

# The EEA and the protection of Human Rights

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## *I. Introduction*

The legal protection of human rights in Europe is complex.<sup>1</sup> Courts in every state have an obvious responsibility to protect these rights. National law often serves as the positive basis on which they engage in such efforts. However, they also rely on international law and supranational law in this regard, including the European Convention of Human rights and for EU Member States in EU law. Individuals have several avenues to seek protection and redress involving national courts, the ECtHR and the EUCJ. The relations between these legal instruments and courts are complex and intricate. If we add to the picture the states connected in a single European market through the EEA agreement, the legal complexities increase. In this paper, I seek to explain the avenues that are open to those who claim that their rights have been infringed upon.

## *II. European Economic Area*

The legal architecture of Europe consists of many overlapping legal orders and jurisdictions. It is not only within the EU one may speak of “differentiated integration”. In Western Europe there exists a second legal order, the European Economic Area (EEA), mirroring the single market of the EU. This encompasses the EU Member States and the three EFTA States Iceland, Lichtenstein and Norway. Less is known in the debate on the many facets of European legal integration on how this legal order operates and works.

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1 *Voermans*, Protection of European human rights by highest courts in Europe, in: Popelier/Van de Heyning/Van Nuffel (eds.), *Human rights protection in the European legal order: The interaction between the European and the national courts*, 2011, p. 367-370.

The EEA is created by an agreement between the contracting parties that reflects the freedoms of the single market of the EU, with the object ‘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’.<sup>2</sup>

In this paper I will examine the protection of fundamental rights within the EEA. Since the EEA is not a supranational arrangement in the same way as the EU, the National level is of greater importance when examining EEA-law than it is when studying EU law. The EEA has no legislative powers, the national courts are under no obligation to refer cases to the EFTA Courts, and the opinions of the EFTA Court is not binding on them, and the EFTA Surveillance authority can only within limited fields issue orders that are directly binding on individuals.

My main focus is the implications of these differences for the application of the so-called Bosphorus doctrine in the EEA, and how national EEA judges should deal with conflicts between EEA and the ECHR. At stake is the object of loyalty of the national courts of the EFTA States. What is their position when the EUCJ and the ECtHR differ? Within the scope of a short article it is necessary to limit the scope, so I will focus on Norway as an example of the national level.

### *III. Fundamental Rights in the EU and the Bosphorus Doctrine*

In Europe there are two important legal orders for the supranational protection of fundamental rights, the ECHR and the EU. Both these orders are committed to the propagation and protection of fundamental rights. Since many states are members of both, the protection of human rights poses some challenges of jurisdiction as long as the EU has not acceded to the ECHR. On the one hand, the obligations of the ECHR are binding to all states of Europe. On the other hand, the EU as such is not subject to the jurisdiction of the ECtHR and the EU has ‘established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law’.<sup>3</sup> This system puts the EUCJ in charge, and prohibits courts in the Member States from reaching deviating interpretations on fundamental

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2 EEA Agreement, preamble, 15th recital.

3 EUCJ Opinion 2/13, para. 175.

rights with reference to the jurisprudence of the ECtHR. If the EUCJ and the ECtHR differ from each other on the interpretation of a rights entailed in the ECHR this potentially puts the courts of the Member States on the spot: shall they follow the EUCJ and sanction a breach of the ECHR or shall they follow the ECtHR and breach their obligations under union law?

For the time being this conflict is avoided by the Bosphorus doctrine of the ECtHR that entails that ECtHR does not exercise review of EU law as long as its protection of human rights is at least equivalent to the protection offered by the ECHR and not manifestly deficient in the specific case. But how does this apply to the EFTA states within the EEA? On the one hand the EEA Agreement seeks to establish an area ‘with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area’.<sup>4</sup> The courts of the EFTA States are bound by the duty of loyalty in article 3 EEA to ensure homogeneity between EEA and EU law.<sup>5</sup> On the other hand, the EEA lacks the essential characteristics of EU law in important fields such as the transfer of sovereignty, the aim of an ever closing union and the charter of fundamental rights.

Article 6 TEU as amended in the Lisbon Treaty states that the ‘Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties’.

One purpose of article 6 is to protect Member States from being subjected to two different standards of human rights when implementing EU law. This should imply that a limitation of a right that is part of the ECHR could only be justified if that limitation would also be permissible under the convention.<sup>6</sup>

The ECtHR does not have jurisdiction over the EU and EU law. Under the current legal arrangement, it can only deal with EU law indirectly in cases against EU Member States, where it is the application or adherence to EU law which forms the basis for the action that is contested as incom-

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4 Article 1 EEA.

5 *Temple Lang*, *Judicial Protection in the European Economic Area*, 2012, p. 113-115.

6 *Lock*, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, in: *The Law and Practice of International Courts and Tribunals* 8, 2009, p. 375-398, p. 382.

patible with the ECHR. It follows from Article 1 ECHR that ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’. According to the jurisprudence of the ECtHR, this obligation also prevails when the state is acting under an obligation undertaken under international law or according to an international treaty.

In the *Bosphorus case*, it was argued by Ireland that enforcing an EU regulation was not under the ‘jurisdiction’ of Ireland, and that the case therefore fell outside of the scope of the ECHR according to Article 1. The ECtHR rejected this line of argument and determined that issues are under the jurisdiction of the state concerned even when the Member State is only implementing mandatory obligations following from EU law. On the other hand, to the question of whether a measure can be justified as a proportional measure of general interest, the Court referred to the fact that Ireland in this case was acting under an EU obligation. Based on this it held that compliance with legal obligations flowing from the Irish State's membership of the European Community must be regarded as a general interest of ‘considerable weight’ under Article 1 of Protocol No. 1 ECHR.<sup>7</sup> It then went on to state its rule that acting under such obligations could in itself be considered a justification as long as the relevant organisation is considered to protect fundamental rights. The next question then was if and to what extent this could be said to apply to the EU.

Regarding the application of the convention to acts undertaken under an obligation of EU law, the Court stated that ‘state action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides’.<sup>8</sup> Under certain conditions, acting in accordance with international obligations therefore justifies the action of the state, namely when the state is acting in accordance with a legal regime that in itself protects fundamental rights.

At the time of the decision, the treaty of Nice had not yet been adopted, and the EU Charter was not fully binding on the EU or the Member States.

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7 ECtHR, 30 June 2005, No. 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, Application*, para. 150.

8 ECtHR, 30 June 2005, No. 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, Application*, para. 155.

Nevertheless, the court regarded the substantive guarantees of fundamental rights within the EU sufficient to fulfil its requirements of protection. It then went on to assess the mechanisms of control in place to ensure its observance. After describing the co-operation between the union institutions and the courts of the Member States, the ECtHR concluded that ‘in such circumstances, the Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, “equivalent” (within the meaning of paragraph 155 above) to that of the Convention system’.<sup>9</sup>

Later, in the *Nederlandse Kokkelvisserij case*, the Court confirmed that ‘equivalent’ does not mean identical, but comparable.<sup>10</sup>

In the formulation of its deference to international organisations with an equivalent protection of human rights, the ECtHR emphasised both substantive and procedural aspects. An important premise for the conclusion of the Court regarding the EU was the role of the EUCJ. This was emphasised by the court in the case of *M.S.S. v Belgium and Greece* regarding the application of the Brussels convention on refoulement of asylum seekers. In this case, the court underlined that it had ‘attached great importance to the role and powers of the Court of Justice of the European Union (CJEC) – now the CJEU – in the matter, considering in practice that the effectiveness of the substantive guarantees of fundamental rights depended on the mechanisms of control set in place to ensure their observance’.<sup>11</sup> In the same paragraph, the court emphasised that it had limited the Bosphorus doctrine to Community law in the strict sense, which was at that time the first pillar of the EU treaty.

The significance of limiting the deference to the first pillar of EU law is that at that time the jurisdiction of the ECJ in the second and the third pillars had a ‘modest role’.<sup>12</sup> This should indicate that the application of the Bosphorus doctrine is limited to issues for which there is a possibility for review by the EUCJ.

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9 ECtHR, 30 June 2005, No. 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, Application, para. 165.

10 ECtHR, 29 January 2009, No. 13645/05, *Coöperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v. the Netherlands*, para. 20.

11 ECtHR, 21 January 2011, No. 30696/09, *M.S.S. v. Belgium and Greece Application*, para. 338.

12 *Weatherill/Beaumont*, EU Law The Essential Guide to the Legal workings of the European Union, 1999, p. 23.

#### *IV. The EEA Context*

What then with the EEA agreement? The aim and purpose of the EEA 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, Article 1 EEA. The preamble recital 8 underlines the important role of individuals within the EEA and the ‘exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights’. The EEA also establishes a regime for protection of the rights of individuals.

The ECtHR has dealt with the responsibilities of non-members with association agreements with the EU in the case of *Tarakhel v. Switzerland*. In this case, the ECtHR assessed the obligations of Switzerland to the Dublin regulation through the association agreement between the EU and Switzerland under the Bosphorus doctrine. The Court made no mention of the fact that this agreement and the EU treaty create very different legal orders that could have different implications for the application of the Bosphorus doctrine. On the other hand, the Court found that the states under this regulation are not under a legal obligation, and that they therefore are acting under full responsibility for their own judgment under the ECHR. For that reason, the case cannot be taken as an argument that the Bosphorus doctrine also applies to countries associated with the EU through separate agreements such as the EEA agreement.

The EEA differs from the EU in many respects, and the question is to what extent these differences are relevant to the application of the Bosphorus doctrine to the EEA. The scope of the EU and the EEA agreement are different. The EEA agreement does not cover the following EU policies: Common Agriculture and Fisheries Policies (although the agreement contains provisions on various aspects of trade in agricultural and fish products); Customs Union; Common Trade Policy; Common Foreign and Security Policy; Justice and Home Affairs (even though the EFTA countries are part of the Schengen area) or Monetary Union (EMU). The differences in scope do not necessarily affect the application of the Bosphorus doctrine. EU fundamental rights only apply to the Member States when they are implementing EU law or exercising their competences under EU law to restrict or derogate from EU rights (see the EU Charter Article 51). This only means that the scope of the application of the Bosphorus doctrine will differ between the EU and the EEA in that there is a potential for

overlap between the ECHR and EU law within the EU that is greater than within the EEA.

However, other important differences between the EU and the EEA are more relevant to the question of applying the Bosphorus doctrine. One important difference is in the nature of the obligations of the contracting parties to the EEA agreement as compared to the Member States of the EU. The EEA agreement does not include any powers to supranational bodies to give rules. The EFTA states are therefore not acting under an obligation when undertaking to comply with new EU rules. The inclusion of new legislation into the EEA agreement according to Article 102 of the EEA agreement could therefore (in principle) in itself entail an infringement of an obligation under the ECHR subject to the review of the ECtHR.

Another difference arises from the fact that the agreement was concluded 17 March 1993 and includes the single market aquis adopted and given prior to this date. This means that new EU treaties and case law is not part of the agreement as such, including the EU charter on fundamental rights and important case law establishing fundamental rights within the EU, such as case C-112/00 *Schmidberger*.

On the other hand, respect for fundamental rights was part of the EU aquis also prior to the signing of the EEA agreement. The first recognition by the EUCJ of fundamental rights applied as limits to the exercise of powers by the Commission was in the decision from 1969 in the *Stauder case*.<sup>13</sup> In the *ERT case* the EUCJ stated that

where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.<sup>14</sup>

Already at this time, therefore, it was clear that the human rights of ECHR formed part of Community law where not only the institutions, but also the Member States were subject to the control of the EUCJ. Accord-

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13 Case C-29/69 Rec 12 11, 1969, p. 419. See for the development of the protection of fundamental rights in the EU: *Christensen*, *Judicial Accommodation of Human Rights in the European Union*, 2007, p. 28-37.

14 Case C-260/89 ERT [1991] ECR I-2925.

ing to article 6 EEA, this case law would also apply to the interpretation of the provisions of the EEA ‘in so far as they are identical in substance to corresponding rules’ of the EC treaty. Human rights as recognized by the EUCJ thus also formed part of the EEA agreement right from the beginning.<sup>15</sup> But to what extent does this entail that the EEA agreement ‘is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides’?<sup>16</sup>

EU law has seen expansive development regarding human rights and in its relationship to the ECHR since 1993.<sup>17</sup> In 1992 the Treaty of Maastricht established the European Union and included in its article F(2) a provision stating that ‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights (...) as general principles of Community law’. This is now in a strengthened form in article 6 TEU. The EU Charter was proclaimed in Nice 2000. In the Treaty of Lisbon, the accession of the EU to the ECHR was required, and the Charter was made part of the treaty. How, if at all, is this development reflected in the EEA?

The answer to this question varies depending on who one asks. The state parties have expressed different opinions.<sup>18</sup> The Government of Norway argued in *ESA v Iceland* that the Charter lacks direct relevance for the interpretation of the EEA agreement because it has not been incorporated into it.<sup>19</sup> Iceland, on the other hand, relied on the charter in the same case.

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15 *Sejersted*, *Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA-Agreement*, in: Müller-Graff/Selvig (eds.), *The European Economic Area – Norway’s Basic Status in the Legal Construction of Europe*, 1997, p. 56.

16 ECtHR, 30 June 2005, No. 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, *Application*, para. 155.

17 For this development, see *Defeis*, ‘Human rights, the European Union, and the treaty route: From Maastricht to Lisbon’, 35 *Fordham international law journal* 2012, p. 1207-1230.

18 For an overview, see *Wahl*, *Uncharted Waters? The Charter & EEA Law in The EFTA Court* (ed.) *The EEA and the EFTA Court Decentred Integration*, 2014, p. 287-289.

19 Report for the hearing in Case E-12/10 *ESA v Iceland*, para. 163.



In a consistent line of cases, the EFTA Court has held that the EU fundamental rights also form part of EEA law and fall under the jurisdiction of the EFTA Court.<sup>20</sup> The president of the EFTA Court, Carl Baudenbacher, early declared that the EFTA Court has ‘followed suit’ with the EUCJ in its long-standing tradition of referring to the ECHR and the case law of the ECtHR.<sup>21</sup>

Legal doctrine is more reserved. Writing on the EEA and the ECHR, Björgvinsson points out

“from a formal point of view, the Convention does not form a part of the EEA Agreement as a binding source of legal norms in the context of the EEA Agreement. Still, the case law of the EFTA Court strongly supports the conclusion that the norms contained in the Convention, which also reflect a common standard and a common denominator for a minimum standard for the protection of fundamental rights on a European level, are a part of the general unwritten principles of EEA law.”<sup>22</sup>

Fredriksen points out that fundamental rights and the EU Charter not only impose obligations on the states, but also on individuals. The question of the relevance of the Charter to the EEA must be assessed on a case-to-case basis, and homogeneity must yield to legal certainty where drawing upon EU law that is not formally part of the EEA agreement will lead to imposing new obligations on private subjects or encroachments of the sovereignty of the EFTA states.<sup>23</sup> Wahl, also writing on the status of the Charter in the EEA, observes that the Charter cannot be binding in the EEA context, but that on the other hand it cannot be outright excluded when interpreting and applying EEA provisions.<sup>24</sup>

As pointed out by Fløistad, the question of the inclusion of human rights into the scope of the EEA agreement is not one of being for or against human rights, but rather of whether the EFTA Court has been giv-

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20 For an overview of cases, see *Björgvinsson*, *Fundamental Rights in EEA Law in The EFTA Court* (ed.) *The EEA and the EFTA Court Decentred Integration*, 2014, p. 273-275.

21 *Baudenbacher*, *The EFTA Court Ten Years On*, in: *The EFTA Court Ten Years On*, 2005, p. 30.

22 *Björgvinsson*, p. 276.

23 *Fredriksen*, *Betydningen av EUs pakt om grunnleggende rettigheter for EØS retten*, *Jussens Venner* vol. 48, p. 378.

24 *Wahl*, p. 295.

en the mandate to make the choices that balancing human rights against other rights and interests entail.<sup>25</sup>

In my opinion it is difficult at this time to draw a clear conclusion on to what extent the charter and the broad protection of fundamental rights are included in the EEA agreement as obligations on the EFTA states under this agreement. This uncertainty is in itself an argument against applying the Bosphorus doctrine and thus depriving individuals or enterprises of access to the ECtHR when EFTA states are applying and enforcing EEA law.

This brings us to another difference between the EU and the EEA of relevance to the application of the Bosphorus doctrine: the system of enforcement and protection of human rights. Contrary to the EU, the system of co-operation between the EFTA Court and the national courts does not have a binding nature. Formally, national courts are not under an obligation to refer matters to the EFTA Court, and they are not bound by the opinions on EEA law expressed by this court. The Surveillance and Court Agreement between the EFTA states (SCA) states in Article 34(2) that when an issue regarding the interpretation of EEA law ‘is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.’ There is no equivalent provision to Article 267 TFEU on the duties of national courts against whose decisions there is no judicial remedy under national law. When a matter is brought before the EFTA Court, ‘the EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.’ It is noteworthy that the agreement does not use the expression “preliminary ruling”. The advisory nature of the opinions of the EFTA Court was explicitly stated by the Norwegian Supreme Court in the STX case where it chose a different interpretation of article 36 EEA and the posted workers directive than the one expressed by the EFTA Court in an advisory opinion in the same

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25 *Fløistad*, *Fundamental Rights and the EEA Agreement*, ARENA Report No 1/2004, p. 89.

case.<sup>26</sup> This provoked reactions from the EFTA Court and many observers.<sup>27</sup>

It has been argued that both the principles of loyalty, homogeneity and legal certainty entailed in the EEA agreement, and also the right to access to court of article 6 ECHR demand that national courts of the EFTA states are under an obligation to refer matters to the advisory opinion of the EFTA Court. According to Magnusson, the role of the national judge in an EFTA State is, by and large, comparable to what would be the case in an EU State, and ‘a great deal of responsibility for judicial protection under EEA law is placed on the national judiciary which, in turn, has to cooperate with the EFTA Court through the preliminary reference procedure when it is confronted with genuine and relevant questions of EEA law’.<sup>28</sup> Magnusson argues that the case law of the EFTA Court is a ‘de facto’ recognized *aquis* of the EEA agreement, and from this, together with the principle of loyalty, derives the national courts’ obligation ‘to make a referral to the EFTA Court and subsequently to comply with an advisory opinion when applying EEA law’.

As pointed out by Barnard, the principles of homogeneity, reciprocity and the duty of loyal cooperation are principles, not mandatory rules, and a more partner-like relationship between the EFTA Court and the national courts requested by the EFTA Court requires both courts to listen to each other rather than a subordination of one under the other.<sup>29</sup> To use these principles to construe obligations on the courts of the EFTA states that were explicitly avoided under the drafting of the agreements would be to take them quite far. It is difficult to argue for this in the same way as has been argued within the EU (and former EC) for the development of increasing supranationality. There is no *telos* of an “ever closer union” within the EEA, and the EEA was construed specifically as an alternative to the supranational legal order of the EU.

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26 Rt 2013, p. 258 and Case E-2/11 STX Norway and Others, judgment of 23 January 2012 [2012] EFTA Ct Rep 4.

*O v Tariffnemda*, judgment of the Supreme Court of Norway of 5 March 2013.

27 See the overview by *Baur*, Preliminary Rulings in the EEA—State of Play in The EFTA Court (ed.) *The EEA and the EFTA Court Decentred Integration*, 2014.

28 *Magnússon*, Judicial Protection in the EEA—The Role of the National Judge in The EFTA Court (ed.) *The EEA and the EFTA Court Decentred Integration*, 2014, p. 131.

29 *Barnard*, Reciprocity, Homogeneity and Cooperation in The EFTA Court (ed.) *The EEA and the EFTA Court Decentred Integration*, 2014, p. 167.

Disregarding the question of the precise nature of the relationship between the national courts and the EFTA Court, the fact remains that it is not identical to the relationship between the courts within the EU. This issue is not, however, whether the relationships is identical, but whether it is comparable. This must be on the basis of the emphasis that the ECtHR has put on the system of protection of the human rights within the EU. In *M.S.S. v Belgium and Greece* the court underlined that it had ‘attached great importance to the role and powers of the Court of Justice of the European Union (CJEC) – now the CJEU – in the matter, considering in practice that the effectiveness of the substantive guarantees of fundamental rights depended on the mechanisms of control set in place to ensure their observance’.<sup>30</sup> A central feature of the protection of rights within the EU is that reference to the EUCJ is mandatory for the courts of last instance of the Member States, and that the opinions expressed by the court are binding on the Member States. Both these features are lacking within the EFTA side of the EEA. The consequence of this is that individuals of the EFTA states have no access to binding judicial review of the decisions taken by the judicial bodies of their states. The ECtHR would therefore be denying citizens of the EFTA states access to justice if it would not consider on its merits a claim that rights under the convention have been infringed by a state acting under the obligation of the EEA agreement.

Yet another difference between the EU and the EEA agreement lies in the dynamics and the way new legislation from the EU is incorporated into the agreement. There is no legislative body in the EEA. When new legislation is adopted in the EU, the directives and regulations are presented by the Committee to the EEA Joint Committee according to article 102 EEA to the extent that they are ‘EEA relevant’. The EFTA states are not bound to agree to amend the agreement to include the new legislation, but if they do not, the ‘affected part’ of the agreement is ‘regarded as provisionally suspended’. Accordingly, it is difficult to argue that the EEA agreement can put the EFTA states in a position where they are legally bound to adopt legislation or to undertake obligations in contradiction to their obligations under the ECHR or other human rights instruments that they are bound by.

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30 ECtHR, 21 January 2011, No. 30696/09, *M.S.S. v Belgium and Greece Application*, para. 338.

As Björgvinsson stated, the conclusion must be that the Bosphorus doctrine does not apply to the EEA. None of the EEA institutions have directly been invested with the powers to uphold fundamental rights and it is for the national courts to define how the international human rights influence the obligations under the EEA agreement, taking into consideration the specific aims and legal nature of the EEA agreement.<sup>31</sup>

The consequence of the EEA falling outside of the Bosphorus doctrine is that should an issue arise before the ECtHR, this court will have to examine the case on its merits despite that fact that an EFTA state is implementing an EEA rule or acting under a restriction of its freedom following from the EEA agreement. From this may follow that the ECtHR will not necessarily adopt the same solution to a conflict between the EEA rules and the ECHR as the EFTA Court or the national court on a question of conflict. The ECtHR may have to express itself on issues that have not previously been expressly decided by the EFTA Court or the EUCJ regarding the corresponding rules within the EU. There is no good reason why the ECtHR should see itself as bound in any way by the case law of the EUCJ when deciding such an issue. Since the issue has not yet been decided by the EUCJ, the ECtHR will not be in a position where it puts a specific state in the jeopardy of having to deciding between its obligations under the ECHR or EU law, whether it be an EFTA state or an EU Member State.

An intricate question may arise if the case from an EFTA state involves an issue that has been decided by the EUCJ in its EU-law context. The ECtHR cannot refrain from entering into a legal assessment of the case, as this would deprive those resident or economically active in EFTA countries of their access to an independent review of the actions of an EFTA state since they lack access to the EU system of control. The question then remains if the ECtHR without further scrutiny would embrace the solution adopted by the EUCJ. The ECtHR is certainly under no obligation whatsoever to the EEA's principle of homogeneity.

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31 *Björgvinsson*, p. 278.

*V. Consequences for the national courts of the EFTA States*

Since the relationship of the EEA agreement to the ECHR has not been harmonised in the same way as the relationship between the convention and EU law, the national courts are under a dual obligation. For the national courts of the EFTA States this entails that they are under the obligation of the ECHR to make their own assessment of the relationship between the convention and national legislation implementing EEA rules. This assessment must be made on the basis of the method and cases of the ECtHR. As we have seen from the discussion above, it is inherent in the different settings of the human rights that there might be differences in their interpretation within the contexts of the EU/EEA and the ECHR. As long as there is no harmonization of these differences at the international or supranational level, there are no possibilities for harmonisation at the national level. When interpreting EEA rules the national courts must take due regard of the authority of the EFTA Court and the EUCJ, but these courts do not have the same authority when interpreting the ECHR.

If the national court after performing such an individual assessment reaches the conclusion that a human right is violated by EU law, it faces the dilemma of whether to give precedence to the ECHR or to the EEA agreement. For the courts in the EFTA States this conflict must be resolved on the basis of national law. The conflict presently has no resolution at the international or supranational level, and the national courts must determine it according to the national law that implements these two bodies of law into national law.

In the Norwegian setting this means that the question must be resolved by the constitution and by reference to the obligations stemming from the act implementing the international human rights instruments and the obligations stemming from the act implementing the EEA Agreement. Both these acts are similar in structure and wording. The act implementing the EEA agreement from 1992 states in section 2 that legislation implementing Norway's commitments under the EEA agreement takes precedence over other acts regulating the same issues. Similarly, the act regarding the strengthening of the position of human rights in Norwegian law from 1999 states in section 3 that provisions entailed in conventions and protocols referred to in section 2 of the act take precedence over other legislation. The two provisions obviously do not take into account the situation that there might be a conflict between the two.

Human rights, however, have status as constitutional law in Norwegian law. Section 92 of the constitution states an obligation on the state to respect and protect human rights as they are enshrined in the constitution and in international treaties on human rights that are binding on Norway. The right to organisation, hereunder to form trade unions, is stated in section 101 of the constitution. Whether this right in Norwegian law also entails the right to take collective action is not explicitly mentioned in the reasons given for this provision in the *travaux préparatoires*. The same substantial reasons given in international law for this may also be given for the interpretation of the constitution, namely that the whole point of forming trade unions is to act collectively against an employer to obtain and protect rights in employment. In any case, the interpretation of the Norwegian constitution at this point is not decisive as long as this substantial aspect of the right of organisation follows from Article 11 ECHR. The difference in the constitutional status between the international human rights and the EEA agreement must in any case have as a result that the obligations according to the ECHR take precedence over the obligations following from the EEA agreement in Norwegian law. Should the question arise, Norwegian courts are therefore under an obligation to follow the ECtHR in cases of divergences in disfavour of the level of protection of human rights as defined by this court by the level of protection awarded by the EUCJ.