court could determine inconsistencies in the interpretation of EEA law across the EU and EFTA Pillar, or even within the EFTA Pillar itself.[75] Furthermore, the principle of reciprocity, requiring that equal access to justice to individuals across the entire EEA is ensured, has also been invoked;[76] so has Article 6 of the European Convention on Human Rights.[77] Despite such a scholarly proposal, the reality remains that such a duty does not exist within the EFTA Pillar of the EEA, as recognised by the EFTA Court itself, though somewhat ambivalently.[78]

[72]In *Matthews* v *United Kingdom*, *supra* n. 11, para. 33 drew the conclusion that the presumption of equivalent protection – as established by the European Commission of Human Rights 9 February 1990, No. 13258/87, *M & Co* – could not be applied also because the ECJ could not strike down any provision of the Treaties if it found it to be in breach of fundamental rights.

[73]C. Barnard, 'Reciprocity, Homogeneity and Loyal Cooperation: Dealing with Recalcitrant National Courts?', in EFTA Court (ed.), *supra* n. 9, p. 151; G. Baur, 'Preliminary Rulings in the EEA – Bridging (Institutional) Homogeneity and Procedural Autonomy by Exchange of Information', ibid., p. 169; C. Baudenbacher, 'The Implementation of Decisions of the CJEU and of the EFTA Court in Member States' Domestic Legal Orders', 40 *Texas International Law Journal* (2004) p. 383.

[74]Baur, *supra* n. 73, p. 177; S. Magnússon, 'On the Authority of Advisory Opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court', 13 *Europarättslig tidskrift* (2010) p. 528.

[75]S. Magnússon, 'Judicial Homogeneity in the European Economic Area and the Authority of the EFTA Court. Some Remarks on an Article by Halvard Haukeland Fredriksen', 80 *Nordic Journal of International Law* (2011) p. 507 at p. 524-526.

[76]Barnard, *supra* n. 73, p. 157 ff.

[77]J. 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) p. 100.

[78]EFTA Court 28 September 2012, E-18/11, *Irish Bank Resolution Corporation Ltd* v *Kaupping hf*, para. 57 ff; EFTA Court 9 April 2013, E-3/12, *Jonsson*, para. 60; EFTA Court 13 June 2013, E-11/12, *Koch* v *Swiss Life (Liechtenstein) AG*, para. 117. As to the national practice in this regard, *see* Baudenbacher (ed.) (2016), *supra* n. 23, Part 4 'National Authorities in the EFTA Pillar'.

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As for the non-binding nature of advisory opinions, this is supported by the wording of Article 34 of the Surveillance and Court Agreement, which affirms that 'the EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement'. In contrast, Article 267 TFEU uses the notion of 'preliminary ruling'. However, although national Courts have consistently affirmed the non-binding nature of EFTA Court decisions, it is generally accepted that the EFTA Court is a qualified interpreter of EEA law and thus referring courts are to follow its decisions and can only disregard them provided they have compelling reasons to do so, thus achieving in substance a very similar outcome.[79]

In summary, both shortcomings of the supervisory mechanism in place in the EEA system are problematic as they determine potentially severe limitations to individuals' access to the EFTA Court through preliminary references, in a context where direct actions for annulment in the guise of the proceedings devised under Article 263 TFEU are not envisioned. This is especially significant as in the *Bosphorus* case law, the importance of the preliminary ruling mechanism is also considered a counterbalance to the difficulties in asserting standing under Article 263 TFEU.[80]

In *Avotiņš*, however, the Court adopted a less formalistic approach to the requirement of the full deployment of supervisory mechanisms, holding that it would be useless to subject the application of the *Bosphorus* presumption to the referral of preliminary questions to the Court of Justice even in cases where 'no genuine and serious issue arises with regard to the protection of fundamental rights by EU law', or where the Luxembourg Court had already intervened on the issue.[81] Building on that decision, it has been observed that the supervisory mechanism in place in the EEA system, despite the above-mentioned shortcomings, can be generally and abstractly deemed adequate for the purposes of the *Bosphorus* doctrine – with the caveat that whether it has been fully deployed in the concrete case must be verified – because it appears to function well in practice.[82] Such a proposal could also be framed as entailing an incentive for national courts to refer to the EFTA Court and to respect its decisions, thus progressively improving the functioning of the referral mechanism under Article 34 of the Surveillance and Court Agreement and individuals' access to the EFTA Court. This observation should be taken seriously, given that the assessment of the equivalency in the level of fundamental rights protection should consider the actual practice of the law – it is this, after all, that ultimately affects individuals'

[79]S. Magnússon, 'The Authority of the EFTA Court', in Baudenbacher (ed.) (2017), *supra* n. 23, p. 139.

[80]*Bosphorus* v *Ireland*, *supra* n. 6, paras. 162-164.

[81]*Avotiņš* v *Latvia*, *supra* n. 36, para. 109.

[82]Fredriksen and Johansen, *supra* n. 9, p. 727-732.

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fundamental rights. Engaging in such discussion would, however, lead to extremely difficult terrain, that of the review of the concrete practice in Norway, Iceland and Liechtenstein. Evidence of the difficulty of such an 'on the field' assessment is the existing strong divergence in the scholarship regarding the good functioning of the advisory opinion mechanism devised under Article 34 of the Surveillance and Court Agreement.[83]

Despite the different opinions concerning the deficiencies of the supervisory mechanisms in the EEA system, the decisive consideration in deeming such mechanisms insufficient, once again overlooked by the Strasbourg Court, is the lack of any power of the EFTA Court to review the validity of EEA law, either that inscribed in the main part of the Agreement or that incorporated in the Annexes, against fundamental rights standards.[84]

In the scholarly debate, the finding of the lack of any such powers of the EFTA Court is not unanimous; however, contrasting opinions appear unconvincing. Indeed, it has been argued that the EFTA Court would refuse to apply a decision of the Joint Committee incorporating EU law deemed to be seriously flawed under the fundamental rights perspective.[85] It has also been suggested that the EFTA Court could solve cases of EEA law conflicting with fundamental rights by 'holding that the overarching objective of homogeneity between EU and EEA law does not allow for the directive to be applicable in the EEA in a situation where it would have to be considered invalid and therefore inapplicable in the EU'.[86]

The first objection to such proposals is that no provision in the EEA or in the Surveillance and Court Agreement can be found to such an effect and that the EFTA Court has never even hinted at such a possibility.[87] Moreover, the second argument above (regarding the EFTA Court's refusing to apply EEA law whose 'parallel' in the EU would have to be considered invalid) would be seriously at odds with the principle of the autonomy of EU law and that of the interpretative monopoly of the Court of Justice: a court different than the Court of Justice would rule, though somewhat in *obiter*, on the respect by EU law of a fundamental rights standard, something which implies and presupposes an interpretation of the EU norm at issue.[88] Finally, holding that the EFTA Court, established under the Surveillance and Court Agreement – a treaty to which only

[83]Ibid. For the opposite view, *see* Baur, *supra* n. 73, p. 169.

[84]Baudenbacher, *supra* n. 9, p. 58.

[85]Ibid.; C. Baudenbacher, 'Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area', 3 *Columbia Journal of European Law* (1996) p. 169 at p. 184.

[86]Fredriksen and Johansen, *supra* n. 9, p. 733 ff.

[87]Björgvinsson, *supra* n. 9, p. 278.

[88]With specific regard to the EEA Agreement, *see* Opinion 1/91, *supra* n. 29, paras. 37-46. More generally *see* ECJ 30 April 2019, Opinion 1/17, *EU-Canada CET Agreement*, paras. 106-111; ECJ 18 December 2014, Opinion 2/13, *EU Accession to the ECHR*, paras. 237-239.

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Norway, Liechtenstein and Iceland are party – could strike down or refuse to apply decisions of the Joint Committee means that an institution established by only some of the parties to a treaty could unilaterally affect the validity and effectiveness of provisions thereof, which is an extremely problematic conclusion.

Thus, it must be concluded that the EFTA Court cannot strike down any provision of EEA law as enacted in the EFTA Pillar which breaches fundamental rights. Consequently, the EEA system cannot be deemed to fulfil the conditions for the applicability of the presumption of equivalent protection as developed by the European Court of Human Rights. Indeed, it should be clear that the requirement that fundamental rights are 'a condition of the legality of Community [here: EEA] acts'[89] cannot be met under the supervisory mechanism in place in the EEA system.

Concluding Remarks: the Inapplicability of the *Bosphorus* Presumption of Equivalent Protection to the European Economic Area Agreement and its Systemic Consequences

This article has discussed the question of whether the *Bosphorus* presumption of equivalent protection is applicable to EFTA states. The European Court of Human Rights stated that it does not deem the *Bosphorus* presumption to be applicable in the EEA context: as has been argued, such a conclusion is correct, although the reasoning supporting it is open to criticism. In particular, as it was argued, the European Court of Human Rights overlooks two decisive issues which would give its findings much firmer ground. First, EEA law incorporated into the EEA Agreement is 'freely entered into' international law; second, the EFTA Court cannot strike down EEA law which breaches fundamental rights. If these arguments are considered, the conclusion that the *Bosphorus* presumption cannot apply to the EEA Agreement appears inescapable.

Such a conclusion, however, leads to unfortunate systemic consequences, resulting in an asymmetry among the two Pillars of the EEA: whereas EU law is 'shielded' from review by the Strasbourg Court, except in the event of manifest breach, the Court enjoys full jurisdiction over corresponding EEA law enacted in the EFTA Pillar, although it is substantially identical to the former due to the principle of homogeneity. Overall, this results in the indirect review of EU law by the European Court of Human Rights.

This entails the risk of EFTA states facing contrasting international obligations: those stemming from the EEA Agreement and those from the Convention. This situation is potentially worsened by the likely exploitation by way of strategic

[89] *Bosphorus* v *Ireland*, *supra* n. 6, para. 159.

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litigation of the above-mentioned asymmetry. This is because refusing to apply *Bosphorus* to the EEA system opens the door to the indirect review of EU law against Convention standards by challenging the corresponding and substantially identical legislation in the EFTA Pillar of the EEA.

Furthermore, such a conclusion is not without consequences as far as the EU is concerned, especially due to the relevance of the European Convention on Human Rights under EU law,[90] despite the Court of Justice clearly relying on the Charter as the primary source of fundamental rights.[91] Indeed, Article 52(3) of the Charter requires that Charter rights which correspond to those guaranteed by the Convention are given the same meaning and scope as those therein enshrined.[92] Article 53 of the Charter should also be mentioned, although its effectiveness has been reduced by the *Melloni* judgment.[93] Finally, the Convention has long been recognised by the Court of Justice,[94] and more recently also by Article 6(3) TEU, as a source of general principles of EU law.[95] Accordingly, the Convention is 'internalised' in the EU legal order through the above-mentioned provisions, thus preserving the principle of autonomy of EU law:[96] consequently, the Convention, as interpreted by the Strasbourg Court, indirectly influences the validity and the interpretation of EU law.

It is quite likely, therefore, that claimants before the Court of Justice will invoke decisions by the Strasbourg Court's finding that EEA law as enacted in the

[90]*See generally* Š Imamović, *The Architecture of Fundamental Rights in the European Union* (Hart Publishing 2022) p. 56-62.

[91]G de Búrca, 'The EU Charter of Fundamental Rights and Freedoms at 20', 4 *Quaderni costituzionali* (2020) p. 849; G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', 20 *Maastricht Journal of European and Comparative Law* (2013) p. 168.

[92]K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights', 8 *EuConst* (2012) p. 375 at p. 394-397.

[93]ECJ 26 February 2013, Case C-399/11, *Melloni* v *Ministerio Fiscal*; LFM Besselink, 'The Parameters of Constitutional Conflict after Melloni', 39 *European Law Review* (2014) p. 531; B. de Witte, 'Article 53 – Level of Protection', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights* (Nomos 2014) p. 1566.

[94]For an historical periodisation of the Court's case law, *see* A. Rosas, 'The EU and Fundamental Rights/Human Rights', in C. Krause and M. Scheinin, *International Protection of Human Rights: a Textbook* (Åbo Akademi University Institute for Human Rights 2012) p. 497.

[95]According to B. de Witte, 'The Use of the ECHR and Convention Case Law by the European Court of Justice', in P. Popelier et al. (eds.), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts* (Intersentia 2011) p. 17 at p. 22, 'article 6(3) TEU gives formal binding status to the entire content of the ECHR within the EU legal order'. The ECJ appears to maintain, however, a more 'autonomous' stance: *see* e.g. ECJ 15 February 2016, Case C-601/15 PPU, *N.*, para. 45 ff.

[96]C. Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar Publishing 2018) p. 57-64.

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EFTA Pillar breaches Convention rights as authoritative statements as to the violation of the Convention by the corresponding EU law provision, eventually asking the Court of Justice to change its case law. Indeed, such judgments, despite formally having as their object EEA law as enacted in the EEA Agreement and as interpreted by the EFTA Court, would nonetheless substantially concern, due to the principle of homogeneity, provisions of EU law as interpreted by the Court of Justice. However, it is quite unlikely that the Court of Justice will accept such submissions given its stance towards the autonomy of EU law and its own interpretative monopoly thereof.[97]

If the perspective of the individual concerned, rather than that of the legal system, is adopted, then this state of affairs might well result in situations where individuals operating in the EFTA Pillar can have recourse to the European Court of Human Rights, whereas individuals operating within the EU who face the same situation and are affected by the very same norm, instead, cannot.

The consideration of the disparity in available remedies to individuals in a substantially identical situation highlights the limits of the *Bosphorus* doctrine. Indeed, it foregrounds the question of whether the *Bosphorus* compromise leads to an excessive sacrifice of fundamental rights protection for the sake of international cooperation.[98]

Moreover, insofar as EU member states' joint actions, taken within the framework of the EU, are 'shielded' from review by the Strasbourg Court, it raises the question of the equality of states under international law and, more specifically, under the Convention.[99] The fact that, especially in light of the case law pertaining to the EEA Agreement, the *Bosphorus* presumption appears to be of very difficult application to any form of international cooperation among states parties to the Convention other than the EU only reinforces such concerns.

The non-application of the *Bosphorus* presumption to the EEA Agreement, an inescapable necessity as a matter of law, is surely cause for concern regarding the coherence of legal systems in Europe. The subsequent developments will have to be managed carefully by all Courts involved; however, it also constitutes a 'stumbling block' in the fundamental rights architecture of Europe, further highlighting the limits of the *Bosphorus* doctrine and favouring a critical reassessment of it.

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[97] *See* Opinion 2/13, *supra* n. 88, paras. 237-239.

[98] E. Spaventa, 'A Very Fearful Court?: The Protection of Fundamental Rights in the European Union after Opinion 2/13', 22 *Maastricht Journal* (2015) p. 35 at p. 42.

[99] K. Kuhnert, 'Bosphorus Double Standards in European Human Rights Protection?', 2 *Utrecht Law Review* (2006) p. 177.

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