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Square Pegs and Round Holes: The Free Movement of Persons Under EEA Law

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Abstract
Whilst the European Union's aim of achieving an 'ever closer Union' is not an objective of EEA cooperation, homogeneity demands that we follow the same path: as the Union gets ever closer, so too does EEA cooperation, in light of the demands of the fundamental principle of homogeneity. This is particularly well demonstrated by looking at developments in the field of the free movement of persons. The case law of the Court of Justice of the European Free Trade Association (EFTA Court) in this field shows that in situations where homogeneity is put to the test, there seems little to suggest that a more national sovereignty-friendly approach has been adopted than under EU law. Notwithstanding the integral differences between the EU and EEA legal constructs, the EFTA Court has proven highly adept at keeping pace with EU developments in the field through a number of bold and creative interpretations of EEA law, and by using different tools to arrive at uniform conclusions.

Key words: EU, EEA, EFTA Court, free movement, citizenship, homogeneity

I. INTRODUCTION

Immigration and free movement issues dominated much of the popular debate both in the build up to and following the United Kingdom's Brexit referendum of last year. Such issues seem destined to continue to play a large part in the divorce negotiations set to begin in earnest later in 2017, following the UK's formal triggering of the Article 50 TEU procedure on 29 March 2017. The question of how to cater for the approximately three million European Union (EU) citizens currently living in the UK, and the one million British citizens living in other EU Member States, will almost certainly prove integral to any agreement brokered – regardless of the shape or form the agreement itself may take in the end.

Many different solutions for the future EU–UK relationship have been mooted and discussed in the media and in academic circles. The aim of this article is not to provide an overview of the various models of cooperation the UK might seek.[1] Nor is the aim here to champion a particular solution.[2] The 'Norwegian model' – according

[1] This has been ventured elsewhere – see eg C Burke et al, 'Life on the Edge: EFTA and the EEA as a Future for the UK in Europe' (2016) 22(1) *European Public Law* 69.

[2] See eg MJ Clifton, 'EEA: Another Side to Europe' (2016) 5 *European Law Reporter* 174, who argues that an updated version of EFTA could be 'a natural home for the UK post-Brexit'.

to which the UK could attempt to secure continued access to the internal market by (re)joining the European Free Trade Agreement (EFTA) Convention and becoming party to the European Economic Area (EEA) Agreement alongside the three EFTA States of Norway, Iceland and Liechtenstein – also appears to have been largely discarded by the British Prime Minister well in advance of the formal negotiation process with the EU.[3] Ruling out the EEA solution altogether might nevertheless prove somewhat premature at this stage: whilst the political signals of the past year have all pointed towards a hard(er) Brexit, the Prime Minister's surprise announcement of a snap general election held on 8 June 2017 show us that nothing is ever truly decided until everything is decided. Regardless of which solution is opted for in the end, it is in any event important to understand what EEA membership on the EFTA-side truly would entail – even if only for comparative purposes.

There is little doubt that participation in the EEA as a member of EFTA would serve to restore and protect UK sovereignty in many fields currently covered by EU cooperation. Important areas such as the customs union, the common commercial policy, agriculture and fisheries all remain outside the EEA Agreement. As we shall also see, the UK would also retain formal legislative and judicial sovereignty *vis-à-vis* both the EU and the EEA institutions. The question nevertheless remains of exactly how sovereignty-friendly the EEA solution would prove as regards free movement rights for persons. Whilst certain commentators have been keen to point out that there are differences between EU and EEA law in this field, practice reveals that participation in the EEA requires substantial alignment with EU law developments with regards to the four fundamental freedoms, including the free movement of persons, in order to ensure the key EEA goal of homogeneity between the EU and EEA legal systems.[4] Although the free movement of persons in the EEA was initially thought to be largely limited to economically active persons and certain of their family members, the continual development of EU citizenship rights – which find limited resonance in EEA law – has placed the principle of homogeneity under great strain in recent years. As we shall see, the solutions proffered by the EFTA Court to bridge the growing gap between EU and EEA law in this sphere have proven both creative and somewhat controversial. Whilst the EFTA Court deserves a great deal of praise for managing this increasingly impossible situation, the answers offered so far may be of little comfort to those in favour of a more sovereignty-friendly approach to issues concerning rights of free movement.

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[3] [1994] OJ L1/3. Switzerland, although party to the EFTA Convention, is not party to the EEA Agreement. For simplicity's sake, however, the three EFTA States party to the EEA will hereinafter be referred to collectively as the EFTA States, in line with the definition provided for in Art 2(b) EEA.

[4] See eg MJ Clifton, see note 2 above, and C Baudenbacher's remarks in an interview: P Wintour, 'European free trade area could be UK's best Brexit option, says judge' (*Guardian*, 1 December 2016), https://www.theguardian.com/politics/2016/dec/01/european-free-trade-area-could-be-uks-best-brexit-option-says-judge.

II. STRUCTURAL BACKGROUND OF THE EEA LEGAL SYSTEM

In order to understand how rights connected to the free movement of persons have developed in their EEA setting, it is important to grasp at least some of the most basic substantive and institutional idiosyncracies of the EEA legal structure. To EU legal practitioners less well (or un)versed in the trappings of EEA law, most of the substantive provisions of the Main Part of the EEA Agreement should nevertheless seem inherently familiar, as mirroring the rules on the four freedoms and competition rules under EC law as they stood when the EEA Agreement was negotiated and signed in the early 1990s. Yet the Main Part of the EEA Agreement has not been revised since its entry into force in 1994. None of the many amendments to the EC/EU Treaties introduced by the Treaties of Maastricht, Amsterdam, Nice and Lisbon are therefore reflected in its provisions.

It should come as little surprise therefore to find that the overall objectives of the EEA Agreement also differ markedly from the EU Treaties – both as they previously stood, and today. Crucially, unlike the EU's objective of securing an 'ever closer union between the peoples of Europe', the EEA was designed to be more limited to elements primarily connected to economic integration.[5] Yet the access to the internal market afforded to the EFTA States by virtue of the Agreement also comes at a price: EEA developments must keep up to speed with developments in EU law. In light of the constantly evolving nature of EU law, certain mechanisms have therefore proven essential in seeking to ensure that EEA law has been developed dynamically in line with it. Key above all was the insertion of a fundamental principle of homogeneity, requiring the Contracting Parties to the Agreement (ie the EU and its institutions, the EU Member States and the EFTA States) to strive to ensure that identical rules under EU and EEA law are interpreted and applied in a uniform manner, on the basis of equality and reciprocity.[6]

The importance of the homogeneity principle is best understood when seen in light of the distinctive institutional set-up of the EEA, which is markedly different from

[5] As can be seen in several of the Preamble recitals, and also highlighted in Art1(1) EEA, the aim of the Agreement is to 'promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules'.

[6] Arts 1 and 6 EEA, and eg recs 4 and 5 of the EEA Agreement's Preamble. It is worth noting that the precise nature and import of the EEA principle of reciprocity – according to which procedural and/or substantive rights conferred under EEA law should be the same for EU nationals under the EFTA pillar of the EEA as for EFTA nationals under the EU pillar of the EEA – is rather difficult to ascertain in practice. This is in no small part due to potentially divergent views held by the Court of Justice and EFTA Court as to how strictly its requirements ought to be understood. Adopting a seemingly less strict view, in *Kupferberg*, 104/81, EU:C:1982:362, para 18, the Court of Justice held that the fact that the courts of one of the parties to a free trade agreement between the EEC and Portugal considered certain of its provisions to have direct effect whereas the courts of the other party did not, 'is not in itself such as to constitute a lack of reciprocity in the implementation of that agreement'. Adopting a seemingly stricter understanding, however, the EFTA Court held in *Schenker v ESA*, E-14/11 [2012] EFTA Ct Rep 1178, para 121, that the EFTA Surveillance Authority was required 'for reasons of reciprocity' to adopt certain rules concerning access to documents in competition cases corresponding to those applicable to the EU Commission under Regulation 1049/2001.

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that of the EU. Whilst the EFTA States were unwilling (and arguably unable, constitutionally) to submit full authority and control of EEA matters to the EU institutions, the EU for its part could not accept a situation whereby the EFTA States would be free to monitor their own compliance with the provisions of the Agreement. This resulted in the construction of a unique two-pillar structure for decision-making, monitoring of compliance with and enforcement of EEA obligations under the Agreement – with the EU acting collectively under the one pillar, and the EFTA States acting collectively under the other. Several common EEA institutions were established to act as a bridge and a meeting place between the two pillars, yet notably with no common court or supervisory body.[7] The Agreement therefore presumed the establishment of a system for supervising and enforcing EEA obligations which would be indigenous under each pillar. Whilst the Court of Justice and the Commission are charged with doing so under the EU pillar, two new EFTA institutions – the EFTA Court and EFTA Surveillance Authority (ESA) – needed to be established under the EFTA pillar to this end by way of a separate agreement; the Surveillance and Court Agreement (SCA).[8] In order to ensure homogeneity, Article 6 EEA provides that the EFTA Court must interpret EEA provisions in conformity with the relevant case law of the Court of Justice rendered prior to the date of signature of the Agreement (ie 2 May 1992). The EFTA Court's practice nevertheless reveals that it has consistently taken into account relevant rulings of the Court of Justice also after this date.[9] As such, the temporal restrictions of Article 6 EEA would seem more illusory than real in practice. The Court of Justice for its part also endeavours to interpret EEA provisions in conformity with its own subsequent case law concerning corresponding provisions of EU law.[10] In general, the case law of both courts demonstrates a good cooperation and understanding, and a willingness on the part of both to go 'to great lengths in order to achieve homogeneity and to ensure the efficient coexistence of EEA and EU law'.[11] As a telling result, it has so far never been necessary for the EEA Joint Committee to exercise its powers of dispute settlement under Articles 105 and 111 EEA to act in order to preserve the homogeneous interpretation of the Agreement.

Legislative homogeneity is for its part achieved through indigenous decision-making procedures provided for under the EEA Agreement. It is important to bear in mind here that membership in the EEA was not meant to entail any transfer of formal

[7] Indeed, the idea of a common EEA court was ruled out altogether following the Court of Justice *Opinion 1/91 (EEA Agreement)*, EU:C:1991:490.

[8] *Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice*, [1994] OJ L344/3.

[9] See eg *L'Oréal*, Joined Cases E-9/07 and E-10/07 [2008] EFTA Ct Rep 258, para 28. Notwithstanding the potentially less burdensome formal duty under Art 3(2) SCA, which merely requires the EFTA Court to take 'due account' of the principles laid down in rulings of the Court of Justice after the EEA Agreement's date of signature.

[10] See eg *Fonnship*, C-83/13, EU:C:2014:2053; and *Commission v UK*, C-112/14, EU:C:2014:2369.

[11] P Skouris, 'The Role of the Court of Justice of the European Union in the Development of the EEA Single Market' in EFTA Court (ed), *The EEA and the EFTA Court – Decentred Integration* (Hart, 2014), p 7.

legislative authority by the EFTA States to any EU or EEA bodies. Yet in order to keep up to speed with legislative developments in the EU internal market *acquis*, a mechanism was required to ensure that novel EU legislation could be added to the many Annexes to the EEA Agreement containing such measures. The EEA Joint Committee, which is chiefly responsible for ensuring the effective implementation and operation of the Agreement, is therefore charged with taking the necessary decisions to incorporate novel EU secondary legislative measures – primarily directives and regulations – which are deemed EEA-relevant into the various Annexes of the EEA Agreement.[12] As the Joint Committee reaches its decisions by way of consensus, the two-pillar structure therefore requires each pillar to coordinate its views before meeting to discuss their positions.[13] Although the necessary procedures for ensuring coordination of views were already in place under the EU pillar in light of the various decision-making mechanisms spelt out in the EU Treaties, a new EFTA institution (the Standing Committee of the EFTA States) needed to be created to enable the EFTA States to speak with one voice on behalf of the EFTA pillar – both in the Joint Committee, and in all of the other common EEA institutions.[14] The adoption of a consensus based decision-making procedure, and the requirement to speak with one voice, was deemed integral to the EFTA States with a dualist tradition, as it ensured that no legislative sovereignty would be conferred upon the common EEA institutions. The approach is therefore essentially intergovernmental by nature, as it allows for a *de facto* right to veto the incorporation of any new EU measures into the EEA Agreement as each individual EFTA State (or the EU, for its part) might see fit.[15] It is worth noting, however, that whilst the threat of using the veto has certainly led to a number of drawn out discussions, delays and compromises in the EEA Joint Committee concerning the incorporation of certain new EU measures into the Agreement, the effective veto-right has never been formally exercised by any of the EFTA States. The most likely reason for this is a fear of legal and/or political reprisals by the EU. Article 102(4) EEA provides for a form of conciliation procedure to be followed in such instances, failure to reach agreement by which the affected part of the relevant Annex to the Agreement would be regarded as 'provisionally suspended, subject to a decision to the contrary by the EEA Joint Committee.' Exactly what such a provisional suspension would entail – whether it would apply to the entire Annex in question or merely a more distinct part of it; not to mention the potential problems in working out which Annex is to be suspended in the first place – remains unclear in practice. In the worst case, the EU could simply decide to withdraw from the EEA Agreement altogether.[16]

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[12] Art 92 EEA. There are approximately 5000 EU legal acts currently in force as part of EEA law. The Joint Committee's decisions encompass not only legislative acts (as defined in Art 289 TFEU), but also many delegated/implementing acts, decisions and recommendations.

[13] See eg Art 93 EEA.

[14] Agreement on a Standing Committee of the EFTA States of 2 May 1992, http://www.efta.int/legal-texts/committees.

[15] Art 6(2) of the Agreement on a Standing Committee of the EFTA States.

[16] Art 127 EEA.

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After 25 years, the EEA institutional structure has been well-tested on most fronts, and gladly the viability of the structure has also been accepted by the Court of Justice.[17] Homogeneity nevertheless has its limits. The obligation to apply and interpret in a uniform manner is (naturally) formally limited to similar provisions under EU and EEA law. Furthermore, since membership in the EEA was not to entail any transfer of legislative sovereignty, there is no direct effect or primacy of EEA law – at least not in the way that these principles are understood as a matter of EU law. Contrary to certain misguided statements made by the Court of Justice in the recent past, the EFTA Court has on many occasions confirmed that the EEA Agreement does not require direct effect of non-implemented EEA provisions.[18] And when EEA-lawyers discuss primacy, we are speaking of primacy of a rather different and limited nature: unlike EU law, where Regulations are of direct applicability and only directives require implementation, all directives and regulations incorporated into the Annexes of the EEA Agreement require implementation – at least in the dualist EFTA States of Norway and Iceland.[19] Protocol 35 to the Agreement goes on to provide that the national laws which implement EEA directives and regulations are to be afforded primacy over all other conflicting provisions of national law, thus establishing a primacy of sorts between potentially conflicting measures of national law.[20]

As regards other mechanisms for seeking to ensure the effectiveness of EEA law, the EFTA Court has created two principles similar to those under EU law of consistent interpretation and state liability for defective implementation of EEA law.[21]

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[17] See eg *Opinion 1/92*, EU:C:1992:189; and further the Court of First Instance's decision in *Opel Austria*, T-115/94, EU:T:1997:3.

[18] The Court of Justice has at times seemingly implied that EEA regulations are directly applicable; see eg *UK v Council*, C-431/11, EU:C:2013:589, para 54, where the Court of Justice stated that as regards an EU regulation, Art 7(a) EEA 'expressly provides that such an act is 'as such' to be made part of the internal legal order of the Contracting Parties, that is to say, without any implementing measures being required for that purpose.' Further in *Fonnship*, C-83/13, see note 10 above, para 24, where the Court of Justice further stated that the provisions of the regulation in question were 'an integral part of the legal order of all of the States that are parties to the EEA Agreement by virtue of Article 7(a) of the EEA Agreement and Annex XIII thereto.' For the EFTA Court's view see eg *Irish Bank*, E-18/11 [2012] EFTA Ct Rep 592, para 122. Compare nevertheless the views of J Kokott and D Dittert, 'European Courts in Dialogue', in EFTA Court (ed), see note 11 above, p 46, with the views in the same book of DT Björgvinsson ('Fundamental Rights in EEA Law', p 265), and H Bull ('Shall be Made Part of the Internal Legal Order: The Legislative Approaches', p 211), and further with HH Fredriksen and CNK Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On' (2015) 52(3) *Common Market Law Review* 629, pp 669–670.

[19] Art 7 EEA – the situation concerning implementation is naturally different in the monist EFTA State of Liechtenstein.

[20] However, the effects of the Protocol – which is considered equally binding and of the same legal value as the Main Part of the Agreement – may potentially be rendered nugatory by national courts in certain cases: serious conflicts between EEA rules and pre-existing national law will often arise as a result of incorrect implementation of the EEA rules in national law. Primacy arguments can potentially be avoided in cases where the EEA rules have been incorrectly implemented into national law.

[21] State liability was established in *Sveinbjörnsdóttir*, E-09/97 [1998] EFTA Ct Rep 95; for consistent interpretation, see eg *Granville*, E-13/11 [2012] EFTA Ct Rep 400, para 52; *Jan Anfinn Wahl v the Icelandic State*, E-15/12 [2013] EFTA Ct Rep 534, para 54; *Metacom*, E-6/13 [2013] EFTA Ct Rep 856,

Deduced from the EEA Agreement's object and purpose, these unwritten principles have also importantly been accepted by the Supreme Courts of the EFTA States. In the dualist countries of Iceland and Norway, this was achieved by interpreting the national statutes implementing the Main Part of the EEA Agreement into national law as comprising such unwritten principles of EEA law.[22] Although these principles are intended to mirror their EU counterparts, that is not to say that they are synonymous with them.[23] Indeed, practice to date shows how for example the EEA principle of consistent interpretation seems to have been applied and developed by the EFTA Court in a much more cautious (or less controversial/invasive) manner than the corresponding EU principle.[24]

One final preliminary point worth noting before turning our attention to the free movement of persons concerns the EFTA Court's jurisdiction to render Advisory Opinions under Article 34 SCA, which have led to all of the EFTA Court's decisions so far in this field. Whilst the Advisory Opinion procedure was modelled on (and consequently looks rather similar to) the Preliminary Ruling procedure under Article 267 TFEU, these are far from the same. Firstly, as one can gather from its very name – and notwithstanding the fact that the EFTA Court itself chooses to title all of its rulings as 'decisions' in practice – the opinions of the EFTA Court are considered advisory, and not formally binding. Relatively recent case law of the Norwegian Supreme Court shows for example that it may be prepared to deviate from an interpretation of EEA law spelt out by the EFTA Court in a given case, where it (rightly or wrongly) deems this necessary in order to follow the lead of the Court of Justice.[25] Whilst it might therefore be contended that national judiciaries in the EFTA States enjoy more sovereignty *vis-à-vis* the EFTA Court than their counterparts under the EU system, the implicit deference paid to the Court of Justice in a bid to ensure homogeneity in such cases can naturally give a slightly different impression. And whilst there may not be a strict obligation to follow the EFTA Court's Opinions, the threat of infringement proceedings raised by ESA (or one of the other EFTA States, although that would be unlikely) based *inter alia* on a breach of the duty of sincere cooperation under Article 3 EEA and/or Article 2 SCA will usually also entail an exceptionally high threshold before national courts would consider

(F'note continued)
para 69; Case E-12/13, 11.2.2014, *ESA v Iceland*, E-12/13 [2014] EFTA Ct Rep 60, para 73; *Merrill Lynch*, E-28/13 [2014] EFTA Ct Rep 970, para 42.

[22] See eg the Norwegian Supreme Court's rulings in Rt 2005 597; Rt 2005 1536; and Rt 2010 1500; and the Icelandic Supreme Court's decisions in *Sveinbjörnsdóttir*, Case 236/1999 (state liability), and *Biðskýlið Njarðvík*, Case 79/2010 (consistent interpretation).

[23] For an excellent appraisal of the actual and potential similarities and differences between the EU and EEA principles of state liability, see HH Fredriksen, 'The EFTA Court and the Principle of State Liability: Protecting the Jewel in the Crown', in EFTA Court (ed), see note 11 above.

[24] See CNK Franklin, 'The Principle of Consistent Interpretation (or something that looks like it) and Norwegian Courts', in CNK Franklin (ed), *Effectiveness and Application of EU & EEA Law in National Courts: The Principle of Consistent Interpretation* (Intersentia, forthcoming).

[25] This was suggested in Rt 2000 1811 (*Finanger*) and unequivocally demonstrated in Rt 2013 258 (*STX*). See also Rt 2009 839 (*Pedicel*), where the Supreme Court tacitly distanced itself from parts of the Advisory Opinion which the Norwegian Market Council had obtained from the EFTA Court.

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arriving at a different result in practice. Indeed, the national Supreme Courts of the dualist EFTA States have expressed as much of their own accord.[26]

Secondly, there is no written, black-letter duty in either the EEA Agreement or the SCA obliging any national court – even of last instance – to refer questions on the interpretation and/or application of EEA law to the EFTA Court.[27] This fact is reflected in the lack of referrals actually made by national courts in practice – on average, the EFTA Court has received less than five referrals per year from all three EFTA States combined.[28] The Supreme Courts of the EFTA States have proven particularly reluctant to refer, even in cases involving important issues of EEA law. Certain commentators have nevertheless claimed that a recent series of EFTA Court cases may be seen to give rise to an unwritten, *de facto* obligation for courts acting at last instance to refer, based in part on the duty of sincere cooperation.[29] The 'refer or not to refer' debate spawned by these cases has been much discussed in the academic literature.[30] Suffice it to say here that whilst the duty of cooperation under EEA law might well indirectly serve to steer national courts at all levels in their decisions as to whether or not to refer a case to the EFTA Court, neither Article 3 EEA nor Article 2

[26] Although the Norwegian Supreme Court has made it clear that it has the authority and a duty to consider independently whether and to what extent an Advisory Opinion is to be followed or not, it is settled Norwegian case law that significant importance is to be attributed to the view of the EFTA Court – at least in cases where the Court itself has made the reference in question. See eg Rt 2000 1811; Rt 2004 904; Rt 2007 1003; and Rt 2013 258. For similar pronouncements made by the Icelandic Supreme Court, see eg H 1999 4429 and H 1999 4916.

[27] EFTA States also have the opportunity under Art 34(3) SCA to limit the right to request Advisory Opinions to courts and tribunals against whose decisions there is no judicial remedy under national law.

[28] The total number of referrals between 1994 and 2015 (discounting referrals from former EFTA States Austria, Finland and Sweden prior to their joining the EU) is 94.

[29] *Irish Bank*, E-18/11, see note 18 above, para 58, where the EFTA Court held that 'courts against whose decisions there is no judicial remedy under national law will take due account of the fact that they are bound to fulfil their duty of loyalty under Article 3 EEA. The Court notes in this context that EFTA citizens and economic operators benefit from the obligation of courts of the EU Member States against whose decision there is no judicial remedy under national law to make a reference to the [Court of Justice] (see *Ospelt and Schlössle Weissenberg*, C-452/01 [1993] ECR I-9743)'. The EFTA Court's views were further confirmed in *Jonsson*, E-3/12 [2013] EFTA Ct Rep 136, para 60, *Koch*, E-11/12, [2013] EFTA Ct Rep 272, para 117, and *HOB-vín*, E-2/12 [2012] EFTA Ct Rep 1092, para 11.

[30] See eg C Baudenbacher, 'The EFTA Court: Structure and Tasks' in C Baudenbacher (ed), *The Handbook of EEA Law* (Springer, 2016), p 157: '[i]f there is no clear case law either from the [Court of Justice] or the [EFTA] Court, a [national] court of last resort is basically obliged to make a reference. It is for ESA to enforce that obligation.' Similarly, G Baur, 'Preliminary Rulings in the EEA – Bridging (Institutional) Homogeneity and Procedural Autonomy by Exchange of Information', in The EFTA Court (ed), see note 11 above, p 177, who speaks of a '*de facto* duty to submit'; and S Magnusson, 'Efficient Judicial Protection of EEA Rights in the ETA Pillar – Different Role for the National Judge?', in EFTA Court (ed), see note 11 above, pp 122–123, who views the EFTA Court's decision in *Irish Bank* as making clear that '"whether or not to refer" is not purely optional for the national courts [of last instance of the EEA EFTA States]', and that 'national courts cannot be considered to enjoy full discretion with regard to this matter.' Compare however with the more sceptical views of HH Fredriksen and CNK Franklin, see note 18 above, pp 672–673; and CNK Franklin, 'Article 3 EEA' in F Arnesen et al (eds), *Agreement on the European Economic Area: A Commentary* (Nomos/Hart, forthcoming).

SCA could be viewed as directly determinative or constitutive in themselves of an obligation to refer. At best, the duty of cooperation under EEA law could (and should) be seen as imposing heightened duties on all national courts of the EFTA States to seriously consider the potential implications of a duty not to refer in cases where the status of EEA law appears to be unclear. In the event that a national court were to decide not to refer in a case, and then proceeded to interpret and/or apply EEA law in a manner which proved manifestly wrong or at odds with the practice of the Court of Justice and/or EFTA Court, then the duty of cooperation might clearly come into play *ex-post* the national court's final ruling. In such an event, ESA or one of the other EFTA States could raise infringement proceedings against the EFTA State concerned for failing to take a measure (ie referral) which might otherwise have ensured fulfilment of its EEA obligations – notably the fundamental objectives of homogeneity, reciprocity and/or the judicial defence of individual EEA rights in the specific case at issue. Yet the fact that there would be no possibility in such an event to impose a penalty payment for failure to follow an Advisory Opinion or a subsequent infringement ruling further emphasises the EFTA Court's more limited jurisdiction and means of enforcement as compared to the Court of Justice for breaches of EEA law.

Finally, whilst the peculiarities of the Advisory Opinion procedure might therefore serve to placate certain fears that by joining the EEA on the EFTA-side, the UK would simply be releasing itself from the yoke of one supranational court only to fall under the grasping jurisdiction of another, it is also worth bearing in mind that the EFTA Court seldom accepts 'state-friendly' arguments in practice – at least not in situations where homogeneity is truly at stake.[31] Arguments based for example on statements made by the Contracting Parties during the EEA Agreement negotiations, and unilateral reservations made by the EFTA States following its conclusion, have therefore largely been deemed irrelevant as factors of interpretation by the EFTA Court.[32] As we shall see in the following sections, this point would seem to be brought well and truly home in the field of free movement of persons.

III. THE LEGISLATIVE DEVELOPMENT OF THE FREE MOVEMENT OF PERSONS UNDER EEA LAW – THE WIDENING GAP EXPOSED

Considering that the Main Part of the EEA Agreement has remained unamended for more than 20 years, seeking to ensure homogeneity has proven no mean feat in

[31] The EFTA Court has for example consistently rejected pleas from the EFTA States for a more 'state-friendly' interpretation of the EEA Agreement than the Court of Justice's interpretation of corresponding provisions of EU law, letting homogeneity prevail over any temptation to exercise its formal independence from the Court of Justice to pursue a more 'EEA-specific' interpretation of the internal market *acquis*. See eg *L'Oréal*, Joined Cases, see note 9 above, para 28, where the EFTA Court held that homogeneity required 'an interpretation of EEA law in line with new case law of the [Court of Justice] regardless of whether the EFTA Court has previously ruled on the question.' For other examples, see e.g. *Herbert Rainford-Towning*, E-3/98 [1998] EFTA Ct Rep 205; *Hörður Einarsson v the Icelandic State*, E-1/01 [2002] EFTA Ct Rep 18; *Fokus Bank*, E-1/04 [2004] EFTA Ct Rep 11; and *EFTA Surveillance Authority v The Kingdom of Norway*, E-2/06 [2007] EFTA Ct Rep 102.

[32] See eg *ESA v Norway (Hydropower concessions)*, E-2/06 [2007] EFTA Ct Rep 164.

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practice – particularly in the highly dynamic field of free movement of persons. As mentioned above, the rules in the Main Part of the Agreement reflect the legal situation in the EC prior to the Treaty of Maastricht, and hence prior to the introduction of the concept of EU Citizenship. There are therefore no provisions to be found in the Agreement mirroring those found today in Articles 20–25 TFEU. The very concept of EU Citizenship, and the many political rights that individuals may draw directly from Articles 21–25 TFEU, finds no parallel under EEA law. The EFTA States have consequently taken the principled view that the free movement of persons under EEA law is still primarily to be considered a matter of economic policy, and essentially limited to rights concerning the free movement of workers and other economically active individuals (as broadly construed by the Court of Justice over the years), and certain of their family members.[33]

Furthermore, beyond certain derived rights for third country nationals enjoyed by virtue of familial ties with individuals exercising their rights to free movement under EEA law, immigration policy matters are also generally deemed to fall without the scope of the EEA Agreement. We therefore find no EEA equivalents to the EU rules establishing the Area of Freedom, Security and Justice (AFSJ), and the many secondary EU measures giving rise to independent rights for third country nationals are not considered EEA-relevant.[34] Although all of the EFTA States take part in Schengen-cooperation, this falls outside the scope of the EEA Agreement and is therefore subject to separate bilateral commitments between the individual States and the EU.

The fact that the EU Treaties contain rules which are not reflected in the EEA Agreement is of course not in itself problematic – unless and until they start impacting on rights and duties which are contained in both legal regimes. The introduction of EU Citizenship transformed and re-conceptualised the free movement of persons under EU law.[35] Rights of movement and residence were henceforth to be enjoyed by virtue of a person's political status as a citizen, as opposed to the person's mere economic function as a factor of production within the host State. The Citizenship provisions of the Treaty have been used by the Court of Justice to strengthen and extend rights of free movement and residence of both economically and non-economically active EU citizens, and their family members (irrespective of nationality), either through direct application of Treaty rules on Citizenship and/or interpretations of EU secondary law in the light thereof. As mentioned above, the EFTA Court and the national courts of the EFTA States strive to keep abreast with the dynamic developments in the case law of the Court of Justice – also on this front. Yet looking at the substantive provisions on the free movement of persons in the Main Part of the EEA Agreement, the same tools and hence methods for developing

[33] Arts 28–30 EEA.

[34] Such as the Family Reunification Directive (2003/86/EC [2003] OJ L251/12), and the Long-term Residents Directive (2003/109/EC [2003] OJ L16/44).

[35] For more generally on this transformation, and the particular role of the Court of Justice in it, see eg C Barnard, *The Substantive Law of the EU – The Four Freedoms*, 5th ed (Oxford University Press, 2016), p 203 ff.

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similar rules under the EEA Agreement are simply not available to them.[36] There seemed to be much to suggest therefore that the widening gap in this field would eventually expose the true limits to homogeneity in the interpretation and application of EEA law.

A certain dynamism has nevertheless been ensured by incorporating new EU legislation into EEA law. Many EU Directives and Regulations concerned with facilitating the free movement of workers and other categories of persons falling within the Court of Justice's broad definition of this term (students, retirees etc) had been incorporated into the EEA Agreement's Annexes from the very outset.[37] New legal and political problems were to present themselves, however, when six of the key measures in the field came to be replaced by the EU Citizenship Directive in 2004 – the first major legislative reform in the field since the entry into force of the EEA Agreement.[38] Many of the rights and duties contained in the new Directive were clearly EEA-relevant, and eventually deemed so by the EEA Joint Committee as well, following a great deal of political discussion and bargaining. Certain new and/or amended rights and duties (arguably) attributable to Citizenship, immigration and social policy considerations nevertheless caused a great deal of consternation amongst some of the EFTA States. The novel rights of permanent residence in the host State after five years, and the derived rights of residence for third country national family members, were a particular cause for concern in this regard.[39] The underlying fear was that incorporating the Directive into the EEA Agreement would lead to a *de facto* broadening of the scope and objectives of the EEA Agreement itself through the backdoor – which although not always objected to outright by the EFTA States in practice, nevertheless proved more testing in this instance in light of the highly politically charged issues at stake.

In the EEA Joint Committee, the Commission (speaking on behalf of the EU pillar) made it clear from the very outset that it considered the entire Directive to be EEA-relevant. Consensus proved more difficult to reach on the EFTA-side, however, as Iceland and Liechtenstein – for partially different reasons – seemed less positive towards incorporating the Directive than Norway.[40] Interestingly, however, none of the EFTA States used their *de facto* right to veto in this case, presumably as

[36] Take for example the issue of job-seekers rights to equal treatment, which were initially limited under EU law to matters concerning access to employment. There was no right to equal treatment as far as social benefits were concerned. In *Collins*, C-138/02, EU:C:2004:172, however, the Court of Justice held that in light of the establishment of EU Citizenship, it was no longer possible to exclude benefits of a financial nature intended to facilitate access to employment. Without any corresponding Citizenship provisions in the EEA Agreement, the same method of interpretation of Art 28 EEA (which mirrors Art 45 TFEU) and/or the Workers Regulation (which is incorporated into the EEA Agreement), would naturally not be possible. That is not to say, however, that it would be impossible to arrive at the same result or outcome under EEA law by using different tools.

[37] Such as eg the Workers Regulation (Regulation No 492/2011, [2011] OJ L141/1).

[38] Directive 2004/38/EC, [2004] OJ L158/77.

[39] J Jonsdottir, *Europeanization and the European Economic Area* (Routledge, 2013), p 103 – this book contains an excellent exposé on the underlying politics and discussions involved.

[40] Ibid p 105.

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they were wary of the potential reprisals from the EU that this might entail. Discussions in the Committee dragged on for more than three years. Having rejected any suggested EEA adaptations to the text of the Directive put forward by the EFTA-side – a much used tool in similar situations, where EU texts require adjustments in order to make sense in their EEA legal setting – the Commission finally invoked the procedure under Article 102 EEA in an attempt to broker a final solution. Although this procedure according to the strict wording of the Agreement is subject to a six-month time-limit, conciliation talks dragged on for almost a year before the EFTA-pillar finally caved in – although without any of the relevant parts of the Agreement being provisionally suspended in the meantime, as they could have been.

The compromise reached in the end saw the EFTA States collectively agree to incorporate the Directive in full into the EEA Agreement, whilst also attaching a Joint Declaration (notably agreed upon by all of the Contracting Parties) to the EEA Joint Committee's decision.[41] The Declaration, set out here in full, stipulates that:

> The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.
>
> The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

The mere possibility of including such a Declaration – which clearly appears to attempt to limit the scope of the Directive under EEA law – might naturally be taken by some as a welcome sign of the possibility for the EFTA States to protect and control certain elements of their sovereignty in the face of the EU juggernaut. Its inclusion undoubtedly served to further complicate an already highly complex legal situation. Unsurprisingly, the differing legal backdrops against which the Directive finds itself under EU and EEA law eventually started to give rise to a number of

[41] *Joint Declaration by the Contracting Parties to Decision No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement*, http://www.efta.int/sites/default/files/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2007%20-%20English/158-2007-declaration.pdf.

homogeneity concerns in practice. As we shall see in the following section, in the relatively few cases which have made their way to the EFTA Court so far, the response of the Court has been both (justifiably) bold and creative.

IV. THE EFTA COURT'S RESPONSE – ATTEMPTING TO BRIDGE THE GAP

The EFTA Court's decision in *Clauder* set the scene for what was to come.[42] As we recall from above, the Citizenship Directive replaced and revised six earlier directives and regulations, all of which had been included in the EEA Agreement from the very beginning.[43] One of the key questions concerning the remit of the Citizenship Directive in its EEA setting was therefore how one might seek to disentangle pre-existing rights and duties (which had always formed part of EEA law) from any new or amended rights or duties. If the latter could be said to be attributable to the introduction of EU Citizenship, an argument could be made in light of the Joint Declaration that they warranted no protection under EEA law (ie that the limits of homogeneity would be reached).

The *Clauder* case concerned the interpretation of Article 16 of the Citizenship Directive, and issues of derived residence rights for family members of retired EEA nationals enjoying permanent residence in another EEA State.[44] The material content of Article 16 had been amended by the introduction of the Citizenship Directive: whilst two of the previous directives it had replaced had contained general requirements of sufficient resources and health insurance in order to trigger such derived rights, Article 16 contained no such requirements.[45]

The EFTA Court held that although not expressly stated in the wording of the provision, the right of permanent residence under Article 16(1) nevertheless conferred a derived right of residence for family members in the host State.[46] Careful not to make any direct reference to the case law of the Court of Justice based on the concept of Citizenship – which it was prohibited from doing in light of the Joint Declaration – the EFTA Court's opinion nevertheless strongly hinted towards an approach mirroring the Court of Justice ruling in *Metock*: that since the Citizenship Directive aims to facilitate and strengthen the right to move and reside freely within

[42] *Clauder*, E-4/11, [2011] EFTA Ct Rep 216.

[43] Amending Regulation 1612/68 (Workers Regulation); and repealing Directive 68/360/EEC on movement and residence within the Community for workers of Member States and their families, [1968] OJ L257/13; Directive 73/148/EEC on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, [1973] OJ L172/14; Directive 90/364/EEC on the right of residence, [1990] OJ L180/26; Directive 90/365/EEC on residence for retired employees and self-employed persons, [1990] OJ L180/28; and Directive 93/96/EEC on the right of residence for students, [1993] OJ L317/59.

[44] For more details on the facts surrounding the case, which need not concern us here, see eg T Burri and B Pirker, 'Constitutionalization by Association? The Doubtful Case of the European Economic Area' (2013) 32(1) *Yearbook of European Law* 207, pp 218–220.

[45] Art 1 Directive 90/364/EEC, and Art 1 Directive 90/365/EEC.

[46] *Clauder*, E-4/11, see note 42 above, paras 43–48.

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the territory of the EEA, individuals cannot derive less rights from that Directive than from the instruments of secondary legislation which it amended or repealed.[47] The EFTA Court thereby seemed to be implying that as long as the novel or amended rights in question could be linked in some way to workers (in the broadest of understandings) – and in any event in situations where the Court of Justice had yet to interpret the relevant parts of the provisions at issue in its case law (as in this particular case, thus leaving it free to charter its own interpretative course) – that it would continue to interpret such provisions in a highly dynamic and teleological manner. So even in the hypothetical event that the Court of Justice might have arrived at a similar conclusion under direct reference to Citizenship rules in the EU Treaties, as long as the ETFA Court can contrive to find a link to workers in the novel or amended provisions in question, it might well prove able to reach the same outcome in practice by using different tools available to it under EEA law.

The EFTA Court would have to wait another two years for its first opportunity to tackle the effects of the Joint Declaration itself in the *Wahl* case.[48] The case concerned the interpretation of certain of the justifications set out in Article 27 of the Citizenship Directive. Icelandic authorities had decided to ban the entry of a Norwegian citizen on grounds of public policy and/or public security, essentially for being a member of the Hell's Angels motorcycle organisation. The Norwegian Government (intervening in the case) had raised a number of principled arguments at the oral hearing, claiming that the Citizenship Directive must be considered as having a more limited scope under EEA law, given that the concept of citizenship fell without the EEA Agreement. The EFTA Court nevertheless spent little time in knocking back much of the intended impact of the reservations of the EFTA States in a few preliminary remarks to its Opinion. Whilst generally recognising that the concepts of EU Citizenship and immigration policy fell without the EEA Agreement, it held that these exclusions had no impact on the present case. Notwithstanding the fact, it would seem, that the Directive had introduced more procedural safeguards, thus further limiting the scope of Member State discretion to end an individual's right of residence on grounds of public policy, public security and public health than had previously been the case under the secondary measures it replaced. The Court did admit, however, that the Declaration's impact could vary from one case to another, and would therefore need to be assessed on a case-by-case basis. The EFTA Court pointed out explicitly in this regard that such arguments might be particularly relevant in cases concerning Article 24 of the Directive, which concerns rights of

[47] *Metock and Others*, C-27/08. EU:C:2008:449, paras 59, 82. The EFTA Court may also have drawn a certain inspiration from the decision of the Court of Justice in *Lassal*, C-162/09, EU:C:2010:592. The Court of Justice implied here that even though Art 16 introduced a new right of permanent residence based on legal residence for a continuous period of five years in the host state, that the interpretative outcome in the case (according to which the continuous periods of five years' residence completed before the Citizenship Directive's transposition deadline must be taken into account for the purposes of the acquisition of the right of permanent residence), would in any event have been the same – and even clearer – in the event that the right in question had in fact been traceable to one of the directives which the Citizenship Directive had replaced (paras 33–34).

[48] *Wahl v Iceland*, E-15/12, see note 21 above, paras 74–77.

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equal treatment for third country national family members of EEA nationals enjoying a right of residence or permanent residence. The accidents of litigation have yet to bring such a particular case before the EEA courts in practice.

The EFTA Court's Opinion in *Gunnarsson* went even further in illustrating the Court's willingness and creativity in seeking out homogenous interpretations of the Citizenship Directive under EEA law, effectively brushing aside the fact that there are no provisions in the EEA Agreement mirroring Articles 20 and 21 TFEU.[49] Mr Gunnarsson was an Icelandic citizen, who had lived in Denmark with his Icelandic wife for a number of years. Although neither of them had worked during their years abroad, Mr Gunnarsson was nevertheless required to pay Icelandic income tax during this time. He challenged a decision of the Icelandic authorities seeking to prevent him from claiming his wife's personal tax credit whilst they were in Denmark. He claimed that this was discriminatory since he was being treated differently to Icelandic citizens resident in Iceland, and that this was therefore liable to hinder the free movement of persons under EEA law by potentially dissuading people from leaving the country.

One of the questions which arose during the course of the proceedings was whether this was contrary to Article 7(1)(b) of the Citizenship Directive, which provides for a right of residence for up to five years in another EEA State, subject to requirements of sufficient resources and comprehensive medical insurance. The problem for Mr Gunnarsson was that the wording of this provision only expressly imposed obligations on the host State (ie Denmark) and not on his home State (ie Iceland). Although the Court of Justice had previously imposed obligations on the home State not to prevent exiting, it had done so on the basis of Article 21 TFEU. As no corresponding interpretative route seemed open to the EFTA Court, a different outcome from that which in all likelihood would have followed under EU law did not therefore seem improbable.

In line with the indications previously spelt out in *Clauder* and *Wahl*, however, the EFTA Court opined that the Icelandic authorities' decision was in fact incompatible with Article 7 of the Directive. The EFTA Court pointed out that this provision had replaced yet retained the substance of a provision previously set out in one of the directives which the Citizenship Directive had replaced (Article 1 of Directive 90/365). The earlier provision – which pre-dated the very concept of EU citizenship, and had been incorporated into the EEA Agreement in 1994 – conferred certain rights of residence on economically inactive persons and their spouses. Since taking up residence in another EEA State presupposed a move from one's home State, Article 1 of Directive 90/365 had to be understood as also prohibiting the home State from hindering the right of free movement. Mimicking once again the general approach of the Court of Justice following *Metock*, yet without making any direct reference thereto, the EFTA Court crucially held that 'individuals cannot be deprived of rights that they have already acquired under the EEA Agreement before the introduction of Union Citizenship in the EU'.[50] Since obligations could be imposed

[49] *Iceland v Gunnarsson*, E-26/13 [2014] EFTA Ct Rep 254.

[50] Ibid para 80.

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on the home State under Directive 90/365, and this rule was maintained in Article 7 of the Citizenship Directive, then the same interpretation was deemed to apply to the latter.

The EFTA Court also pointed out that just because the Court of Justice had arrived at the same conclusion on the basis of Article 21 TFEU in its case law, this fact alone could not rule out arriving at the same result under Article 7 of the Directive – the Court of Justice had simply felt no need to interpret secondary EU law in that regard.[51] This statement looked destined to come back to haunt the EFTA Court in light of the Court of Justice decision in *O and B*, where it seemed to state more clearly that the Citizenship Directive did not of itself confer derived rights of residence for third country nationals in the home States of EU nationals to whom they are attached.[52] The Court of Justice held here that although the Directive aimed to facilitate the exercise of primary and individual rights of free movement, that: 'It follows from a literal, systematic and teleological interpretation of Directive 2004/38 that it does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national'.[53] According to the Court, such a right could only be based on Article 21 TFEU, through a more general application of the reasoning provided for in *Singh* and *Eind* – two cases concerning situations similar to *O and B*, but where the EU citizens in question were also classified as workers.[54] The Court finally emphasised that whilst the derived right in question must be seen to flow directly from Article 21 TFEU, the conditions for granting such a derived right of residence as set out in the Directive would apply 'by analogy' in such a situation – thus requiring the initial residence in the host Member State, prior to a move back to the home State, to be considered 'sufficiently genuine' in accordance with its terms.[55] The question as to whether or not residence in the host State should be considered sufficiently genuine (ie as in accordance with for example Article 7 of the Directive) was a matter for the national court to determine.[56]

Strangely, the decision of the Court of Justice in *O and B* was not mentioned in *Gunnarsson*, in spite of the fact that it was delivered several months before the EFTA Court's Opinion was published, and prior to the oral hearing in that case.[57] In any event, the Oslo District Court's referral in the *Jabbi* case a few years later, which raised many of the same issues as *Gunnarsson*, inevitably signalled a second round on the interpretation of Article 7 of the Citizenship Directive in its EEA setting.[58]

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[51] Ibid para 81.

[52] *O and B*, C-456/12, EU:C:2014:135.

[53] Ibid para 37.

[54] *Singh*, C-370/90, EU:C:1992:296; *Eind*, C-291/05, EU:C:2007:771.

[55] Ibid paras 50–51.

[56] Ibid para 56.

[57] The decision of the Court of Justice in *O and B* was delivered on 12 March 2014, almost a month prior to the oral hearing in *Gunnarsson* (10 April 2014), and more than three months before the EFTA Court's Opinion was published (27 June 2014).

[58] *Jabbi v Norway*, E-28/15 [2016] (nyr).

Mr Jabbi (a Gambian national), met and married Ms Martinsen (a Norwegian citizen) in Spain. They moved to Norway a year later. Ms Martinsen had not been economically active during her time in Spain, but she did claim to have funds to support her stay whilst she was there. Mr Jabbi challenged a decision of the Norwegian immigration authorities rejecting his application (and subsequent appeals) for residence in Norway, and expelling him from the country. One of the issues facing the Oslo District court was whether Mr Jabbi could enjoy a right of residence in Norway under EEA law, derived from his wife's status as a Norwegian citizen.[59] Following *Gunnarsson* alone, the result in *Jabbi* should have been a given – but the Court of Justice decision in *O and B* naturally raised certain doubts concerning the EFTA Court's earlier approach.

The Oslo District Court stayed proceedings, and requested an Advisory Opinion from the EFTA Court, which was delivered eight months later.[60] The Court started out by recalling that the free movement of persons is one of the fundamental freedoms of the internal market, forming part of the core of the EEA Agreement. Its scope had been broadened by EEA legislation to include students and other economically inactive persons, conditional on requirements of sufficient resources and comprehensive medical insurance during one's stay in the host State. The Court then pointed out that the freedom of movement of persons under EEA law had included both workers and economically inactive EEA nationals, including their family members, from the very outset – as reflected in both the preamble and specific provisions of the Main Part of the Agreement, and the various secondary measures predating and replaced by the Citizenship Directive. The Court then recalled that the Court of Justice had already made clear in *Singh* and *Eind* that both workers and economically inactive persons had the right to return to their home States with family members of any nationality, provided they had exercised their rights to free movement in moving to the host State to begin with.[61] By incorporating the Citizenship Directive into EEA law, the Contracting Parties had thereby also agreed to include certain derived rights for third country nationals as a corollary to the right of free movement of nationals of the EU and EFTA States.[62]

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[59] Art 7 of the Citizenship Directive had been implemented into Norwegian law by Sections 110(2) and 112 of the Norwegian Immigration Act 2008. Sec 110(2) states that: 'Family members of a Norwegian national are subject to the provisions of this chapter if they accompany or are reunited with a Norwegian national who returns to the realm after having exercised the right to free movement under the EEA Agreement … in another EEA country'. Sec 112 states that: 'An EEA national has a right of residence for more than three months as long as the person in question (a) Is self-employed, (b) Is to provide services (3) Is self-supporting and can provide for any accompanying family member and is covered by a health insurance policy that covers all risks during the stay'.

[60] To its credit, and notwithstanding its relatively light caseload, the EFTA Court is remarkably fast and efficient in dealing with the cases that come before it – averaging approximately eight months per case. There is also the possibility to apply for an accelerated procedure in pressing cases. Another strength of the EFTA Court is that the reasoning of its Opinions and Decisions is usually much more detailed (and hence more transparent) than many decisions of the Court of Justice.

[61] *Jabbi*, E-28/15, see note 58 above, para 53.

[62] Ibid para 64.

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The case in *O and B* was then distinguished from the case at hand. Careful to acknowledge more generally that certain gaps had revealed themselves between the two EEA pillars over the years (ie that there were certain discrepancies between the Main Part of the EEA Agreement and the EU Treaties) and that this might have an impact on the interpretation of the EEA Agreement (ie pose homogeneity problems) the Court made it clear that Citizenship could not be considered synonymous with free movement. Indeed, the latter only forms one (albeit integral) part of the former. The EFTA Court therefore said that *O and B* was distinguishable from the present case, since it had to be read in its proper legal context – which encompasses the concept of Citizenship. And since the concept of Citizenship does not exist in EEA law, the case did not apply.[63]

Given that the legal settings in the two cases were not considered the same, the EFTA Court emphasised the need to assert its judicial independence *vis-à-vis* the EU Courts in the present situation with a view to achieving homogeneity.[64] If homogeneity between the free movement of persons under EU and EEA law were to be achieved, such a finding would have to be capable of being based on an EEA authority – ie the Main Part of the EEA Agreement, incorporated legal acts and/or relevant case law.[65] Proceeding therefore along the same tack as in *Gunnarsson* – and building particularly on the decision of the Court of Justice in *Eind* – the Court found that the right of economically inactive persons to move freely from one's home State under Article 7(1)(b) of the Citizenship Directive could not be fully achieved if EEA nationals were deterred from exercising their rights to free movement by their home States placing obstacles in the way for a return with accompanying third country national spouses. The Court concluded the point by stating that the provisions of the Directive which open for a derived right of residence for third country national family members in another EEA State, will therefore apply 'by analogy' in situations where the EEA national returns home with a third country national family member.[66]

The EFTA Court's opinion will undoubtedly have been a bitter disappointment for the governments of the EFTA States – especially since the Court of Justice has confirmed its views in *O and B* in later case law.[67] The EFTA Court emphasised in *Jabbi* that since the free movement of persons forms part of the core of the EEA Agreement, that the 'consideration of homogeneity therefore carries

[63] Ibid paras 60–67.

[64] Ibid paras 70–71.

[65] Ibid para 68.

[66] Ibid para 82.

[67] See eg *S and G*, C-457/12, EU:C:2014:136, para 34; and *Chavez-Vilchez*, C-133/15, EU:C:2017:354, para 53: 'Directive 2004/38 is only applicable to the conditions governing whether a Union citizen can enter and stay in Member States other than that of which he is a national. Directive 2004/38 does not therefore confer a derived right of residence on third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national'. Compare however with the contrary views expressed by Advocate General Szpunar in the latter case, where he argued strongly in favour of a different interpretation (Opinion of Advocate General Szpunar in *Chavez-Vilchez*, C-133/15, EU:C:2016:659, para 68).

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substantial weight'.[68] However, the EFTA Court's interpretation of Article 7 of the Citizenship Directive was clearly not homogenous with the Court of Justice interpretation of the same provision. It provides a good illustration therefore of the EFTA Court's pragmatic approach: where homogenous interpretation might conflict with homogenous results, the latter will seemingly prevail in practice.

In any event, as a result of the EFTA Court's Opinions in both *Gunnarsson* and *Jabbi*, it seems as though all rights – both autonomous and derived – contained in EEA rules pre-dating yet furthered in the Citizenship Directive will continue to enjoy the same protection under EEA law today, and will continue to be interpreted in conformity with EU developments. It would seem as though almost any case in which the Court of Justice bases its findings on the Citizenship rules of the Treaty, and where aspects of the rights in question find at least some resonance in the provisions of the Directive, might therefore be capable of being followed – by way of analogy. The EFTA Court's point seems to be that if one of the aims of the Citizenship Directive was to strengthen preexisting rights of free movement, then one cannot rely on the introduction of Citizenship to do away with such preexisting rights in an EEA context. Even if the concept of Citizenship cannot be used to enhance the preexisting rights which applied under EEA law, it should certainly not be used as an argument to limit rights which were intended to survive.

The creative technique opted for by the EFTA Court will therefore presumably be capable of ensuring homogeneity between EEA and EU law in most cases, notwithstanding the contrary impression one might otherwise get from (and perhaps the intention behind) the Joint Declaration. It seems less clear, however, whether or not – and if so, how – the EFTA Court might have arrived at the same result if these cases had concerned provisions of the Directive founded more particularly on Citizenship. After all, the Directive did introduce a number of new rights – such as extending family reunification rights of Union citizens to their partners under certain conditions, granting novel autonomous rights to family members (regardless of nationality) in case of death or departure of the Union citizen or dissolution of marriage or registered partnership, introducing a new right of permanent residence, and further limiting the scope for Member States to end an individual's right of residence on grounds of public policy, public security and public health through the introduction of new procedural safeguards. In light of the EFTA Court's previous indication in *Clauder* to the effect that not all new or amended rights introduced by the Directive could be deemed attributable to the concept of Citizenship as such, it remains to be seen whether it might view any such novel rights as flowing from Citizenship at all.

Whether the EFTA Court's approach should be lauded or criticised is naturally a matter of personal and political opinion. Some might say that the EFTA Court is proving more catholic than the Pope in the way it approaches these issues. Others would counter that the Court is simply fulfilling its primary task under the EEA Agreement and the SCA to the best of its ability, and with individual rights firmly in mind in doing so, in arriving at a result which most likely would have been the same as the Court of Justice had the latter not had recourse to a provision such as Article 21

[68] Ibid para 60.

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TFEU upon which to base its decisions. Regardless of which view one takes, the EFTA Court has done a remarkable job more generally over the past 20 years in persuading the Court of Justice that it is capable of ensuring a dynamic, effective and homogenous working of the EEA Agreement through its decisions – both in accepting the implied hegemony of the rulings of the Court of Justice, and also in certain cases by 'going first' and having its approach later endorsed by the Court of Justice itself.[69] Securing its independence from the EFTA States has become a more pressing concern in recent times, however, as revealed by the controversial saga concerning the recent reappointment of the Norwegian judge at the EFTA Court.[70] In what Norwegian media have alluded to as a politically motivated move, presumably with a view to securing a potentially more 'state-friendly' judge, the Norwegian Government first advertised the position on the open market.[71] When that attempt at replacing the judge failed, following a highly publicised exchange of views between the EFTA Court's President and the Norwegian Attorney General, the EFTA States attempted to subvert the written requirement under Article 33 SCA concerning the length of appointments to the EFTA Court from six years down to three.[72] Notwithstanding the EFTA States' subsequent 'u-turn' less than two months later, the EFTA Court rightfully and expressly rejected such a blatant attempt to interfere with its independence in *Nobile*.[73] Whilst undoubtedly a legally correct and justified ruling – particularly at a time when the independence of national judiciaries in several EEA States are being subjected to increasing attacks – those in favour of seeking a more national sovereignty fuelled solution to the future relationship between the UK and the EU will probably be less enamoured by the outcome.

Returning our attention once again to *Jabbi*, as if to soften the blow of its opinion, the EFTA Court recalled that the derived rights of residence in question were still conditional. In other words, it was not only the derived right under the Directive which applied by way of analogy, but also the conditions for exercising that right. In addition to the requirements of sufficient resources and comprehensive sickness insurance cover, derived rights of residence could therefore also be revoked in the event of sham marriages (although that did not appear to be the case here);[74] the common justifications of public policy, security and health might apply; and further, 'the residence of the EEA national in the host State must have been genuine such as

[69] For many examples of the latter, see eg C Baudenbacher, 'The Relationship Between the EFTA Court and the Court of Justice of the European Union' in C Baudenbacher (ed), *The Handbook of EEA Law* (Springer, 2016), pp 187–190.

[70] Generally on the background to this debacle, see M Andenæs and HH Fredriksen, '*EFTA-domstolen under press*', (2017) 1 *Europarättslig tidskrift* 205 (available in Norwegian only).

[71] See the Norwegian national newspaper *VG*'s story for example, http://www.vg.no/nyheter/innenriks/norsk-politikk/norsk-toppdommer-kan-bli-byttet-ut/a/23783682/.

[72] ESA/Court Committee Decision 2016 No 5 on the reappointment of a Judge to the EFTA Court (1 December 2016).

[73] ESA/Court Committee Decision 2017 No 1 on the reappointment of a Judge to the EFTA Court and repealing Decision 2016 No 5 of 1 December 2016 (13 January 2017). *Pascal Nobile v DAS Rechtsschultz-Versicherungs AG*, E-21/16, 14 February 2017 (nyr).

[74] Art 35 Citizenship Directive.

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to enable family life in that State'.[75] The EFTA Court seemed happy to leave the assessment of whether these conditions were fulfilled to the national court.[76] Upon receipt of the EFTA Court's opinion, the Oslo District Court held that Ms Martinsen did not have sufficient resources for her stay in Spain, and that she had not therefore exercised her rights to free movement under EEA law in the first place.[77] This was surprising, since she did in fact have funding in the form of various social benefits received from the Norwegian State. The amount she received each month was almost twice as high as the threshold at which Spanish nationals become eligible for social assistance, and therefore also in conformity with general Spanish requirements of sufficient resources as implemented under the Directive.[78] She had also applied for and received a Spanish residence card for her stay. The Oslo District Court nevertheless held that the requirement was not fulfilled, since the social benefits she had received were conditional upon residence in Norway. It was of no consequence to the Court that Norwegian authorities had no intention of attempting to reclaim the monies paid to Ms Martinsen in breach of the terms for receiving such social benefits. The Court therefore seemed to be implying that a breach of the right to receive benefits in the home State would be enough to conclude that a person did not have sufficient resources to stay in the host State under Article 7 of the Directive. Such an interpretation seems highly questionable, to say the least, as manifestly at odds with the Directive's underlying objectives. As the Court of Justice held in *Dano*, for example, the very purpose of the requirement is 'to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence'.[79] Ms Martinsen had not at any time sought to supplement her funds by applying for social benefits from the Spanish State. The decision of the Oslo District Court has been appealed, with a decision not expected until 2018.

V. CONCLUSIONS

As we have seen, whilst the aim of achieving an 'ever closer Union' is not an objective of EEA cooperation, homogeneity demands that one follows the same path: as the Union gets ever closer – as so poignantly demonstrated by developments in the field of the free movement of persons – so too does EEA cooperation, in light of the demands of homogeneity. The EFTA Court's case law shows that in situations where homogeneity is put to the test, there seems little to suggest that a more national sovereignty-friendly approach has been adopted in the field of free movement of

[75] This latter reference is quite strange, though, as the genuine residence condition is not provided for in the Directive, and seems based on Art 21 TFEU. See eg *O and B*, note 52 above, para 53.

[76] *Jabbi*, E-28/15, see note 58 above, para 73: 'The Court assumes that [Ms Martinsen] stayed legally in Spain for more than three months. If this is not the case, [she] cannot be said to have acted under EEA law for the purpose of creating a derived right as a family member for a third country national. It is for the referring court to establish the respective facts.'

[77] Decision of Oslo District Court, Case No 15-052864TVI-OTIR/08, 23 March 2017.

[78] Art 7 of Royal Decree 240/2007, and Art 3(c)2ª of Order PRE/1490/201218.

[79] *Dano*, C-333/13, EU:C:2014:2358, para 73; and rec 10 of the Preamble to the Citizenship Directive.

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persons under EEA law. Notwithstanding the integral differences between the EU and EEA legal constructs, the EFTA Court has proven highly adept at keeping pace with EU developments in the field through a number of creative interpretations of EEA law, and using different tools to arrive at uniform conclusions. For those who might contend that the lack of Citizenship entails differences under EU and EEA law with regard to rights of movement and residence, it is difficult to see what the differences really are in practice – or perhaps they have merely yet to show themselves. There is no reason to be apologetic about this fact, either. On the contrary, the EFTA Court deserves a great deal of praise for its efforts in seeking to bridge the widening gaps between EU and EEA law – both in this and other areas – which it is mandated and obliged to do, and without which the structure of the EEA Agreement would most probably have collapsed long ago. However, there is little escaping the fact that this has come at a certain cost, at times even serving as an affront to the national sensitivities of the three EFTA States. For those in favour of a harder Brexit, the EEA solutions in this particular field will probably not therefore offer much by way of comfort. Politically, there are undoubtedly ways to strengthen the sovereignty of the EFTA States in this field, although this would almost certainly require a much needed revamping of the Main Part of the EEA Agreement itself. Whether the current parties to the EEA Agreement, who by and large seem content with the overall working of the Agreement in practice, would want to rock the boat by seeking a renegotiation of its terms of course remains to be seen. At the time of writing, however, it would not appear as though the EFTA States would dismiss such an opportunity out of hand. In the meantime, and regardless of the outcome of the divorce proceedings with the EU, it will be interesting to see whether the UK would consider becoming party to the EFTA Convention in any event: such a move would allow for continued rights of free movement and residence between the UK and the four EFTA States (including Switzerland), yet under stricter conditions than under EEA law, and subject to more intergovernmental forms of cooperation and enforcement.[80]

[80] See Arts 20–22 of the EFTA Convention, Annex K and Appendix 1–3 attached thereto; http://www.efta.int/legal-texts/efta-convention.

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