DOES THE EFTA COURT INTERPRET THE EEA AGREEMENT AS IF IT WERE THE EC TREATY? SOME QUESTIONS RAISED BY THE *RESTAMARK* JUDGMENT

A. Introduction

The European Economic Area (EEA) Agreement signed in May 1992 between the European Free Trade Area (EFTA) States, the European Community (EC) and the EC member States[1] seeks to establish "a dynamic and homogeneous" area by extending provisions which apply within the European Community to the EEA.[2] The first decision of the EFTA Court,[3] interpreting the EEA Agreement to determine its application within the legal orders of the EFTA States, concerned the Finnish alcohol monopoly. The *Restamark* decision was awaited with great interest to know to what extent the EFTA Court would follow the European Court of Justice's interpretation of the EC Treaty in order to achieve the aims of the EEA Agreement.

The *Tullilautakunta* (the Appeals Committee at the Finnish Board of Customs) asked the EFTA Court for an advisory opinion under Article 34 of the European Surveillance Authority and EFTA Court Agreement (the ESA/EFTA Court Agreement)[4] on two questions regarding the interpretation of Articles 11 and 16 of the EEA Agreement.[5] These questions arose in an appeal against a decision of

1. The European Economic Area Agreement has been in force since 1 Jan. 1994 ((1994) O.J. L1, 3 Jan.) Following the accession of Liechtenstein on 1 May 1995, there are 19 contracting parties.

2. Fourth recital, Preamble to the EEA Agreement.

3. Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* v. *Helsingin Piiritullikamari* 16 Dec. 1994) [1995] 1 C.M.L.R. 161. Even though three of the EFTA States have become members of the EU, the EFTA Court, according to an arrangement signed in Sept. 1994, still held jurisdiction for a transitional period of six months over pending cases entered before accession. The EFTA Court has dealt with three other cases: in Apr. 1994 the Scottish Salmon Growers Assen. appealed against the EEA Surveillance Authority's refusal to take action against alleged Norwegian State aid to the Norwegian salmon industry—on 21 Mar. 1995 the Court confirmed the competence of the Surveillance Authority; in June 1995 the Court delivered two advisory opinions, the first on TV advertising in Norway and interpretation of EC Directive 89/552 ("Television without frontiers") in Joined cases E-8/94 and E-9/94 *Forbrukerombudet* v. *Mattel Scandinavia A/S and Lego Norge A/S*, 16 June 1995 (not yet rep.); the second concerned interpretation in Sweden of EC Directives 80/987 and 87/164 relating to the protection of employees in the event of their employer's insolvency: Case E-1/95 *Ulf Samuelsson and Svenska Staten*, 20 June 1995 (not yet rep.).

4. Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (1994) O.J. L344, 31 Dec. The relevant part of Art.34 of the ESA/EFTA Court Agreement states that "the EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement. Where such a question is raised before any court or tribunal in an EEA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion." Moreover, Art.96(3) of the EFTA Rules of Procedure ((1994) O.J. L278, 27 Oct.) provides that "the request for an advisory opinion shall be accompanied by a summary of the case before the national court including a description of the facts of the case as well as a representation of the provision in issue in relation to the national legal order, necessary to enable the Court to assess the question to which a reply is sought".

5. Art.11 EEA provides that "quantitative restrictions on imports and all measures hav-

https://doi.org/10.1017/S0020589300058735 Published online by Cambridge University Press

the Helsinki District Customs House refusing to permit Restamark, the plaintiff, to market imported Italian red wine and whisky from Germany freely in Finland. The Customs House relied on specific provisions of the *Alkoholilaki* (the Finnish Alcohol Act) of 1968 and of the *Asetus Alkoholijuomista* (the Decree on Alcoholic Beverages).[6] *Oy Alko Ab*, the Finnish Alcohol Company,[7] which was asked by Restamark for consent to import the consignment, requested further information about the origin of the beverages and their use in Finland, which Restamark refused to give as it considered this information to be commercial secrets.[8] When dealing with the case, the Appeals Committee asked the EFTA Court for an interpretation of the EEA Agreement on the following questions:[9]

1. Can it be considered, having regard, on the one hand, to the statutory monopoly of Oy Alko Ab (the Alcohol Company) in the import of alcoholic beverages and, on the other hand, to the measures of authorization which the company has announced it is ready to institute in order to permit commercial import of alcohol on terms laid down by the company itself, that the commercial import of alcohol from other Contracting States is not quantitatively restricted or hindered by a measure having equivalent effect contrary to article 11 of the Agreement, if this administrative court of appeal confirms the decision of the competent customs authority not to permit the imported consignment of alcohol into free circulation without the permission of Oy Alko Ab, which permission is required by law?
2. Is the statutory monopoly referred to above contrary to article 16 of the Agreement? If so: is this article so unconditional and sufficiently precise as to have direct legal effect and should the import monopoly therefore be considered as having expired from 1.1.1994?

The *Restamark* decision is not surprising in substance since it confirms, within the ambit of the EEA, the well-established case law of the European Court of Justice, based on both Articles 30 and 37 of the EC Treaty.[10] The European Court has stated that an exclusive right to import goods granted to a State monopoly, unless justified under Article 36 of the Treaty, restrains the free movement of goods within the Community; so a "State monopoly of a commercial character must be adjusted so as to eliminate this exclusive right to import the goods subject

ing equivalent effect shall be prohibited between the Contracting Parties". Art.16 states: "1. The Contracting Parties shall ensure that any State monopoly of a commercial character be adjusted so that no discrimination regarding the conditions under which goods are procured and marketed will exist between nationals of the European Community Member States and the EFTA States. 2. The provisions of this Article shall apply to any body through which the competent authorities of the Contracting Parties, in law or in fact, either directly or indirectly supervise, determine or appreciably influence imports or exports between the Contracting Parties. These provisions shall likewise apply to monopolies delegated by the State to others."

6. These provisions were: s.2(1) of the 1968 Alcohol Act, which provides that "Production, import, export and sale of alcoholic beverages and industrial alcohol shall be, with the exceptions prescribed hereafter in this Act, the monopoly of the limited company called the alcohol company", s.27(1), which lists some exceptions to that rule, s.27(4), which regulates the surrender by Customs of consignments of alcoholic beverages from abroad, and s.14(a) of the Decree on alcoholic beverages (636/81), which defines a gift or other consignment referred to in the Alcohol Act. See Alcohol Act 68/459, 26 July 1968.

7. The Finnish Alcohol company, *Oy Alko Ab*, is a wholly Stated-owned company created by the Liquor Act of 1932, 32/45, 9 Feb. 1932.

8. *Restamark*, *supra* n.3, at para.4 of the judgment.

9. *Idem*, para.5.

10. Case 59/75 *Pubblico Ministero* v. *Flavia Manghera* [1976] E.C.R. 91.

to the monopoly".[11] However, in the author's view, the principal interest of the *Restamark* decision is that the EFTA Court interprets the EEA Agreement in the light of the case law of the European Court.

B. Towards an EEA Definition of Judicial Bodies

The EFTA Court recalled that the EEA Agreement has to be interpreted in line with the 15th recital of its Preamble, i.e. that it must be borne in mind that "the objective of Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement".[12] Moreover, the EFTA Court stressed the relevance of Article 6 of the EEA and Article 3(2) of the ESA/EFTA Court Agreements when interpreting provisions of the EEA Agreement.[13] Nevertheless, even though the EFTA Court was not bound to interpret the EEA Agreement in the light of previous case law of the European Court, it considered it appropriate to do so. Thus, by adopting the criteria developed by the European Court for determining what constitutes a "tribunal or a court", the EFTA Court emphasised the principle of homogeneity referred to in the fourth recital of the Preamble to the EEA Agreement.

1. Following criteria applied by the European Court of Justice

Indeed, the EFTA Court had to deal with the admissibility of the request, contested by the Finnish and the Norwegian governments,[14] in order to decide whether or not the Appeals Committee was to be considered a "tribunal" within Article 34 of the ESA/EFTA Court Agreement.

This question has been raised frequently before the European Court, which has given a broad interpretation of the wording of Article 177 of the EC Treaty in this

11. *Ibid.*

12. *Restamark*, *supra* n.3, at para.32 of the decision. This recital was introduced by the contracting parties during renegotiations following the negative opinion of the ECJ in its Opinion 1/91 *The draft Treaty on a European Economic Area* [1991] E.C.R. I-6079.

13. *Restamark*, *idem*, paras.33–34, 46, 56 and 64. Art.6 EEA provides that "Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are *identical in substance* to corresponding rules of the Treaty" establishing the EC and the ECSC Treaty "and to acts adopted in their implementation and application, *be interpreted in conformity with the relevant rulings of the Court of Justice of the EC given prior to the date of signature of this Agreement*". The relevant part of Art.3(2) of the ESA/EFTA Court Agreement is as follows: "in the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and *the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the EC given after the date of signature of the EEA Agreement* and which concern the *interpretation of that Agreement* or of such rules of the Treaty establishing the EEC and the Treaty establishing the ECSC in so far as they are *identical in substance* to the provisions of the EEA Agreement" (my emphasis).

14. Written observations, points 27 to 41.

respect.[15] The arguments of the Finnish government, albeit quite persuasive,[16] especially on the basis of the recent *Corbiau* case,[17] denied that the Appeals Committee was a tribunal since it was not a "third party" in relation to the authority which made the first decision. This argument was supported at the hearing by the Norwegian government and the EFTA Surveillance Authority. Moreover, the European Commission, notwithstanding its proposal that in cases of uncertainty there should be a presumption in favour of the existence of a tribunal, took the view that the information submitted was insufficient. This rather sceptical approach by most of the parties involved could have provided a reasonable basis for pronouncing the Appeals Committee's request inadmissible. Nevertheless, the EFTA Court upheld the views of Restamark that the order was admissible since "the reasoning" of the European Court, in its interpretation of the expression "tribunal or court" in Article 177 of the EC Treaty, was "relevant in this context",[18] even though the EFTA Court was not bound by Article 3(1) of the ESA/EFTA Court Agreement.[19] Thus, the very meaning of a tribunal within the ambit of Article 34 of the ESA/EFTA Court Agreement follows the criteria already applied by the European Court for interpreting Article 177 of the EC Treaty. Since the European Court has laid down a Community definition of judicial bodies, the EFTA Court stated: "in this interpretation [of Article 34 of the ESA/EFTA Court Agreement] it is not decisive how the body has been defined under national rules."[20] Therefore a national body which is a permanent body entrusted by law for judicial

15. Apart from bodies designated as courts or tribunals by the States themselves, the ECJ has ruled that an order for a preliminary ruling could be admissible: from bodies which do not consider themselves as courts, Case 61/65 *Vaassen-Göbbels* v. *Beambtenfonds voor het Mijnbedrijf* [1966] E.C.R. 377; from professional committees to which the State has granted rights to implement EC requirements in a specific area, Case 246/80 *Broekmoelen* v. *Huisarts Registratie Commissie* [1981] E.C.R. 2311; in non-contentious proceedings, e.g. Case 162/73 *Birra-Dreher* v. *Amministrazione delle Finanze dello Stato* [1974] E.C.R. 201 and Case 199/82 *Amministrazione delle Finanze dello Stato* v. *SpA San Giorgio* [1983] E.C.R. 3595; during interlocutory proceedings, Case 107/76 *Hoffman-La Roche* v. *Centrafarm Vertriebsgesellschaft pharmazeutischer Erzeugnisse mbH* [1977] E.C.R. 957; but not from an arbitrator since his competence is not compulsory, Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH* v. *Reederei AG and Co. KG* [1982] E.C.R. 1095; and not from bodies which have organisational links with the contested administrative services, Case C-24/92 *Corbiau* v. *Administration des contributions* [1993] E.C.R. I-1277.

16. The Finnish government observed that there were organisational links between the Helsinki District Customs House and the National Board of Customs, of which the Appeals Committee is part. The Finnish authorities were of the opinion that the National Board of Customs was both the supervising authority and the appellate authority in the same case. See written observations at points 31, 33, 34 and 35.

17. Case C-24/92, *supra* n.15.

18. *Restamark*, *supra* n.3, at para.24.

19. Art.3(1) ESA/EFTA Court Agreement, modelled on Art.6 EEA, states that "provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to this Agreement, in so far as they are identical in substance to" EC and ECSC legislation "shall in their implementation and application be interpreted in conformity with the relevant rulings of the Court of Justice of the EC given prior to the date of signature of the EEA Agreement".

20. *Restamark*, *supra* n.3, at para.24.

functions, whose members are appointed by public authorities and which has compulsory jurisdiction,[21] and which applies the rules of law, is independent and is bound by rules of adversarial procedure, is to be considered a tribunal.[22]

In relation to the Appeals Committee, there were two problematic questions that the EFTA Court solved in a positive way in admitting the request. These merit further comment.

2. Adopting the reasoning of the European Court of Justice as a precedent

(a) The "third party" requirement. In considering the third-party requirement laid down in *Corbiau*,[23] the EFTA Court was quite evasive since it noted that the Appeals Committee "appears to be closely linked to the central customs administration" but judged, "on balance",[24] the independence and the elements of judicial procedure to be key criteria weighing in favour of its impartiality. The decisive points which made the EFTA Court depart from the ruling of the European Court in *Corbiau* were the facts that in that case the *Directeur des contributions directes* to whom the appeal was made was not only *obviously* linked to the administrative body which had made the contested decision but would also have been involved as a party in any subsequent decision of the Luxembourg Conseil d'État.[25] The EFTA Court found that this was not the case with the Appeals Committee.[26] Thus, even if it were not bound by *Corbiau*, the EFTA Court nevertheless used the case as a precedent but distinguished it from the instant one.

(b) The lack of an adversarial procedure. As regards the issue of adversarial procedure, the EFTA Court adopted a purposive and pragmatic way of interpreting the lack of such procedure before the Appeals Committee. Indeed, after recalling that, as a general rule in both Finland and Sweden, frequently only one party appears before administrative courts, it went on to state:[27]

> if the right to request an advisory opinion from the EFTA Court were subject to the procedure before the national court being *adversarial*, this would result in the administrative courts in Finland (and also in Sweden) being largely unable to refer a question to the EFTA Court. In most cases these are the very courts which are the competent judicial bodies for the application of EEA rules.

"Adversarial procedure" undoubtedly means the same as the expression "adversary proceedings" used in the *Municipality of Almelo* case.[28] As the European Court mentioned several times, though an adversarial procedure could prove to be in the interests of the orderly administration of justice, Article 177 of the EC Treaty does not limit the Court's competence to contested proceedings before the national tribunal.[29] Surprisingly, the EFTA Court did not refer to these judicial developments. However, it adopted the reasoning of the European Court

21. Case 61/65, *supra* n.15.
22. *Restamark*, *supra* n.3, at para.24 and Case C-393/92 *Municipality of Almelo and others* v. *Energiebedrijf Ijsselmij NV* [1994] E.C.R. I-1477, para.21.
23. *Restamark*, *idem*, para.29.
24. *Ibid.*
25. Case C-24/92, *supra* n.15, at para.16.
26. *Restamark*, *supra* n.3, at para.30.
27. *Idem*, para.27 (my emphasis).
28. *Supra* n.22.
29. See e.g. Case 70/77 *Amministrazione delle Finanze dell Stato* v. *Simmenthal SA* [1978]

of Justice. If an adversarial procedure before national judicial bodies was, as a principle, to be preferred, the EFTA Court found that it would amount to an unreasonable criterion for administrative courts in both Finland and Sweden, taking into consideration the effectiveness of the Agreement and the advisory opinion procedure, which constitute a "means of co-operation between the Court and the national courts".[30]

This purposive interpretation is certainly the correct construction of Article 34 of the ESA/EFTA Court Agreement[31] and one which aims to open the doors of the EFTA Court at least as widely as those of the European Court.[32] It would have been detrimental not to accept the Appeals Committee's order merely because it did not fulfil one of the numerous criteria developed, as principles, by the European Court. Nevertheless, it seems doubtful that such a conclusion would have been reached had there been no customary rule enshrining the lack of adversarial procedure in administrative courts in Finland. Thus, this reasoning follows that pursued under Article 177 of the EC Treaty by the European Court in relation to orders made during the injunction procedure under Italian law by the *Pretura*.[33]

Based on the above, the European Court can be expected to adopt the same attitude towards a preliminary ruling sought by this type of administrative judicial body, now that Finland and Sweden have become members of the European Community. How could it refuse such an order unless holding the view that the criteria for a tribunal are more stringent in the EC legal order than in the EEA context due to the fact that the EFTA Court's judging powers are narrower than those of the European Court? This seems rather inconsistent since it would deprive many bodies, and indirectly individuals, of a right that they held by virtue of the EEA Agreement being interpreted in the light of the case law of the European Court!

Consequently, there is a European judicial harmonisation of the concept of "tribunal" within the territories of the contracting parties to the EEA Agreement. It is worth noting that even if the EFTA Court was not bound to follow the European Court's case law on Article 177, all the parties involved in the proceedings had accepted that this Article was to be referred to when dealing with Article 34 of the ESA/EFTA Court Agreement.[34] Nevertheless, this will not apply to case law concerning the binding effect of preliminary rulings since the EFTA Court's decisions, under Article 34 of the ESA/EFTA Court Agreement, are merely of an advisory nature.[35]

E.C.R. 1453; Case 199/82, *supra* n.15 and Case C-18/93 *Corsica Ferries Italia SRL* v. *Corpo dei Piloti del Porto di Genova* [1994] E.C.R. I-1783, para. 12.

30. *Restamark*, *supra* n.3, at para. 31 and also paras.25 and 78. Also confirmed in Case E-1/95, *supra* n.3, at para.13 "for providing the national courts with the necessary elements of EEA law". This wording is modelled on that used by the ECJ: see Case 16/65 *Firma C. Schwarze* v. *Einfuhr und Vorratsselle für Getreide und Futtermittel* [1965] E.C.R. 877, 886. As a consequence, the EFTA Court (at para.78) denied itself the right to interpret national law.

31. For such an opinion in the EC context see H. Smit and P. E. Herzog, "Article 177", in *The Law of the EEC, a Commentary on the EEC Treaty* (1993) Vol.5, p.463.

32. However, the EFTA Court is not competent to deal with requests on validity, unlike the ECJ under Art.177 EC.

33. See Case 70/77, *supra* n.29.

34. *Restamark*, *supra* n.3, at para.8. It can be asked what would have occurred had there not been such a consensus on the reference to Art.177 EC. Would the EFTA Court have been less confident in deciding on the admissibility of the request?

35. See also Art.108 EEA. Consequently, advisory opinions of the EFTA Court do not

Taking jurisdiction over the case, the EFTA Court had to consider the two questions submitted to it. In doing so it recalled the material scope of the EEA Agreement when dealing with both Article 11 on the free movement of goods and Article 16 on the adjustment of State monopolies.

C. *The Uniform Interpretation of Provisions Identical in Substance with EC Legislation*

As already mentioned,[36] the EFTA Court stipulated that as Articles 11 and 16 of the EEA Agreement were "identical in substance" to the respective EC Treaty provisions, i.e. Articles 30 and 37, they were to be interpreted in accordance with the case law of the European Court delivered before the signing of the EEA Agreement.

The EFTA Court remarked that since wine does not benefit from the free movement of goods within the EEA,[37] Restamark could not avail itself of Article 11 of the EEA Agreement and was thus obliged to comply with specific national rules regarding importation. However, Article 16 of the EEA Agreement, on State monopolies, does apply to wine as well as to other alcoholic beverages. Thus, a State monopoly must adjust its exclusive right to import all alcoholic beverages, i.e. ban any discrimination in the conditions under which alcoholic beverages are procured and marketed between nationals of EC member States and EFTA States.

Nevertheless, the core of the judgment answered a number of interesting questions that had not been free from doubt before *Restamark*, although it also raised other issues.

1. *Enshrining homogeneous free-movement principles*

The EFTA Court ruled that all alcoholic beverages, except wine, benefit from the free movement of goods. Recalling the *Dassonville* principle[38] and taking into consideration two European Court cases,[39] the EFTA Court held that an authorisation to import from a State monopoly amounted to an impediment to intra-EEA trade, since an exclusive right to import deprives traders of the opportunities to

bind courts of the EFTA States. For the tribunal requesting the opinion of the EFTA Court, it seems obvious however that the advisory opinion has a highly persuasive authority since one does not understand why such a tribunal, which has no obligation to question the EFTA Court, would have made such an order if it were not to follow the EFTA Court's decision. See, on the binding effect of interpretative preliminary rulings under Art.177 EC, Joined cases 28–30/62 *Da Costa en Schaake NV* v. *Nederlandse Belastingadministratie* [1963] E.C.R. 61. The non-binding effect of similar answers was feared by the ECJ, for the creation of a single EEA Court, in its *Opinion 1/91*, *supra* n.12.

36. *Supra* n.10.

37. Art.8 and Protocol 3 EEA.

38. *Restamark*, *supra* n.3, at para.47. Case 8/74 *Procureur du Roi* v. *Dassonville* [1974] E.C.R. 837: "article 30 EC applies to all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially intra-community trade".

39. Case C-202/88 *France* v. *Commission* [1991] E.C.R. I-1223 and Joined cases 51–54/71 *International Fruit Company NV* v. *Produktschap voor Groenten en Fruit (No.2)* [1971]

sell their products to consumers,[40] and consequently even an automatically granted authorisation constitutes a breach of Article 11 of the EEA Agreement.[41]

The EFTA Court subsequently considered whether such an impediment could be upheld as needed for the protection of public health under Article 13 of the EEA Agreement. In doing so the EFTA Court asked, in the same way as the European Court does under Articles 30 and 36 of the EC Treaty, whether such a discriminatory measure[42] could be justified under Article 13 of the EEA Agreement, which is said to be "identical in substance with article 36 EC".

Finland, Iceland, Norway and Sweden[43] have alcohol monopolies based on public health concerns to reduce the consumption of alcoholic beverages. The Nordic alcohol policy is said to be part of the essence of the Nordic societies.

In its written observations, the Finnish government referred to an international statement of the World Health Organisation Regional Committee for Europe (the 1984 Resolution on the Targets for Health for All),[44] a unilateral declaration of the EFTA Nordic countries concerning their alcohol monopolies[45] and the *Campus Oil* case of the European Court.[46] In that case the Court ruled that the Irish State monopoly on petrol imports could be justified for public security reasons due to the particular conditions in Ireland and to the "exceptional importance" of petroleum products "as an energy source in the modern economy".[47] It was doubtful whether the EFTA Court could rely on such a specific case to accept a derogation under Article 13 of the EEA Agreement on the basis of protection of health. In fact the EFTA Court did not even mention this case in its advisory opinion.

E.C.R. 1107, where the ECJ held that granting a licence to import, even though a pure formality, amounts to a measure of equivalent effect to a quantitative restriction.

40. *Restamark*, *supra* n.3, at para.48.

41. *Idem*, paras.50 and 61.

42. *Idem*, para.51. The EFTA Court rightly excluded application of the so-called *Cassis de Dijon* "mandatory requirements", especially "the protection of public health", since these mandatory requirements apply only to non-discriminatory national measures in order to judge whether they amount to measures having equivalent effect to a quantitative restriction or not. However, the legal reasoning on which the EFTA Court relied is questionable since "mandatory requirements" are not derogations from Art.30 but are the criteria used to qualify a national measure within the ambit of Art.30 EC. Nevertheless, measures which concern only imports are of a discriminatory nature. Case 120/78 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon")* [1979] E.C.R. 649 and Case 113/80 *Commission* v. *Ireland (Re Restrictions on Importation of Souvenirs)* [1981] E.C.R. 1625.

43. See on this subject, P. Bjurman, "Nordic Alcohol Policies with a View to EC Membership" (1993) 17 World Competition 137. However, since 1 Jan. 1995 Finland and Sweden have introduced new legislation which maintains only a retail sale monopoly.

44. *Restamark*, *supra* n.3, at para.53. The aim of the resolution is to reduce drastically alcohol consumption in Europe before the turn of the century. For further details see V. Surell, "European Alcohol Action Plan", in H. Kolstad (Ed.), *Nordic Alcohol Control Policy* (1993), pp.116–120.

45. Declaration annexed to the EEA Agreement stating: "Without prejudice to the obligations arising under the Agreement, Finland, Iceland, Norway and Sweden recall that their alcohol monopolies are based on important health and social policy considerations."

46. Case 72/83 *Campus Oil Ltd and others* v. *Minister for Industry and Energy* [1984] E.C.R. 2727.

47. *Idem*, para.34.

One could of course easily assert that alcohol issues are of importance in the Nordic countries—the EFTA Court did not deny this fact[48]—but the Finnish government failed to establish how State monopoly measures such as restricting imports of alcoholic beverages from other contracting parties were necessary for and proportional to the protection of public health.[49] Thus, the monopoly could no longer restrict imports of alcoholic beverages in Finland. The EFTA Court, relying entirely on the interpretation and reasoning of the European Court, enshrined the principle of free movement of goods in the EEA as being dynamically linked to the developments within the European Community in that field.[50]

Subsequently, the Court had to decide whether the requirement under Article 16 of the EEA Agreement to adjust the monopoly existed from the entry into force of the Agreement and whether that Article were to be considered to have direct effect in the same way as Article 37 of the EC Treaty.[51] The Court, once again, looked to the effectiveness of the EEA Agreement.

2. *Applying a "full parallel doctrine": recognition of an EEA direct effect principle*

In its *Opinion 1/91* on the EEA Agreement, the European Court stated that the fact that provisions are worded similarly is not sufficient to render them identical and for them to be interpreted in the same way; it is essential to refer to the "aims, context and characteristics" of the Agreement.[52] More precisely, the European Court pointed out that, reading Article 6 of the EEA Agreement in conjunction with Protocol 35,[53] "compliance with the case law of the Court of Justice ... does not extend to essential elements of that case law which are irreconcilable with the

48. *Restamark*, *supra* n.3, at para.57 of the opinion.

49. *Idem*, paras.59–61. The EFTA Court noted that in such a case the State holds the burden of proof. It recalled Case 251/78 *Firma Denkavit Futtermittel GmbH* v. *Minister für Ernährung* [1979] E.C.R. 3369, para.24. Is this issue merely a question of a burden of proof, however?—it seems that restrictions laid down by a monopoly holding an exclusive right to import have never been upheld under Art.36 EC. *Campus Oil*, *supra* n.46, is rather specific and open to criticism since the Irish State put forward economic purposes which are normally irrelevant within the ambit of Art.36 EC.

50. Another question, outside the scope of this article, is whether the EFTA Court will follow the new case law of the ECJ which distinguishes, within non-discriminatory national measures, between national prohibitions of "certain selling arrangements", and national legislation providing for conditions which have to be fulfilled by products. See Joined cases C-267/91 and C-268/91 *Criminal proceedings* v. *Keck and Mithouard* [1993] E.C.R. I-6097. Such case law was referred to by certain parties in their written observations before the EFTA Court in the Joined cases E-8/94 and E-9/94, *supra* n.3; however, the Court replied only to the first question raised by the Norwegian Market Court.

51. Case 6/64 *Costa* v. *ENEL* [1964] E.C.R. 585.

52. *Opinion 1/91*, *supra* n.12, at para.28. See also for a free trade agreement concluded by the EC Case 270/80 *Polydor* v. *Harlequin Records* [1982] E.C.R. 329, 348.

53. Protocol 35 provides: "Whereas this Agreement aims at achieving a homogeneous EEA, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the EEA; and Whereas this consequently will have to be achieved through national procedures; *Sole Article*: For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases."

characteristics of the Agreement",[54] i.e. primacy of Community law and the direct effect principle. Even though neither the EC Treaty nor the EEA Agreement contains any reference to the direct effect of its provisions, the direct effect doctrine is one of the major idiosyncrasies of the EC legal order. In contrast to ordinary international agreements, which do not confer rights upon individuals,[55] the European Court stated in *Van Gend en Loos*[56] that "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights" and that "Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights." For the European Court it is the very purpose of integration which grounds the direct effect principle.[57]

It could therefore have been questionable, as the Norwegian government pointed out,[58] to apply the principle of direct effect to provisions of the EEA Agreement, which has been said simply to create rights and obligations between the contracting parties, without requiring any transfer of legislative power[59] and without committing them to the establishment of an internal market.

Nevertheless, one could mitigate such an assertion by relying on the objectives of the EEA Agreement, which do refer to individuals. Indeed, the eighth recital in the Preamble affirms that the contracting parties are "convinced of the important role that individuals will play in the EEA through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights" and the fifteenth recalls that "the objective of the Contracting Parties ... is to arrive at equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition". Since the European Court would interpret the EEA Agreement (in its application within the European Community) in the same way as identical EC Treaty provisions, it seems obvious, from a teleological perspective and for the better effectiveness of the Agreement, that the EFTA States "must afford the same measure of judicial protection under the EEA context offered to Member States' nationals of the EC".[60] Hence the EEA Agreement distinguishes itself from other international agreements "by providing for a continuous adaptation to the common market".[61] The reverse would both lead to a non-homogeneous area and have detrimental effects for European citizens and EC member States' undertakings. The EFTA Court plainly applied what one can call a "full parallel doctrine" to EEA Agreement provisions and EC Treaty provisions which are substantially identical.

54. *Opinion 1/91*, *supra* n.12, at para.26. See also B. Vesterdorf's intervention on Art.6 EEA and its implication for the national legal systems of the EFTA States, *Fifth Nordic Conference on the EFTA and the European Union, 3–5 September 1993, Helsinki* (1994), p.114.

55. Permanent Court of Justice's Advisory Opinion *Jurisdiction of the Courts of Danzig* (1928) Ser.B, No.15.

56. Case 26/62 *NV Algemene Transport- en Expeditie Ondeeneming Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] E.C.R. 1.

57. G. Isaac, *Droit communautaire général* (4th edn, 1994), p.166.

58. Written observations, points 89–93.

59. *Opinion 1/91*, *supra* n.12, at para.20.

60. R. C. Gladstone, "The EEA Umbrella: Incorporating Aspects of the EC Legal Order" (1994) 1 Leg. Iss. Europ. Integration 39, 43.

61. *Idem*, p.62.

(a) The unconditional requirement to adjust State monopolies. Relying on the European Court's interpretation of Article 37 of the EC Treaty, especially the *Manghera* case[62] (to which the parties to the proceedings also referred), the EFTA Court noted that Article 16 of the EEA Agreement provides in "mandatory terms" that State monopolies of a commercial character were to be adjusted from 1 January 1994 in order to avoid discrimination between domestic and other EEA contracting parties' products.[63] Thus, the Finnish arguments for a reasonable period to be allowed for adjustment were dismissed.[64] Moreover, the fact that an exclusive right to import is granted to a State monopoly, even though the import has in practice always been possible,[65] is by its mere existence potentially capable of discrimination against exporters in other contracting parties, and against "consumers based in the Contracting Party concerned", i.e. in Finland, because the State monopoly holds the "discretionary right to determine the supply of those products on the domestic market and may consequently also determine their price".[66]

Hence, the *Restamark* decision enshrined Advocate General Tesauro's opinion in *Commission* v. *Greece*[67] that it flows from *Manghera* that an exclusive right to import finished products is *per se* contrary to Article 37 of the EC Treaty. Therefore, albeit implicitly since this fell outside the Appeals Committee's request, the EFTA Court did not consider that Article 13 of the EEA Agreement could be involved as a possible derogation from Article 16. Such a question was vigorously debated within the European Community order, but never upheld by the European Court.[68] Moreover, it is interesting to note the reference to "consumers". The author knows of no occasion when the word has been used by the European Court.

62. *Supra* n.10.

63. *Restamark*, *supra* n.3, at para.65. Art.37 EC prescribed a transitional period to 31 Dec. 1969. The only monopolies which can enjoy a transitional period under the EEA Agreement are listed in Protocol 8(1): the Austrian monopoly on salt, the Icelandic on fertilisers and the Liechtenstein ones on salt and gunpowder.

64. *Idem*, paras.72–74.

65. The Finnish government also relied on that fact: *idem*, para.67 of the decision.

66. *Idem*, para.71. It is worth noting that under s.11(6) of the 1968 Alcohol Act the Board of Administration of *Oy Alko Ab* had the "duty to determine the sale prices of alcoholic beverages". Combined with a monopoly of production this provision was certainly contrary to the case law of the ECJ, especially Case 90/82 *Commission* v. *France* [1983] E.C.R. 2011, concerning tobacco price fixing.

67. Case C-347/88 *Commission* v. *Greece* [1988] E.C.R. I-4747.

68. Both the EC Commission and Advocate General Roemer in Case 82/71 *Pubblico Ministero* v. *SAIL* [1972] E.C.R. 119 supported the view that Art.36 EC would be a good basis for derogation from Art.37 EC whereas many authors argue for a narrow construction of Art.36 derogating only from Arts.30 and 34 EC. See J. E. Cockborne, "Les monopoles nationaux à caractère commercial", in J. Mégret, *Le droit de la CEE* (1992), Vol.1, p.307, at pp.338–339: Even though the ECJ specified that "it is clear not only from the wording of article 37 but also from its position in the general scheme of the Treaty that the article is designed to ensure compliance with the fundamental rule of free movement of goods throughout the common market"—Case 78/82 *Commission* v. *Italy* [1983] E.C.R. 1955—it never upheld arguments put forward for possible derogation from Art.37 thanks to Art.36 EC. If the ECJ agreed to look at derogation in Case C-347/88, *ibid*, it did it because it analysed Art.37 EC in conjunction with Art.30; see R. Kovar, "Monopoles", *Encyclopédie Dalloz, Droit Communautaire* (1994), p.5.

In the *Telecommunication Terminals Equipment* case[69] it merely stressed that "the existence of exclusive importing and marketing rights deprives traders of the opportunity of having their products purchased by consumers", therefore still referring to traders as the only group concerned. The EFTA Court seems to give consumers the right to challenge such a discrimination, making it clear that it is ready to "promote their interests and to strengthen their position in the market".[70] This is highly important in conjunction with the principle of direct effect.

(b) Direct effect of EEA implemented provisions. As mentioned above, the uniform interpretation of Article 16 of the EEA Agreement on the basis of the European Court's interpretation of Article 37 of the EC Treaty was thus, due to the homogeneity objective laid down in the fourth recital in the Preamble to the EEA Agreement,[71] confirmed for the purpose of direct effect. As the EEA Agreement was brought into force in Finland by the Finnish Act implementing the EEA Agreement[72]—on the basis of the dualistic doctrine—and section 2 of the Act provided for direct effect, Restamark submitted that the question should have been dealt with by the Appeals Committee and, consequently, not referred to the EFTA Court.[73] The EFTA Court, however, recalling that it could not express a view on the interpretation of Finnish law,[74] stated that "in order to ensure equal treatment of individuals throughout the EEA", and therefore to permit them to rely before national courts on implemented EEA provisions which are unconditional and sufficiently precise, Article 16 of the EEA Agreement "must be interpreted as fulfilling the implicit criteria in Protocol 35 EEA of being unconditional and sufficiently precise".[75] Indeed, as L. Sevón stresses: "the text of Protocol 35 lays down the obligation of the EFTA States to ensure either through the retention of their present constitutional system, or by the introduction of the necessary provisions", equal treatment of individuals and economic operators. "The obligation is not limited to primacy for laws implementing the EEA Agreement in cases where a mistake has taken place, the obligation is to ensure that the economic operators and individuals have the right to invoke the EEA Agreement as such, not some distorted piece of national legislation enacted some time in the future."[76]

Hence, the EFTA Court underlines, even more than the European Court, the difference between the two "essential elements"—primacy and direct effect. The latter does not flow from the former, but all its effects are thanks to the primacy principle. On the one hand, primacy of the EEA Agreement does not derive from

69. Case C-202/88, *supra* n.39, at para.34.
70. 12th recital, Preamble to the EEA Agreement.
71. *Restamark*, *supra* n.3, at para.32.
72. Act 1504/93. See on this point P. Timonen, "The Effects of the EEA Agreement in Finland" (1994) E.B.L.Rev. 251.
73. Written observations, point 85. The Norwegian government shared the same opinion on the basis that s.2 of the Finnish Act implementing the EEA Agreement gave priority to the main part of the EEA Agreement over national legislation; see *idem*, point 87.
74. *Restamark*, *supra* n.3, at para.78. For the ECJ see Case 75/63 *Hökstra (Unger)* v. *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] E.C.R. 177.
75. *Restamark*, *idem*, paras. 80–81.
76. L. Sevón, in *Fifth Nordic Conference*, *supra* n.54, at p.127.

its own inherent character, but from national law.[77] On the other, the *criteria* for direct effect flow from the very nature of EEA provisions that are identical in substance with EC legislation, because of the homogeneity principle and equal treatment of individuals throughout the EEA.[78] However, direct effect is given full effectiveness within EFTA States' legal orders when recognising primacy of EEA implemented provisions over conflicting national measures. Thus, the EFTA Court follows the criteria developed by the European Court for direct effect but adapts the solution to the specificity of the EEA. Therefore, for the EFTA Court, the only provisions which can qualify as being directly effective within the EFTA States are those which are implemented by them. While in *Opinion 1/91* the European Court denied the existence of directly effective EEA provisions,[79] the EFTA Court stated that "it is inherent in the nature of Protocol 35 that individuals and economic operators in case of conflict between *implemented EEA rules* and national statutory provisions must be entitled to invoke and to claim at the national level any rights that could be derived from provisions of the EEA Agreement".[80] Therefore, as regards the *Restamark* case, individuals could invoke Article 16 of the EEA Agreement in order to compel the State alcohol monopoly in Finland to be adjusted.

Recognising direct effect within the EEA is a crucial step taken by the EFTA Court. Indeed, such status can be bestowed not only on provisions of the EEA Agreement[81] but also on secondary legislation, i.e. regulations and directives.[82] These two types of act are clearly referred to in Article 7 of the EEA Agreement, which points out their "binding" effect upon the contracting parties, which are obliged to make them "part of their internal legal order". Following Article 189 of the EC Treaty, it seems obvious from Article 7 of the EEA Agreement that an act referred to in the annexes of the EEA Agreement and corresponding to an EC regulation would be directly applicable in all the legal orders of the contracting parties.[83] In the case of acts corresponding to an EC directive referred to in the annexes and fulfilling the criteria laid down by the European Court for direct effect, that is to say, entailing provisions unconditional and sufficiently precise which have not been correctly implemented after the time limit set in the directive,

77. See M. Cremona, "The 'Dynamic and Homogeneous' EEA: Byzantine Structures and Variable Geometry" (1994) E.L.Rev. 508, 521.

78. For Art.16 EEA, see *Restamark*, *supra* n.3, at para.80.

79. *Opinion 1/91*, *supra*, n.12, at para.28.

80. *Restamark*, *supra* n.3, at para.77 (my emphasis).

81. There is no doubt that Art.11 EEA fulfils the criteria for direct effect since the EFTA Court adopted the ECJ's interpretation of Art.30, which is directly effective in the EC legal order: see Case 74/76 *Iannelli and Volpi SpA* v. *Ditta Paolo Meroni* [1977] E.C.R. 557.

82. Direct effect of directives was established for the first time by the ECJ in Case 9/70 *Franz Grad* v. *Finanzamt Traunstein* [1970] E.C.R. 825. In Case 8/81 *Becker* v. *Finanzamt Münster-Innenstadt* [1982] E.C.R. 53 it ruled that if member States are placed under a duty to adopt a certain cause of action by means of a directive, "*the effectiveness* of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and if national courts were prevented from taking it into consideration as an element of Community law" (my emphasis).

83. See within the EC Case 43/71 *Politi S.A.S.* v. *Ministry for Finance of the Italian Republic* [1971] E.C.R. 1039.

the same conclusion is to be reached.[84] This seemed to be recently confirmed by the EFTA Court, albeit implicitly, in an advisory opinion requested by the Norwegian Market Court.[85] The request concerned a Norwegian prohibition of broadcast advertisements directed at Norway and specifically aimed at children and interpretation of Articles 2(2) and 16 of the so-called "Television without frontiers" EC Directive of 1989, which ensures freedom to provide television broadcasting services within the EEA, by establishing the "transmitting State principle".[86] The EFTA Court held that the scope of co-ordination of the rules regarding television advertising aimed at children is such that a receiving State is bound to limited actions, laid down by the directive, for the suspension of these advertisements. Thus Article 2(2) does not allow discretionary prohibitive measures to be taken by a receiving State within its territory. Without explicitly mentioning the direct effect principle, the EFTA Court enshrined the views expressed by the EC Commission that both EEA broadcasters and advertisers could rely on Articles 2(2) and 16 of the 1989 Directive to oppose an express national prohibition of advertisements which target children.[87] The EFTA Court thus undoubtedly seems poised to follow entirely the European Court's interpretation in the field of direct effect. This may mean that the EEA Agreement is interpreted as a copy of the EC Treaty. Furthermore, the principle of co-operation laid down in Article 5 of the EC Treaty,[88] which finds its counterpart in Article 3 of the EEA Agreement, is also the genuine basis for national courts "to ensure the legal protection which persons derive from the direct effect of provisions of Community law".[89] Hence, one does not see why the principle laid down in Article 3 would not entail the same consequence for national courts of EFTA States, allowing them to grant interim relief against a national law impairing the full effectiveness of EEA implemented provisions.[90]

Generally speaking and notwithstanding a lack of direct effect of a directive, the EFTA Court would undoubtedly follow the *Marleasing*[91] case, which provides for national courts to interpret national law "in the light of the wording and the purpose of the directive" according to Article 189(3) and to the obligations imposed

84. See Case 148/78 *Pubblico Ministero* v. *Tullio Ratti* [1979] E.C.R. 1629, para.23 and Case 8/81, *supra* n.82.

85. Joined cases E-8/94 and E-9/94, *supra* n.3.

86. Council Directive 89/552/EEC of 3 Oct. 1989 (1989) O.J. L298, 17 Oct. This Directive is part of the EEA legal order due to Annex X of the EEA Agreement.

87. See the EC Commission's opinion, written obs. in Joined cases E-8/94 and E-9/94, *supra* n.3, at para.36.

88. This duty, as the ECJ stated, concerns all authorities of member States including courts: see Case 14/83 *Van Colson and Kamann* v. *Land Nordhein Westfalen* [1984] E.C.R. 1891, para.26.

89. Case 213/89 *R.* v. *Secretary of State for Transport, ex p. Factortame and others* [1990] E.C.R. I-2433, para.19.

90. *Idem*, paras.19–21. See for the same opinion albeit in a different context S. Peers, "An Ever Closer Waiting Room? The Case for Eastern European Accession to the European Economic Area" (1995) C.M.L.Rev. 187, 210.

91. Case C-106/89 *Marleasing SA* v. *La Comercial Internacional de Alimentación SA* [1990] E.C.R. I-4135, para.8.

by Article 5 of the EC Treaty. However, as Tridimas has rightly stated,[92] when the provisions of national law are not capable of being interpreted so as to conform with the requirements of a directive, a claim in damages may lie against the State which has failed to implement the directive, pursuant to the three conditions laid down in *Francovich*.[93] This case, since it was decided before the signing of the EEA Agreement, would certainly be confirmed by the EFTA Court, even though the European Court expressly referred to such a State's responsibility as an issue "inherent in the system of the Treaty". It would, however, not be of any detrimental effect for the EC legal order—quite the contrary!—to recognise such a responsibility within the ambit of the EEA Agreement, unless to do so would permit the effects of non-implementation to distort the system as a whole.

D. Conclusion

The first decision of the EFTA Court is certainly richer in raising questions than in providing definitive answers to them. Nevertheless, one could observe the peculiar influence of the case law of the European Court both on substantial rules of Community law and on fundamental principles such as direct effect, confirming the objective of the EEA contracting parties to create a homogeneous area. However, it remains uncertain how far the EFTA Court will go in adopting the reasoning of the European Court in cases decided after the signing of the EEA Agreement. Some of the recent cases of the European Court are facing such strong opposition that the EFTA Court might favour a more consistent legal reasoning. This leads to another interesting issue, namely what one can call a "boomerang influence" flowing from the EFTA Court's decisions: legal aspects never raised before the European Court, but dealt with by the EFTA Court, could give the former a sufficient basis to decide future cases, if it dares to refer to the interpretation given by the EFTA Court.

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92. T. Tridimas, "Horizontal Effect of Directives: a Missed Opportunity?" (1994) E.L.Rev. 621, 624.

93. Cases C-6/90 and 9/90 *Francovich, Bonifaci and others* v. *Italian Republic* [1991] E.C.R. I-5357. These three conditions are: (a) that the objective sought by the directive requires the conferring of individual rights, (b) that the content of those rights can be determined by reference to the provisions of the directive, and (c) that there is a causal link between the breach of the obligation of the State and the damage suffered by the person affected.

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