

Constitutional/judicial resistance to European Law in Iceland. Sovereignty and constitutional identity vs. access to justice under the EEA Agreement

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Abstract

In the context of occasional constitutional resistance to international and European Union (EU) law in other countries, we find a similar tension in Iceland vis-à-vis the European Economic Area (EEA) Agreement and the Icelandic constitutional/statutory domestic system (EEA Act 2/1993). The authority and effectiveness of EEA law seem disregarded with negative consequences for the judicial protection of individual rights. The EFTA Surveillance Authority (ESA) sent official letters to Iceland in 2015, 2016 and 2017. In its view, in too many recent cases, the Supreme Court has discarded and set aside validly implemented EEA law in order to give precedence to conflicting Icelandic law. In some cases, individuals have no proper remedy to exercise their European rights (State liability for judicial breaches of EEA law not admissible). It is uncertain at this time whether actions for infringement of EEA law will be brought by ESA to the EFTA Court. This study reviews this sort of judicial, legislative and/or constitutional resistance to EEA law in Iceland and argues that the use of concepts such as sovereignty (public international law) and constitutional identity (EU law) can never justify the denial of access to justice and effective judicial protection under the EEA Agreement.

Keywords: *Iceland, European Economic Area law, constitutional resistance, access to justice.*

JEL Classification: K10, K33, K40

1. Introduction

The European Economic Area (EEA) Agreement² extends the internal market and other EU policies to three non-EU neighbouring countries. It aims to guarantee the free movement of persons, goods, services and capital; to provide equal conditions of competition and to abolish discrimination on grounds of nationality in all 30 EEA States – the 27 EU States and three of the four European Free Trade Association (EFTA) States (Iceland, Norway and Liechtenstein). EEA

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² Agreement on the European Economic Area. *OJL 1, 3.1.1994*. Consolidated text with all amendments up to 7 February 2019 available online at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01994A0103\(01\)-20190207](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01994A0103(01)-20190207). For a recent commentary see Arnesen, F., Fredriksen, H. H., Graver, H. P., Mestad, O. and Vedder, C., *Agreement on the European Economic Area: A commentary*, C. H. Beck, München, 2018; Frommelt, C., *In search of differentiated integration: Lessons from the European Economic Area (EEA)* (doctoral thesis, 2017, ETH Zürich); Baudenbacher, C. (ed), *The Handbook of EEA Law*, Springer, New York, 2016 and Baudenbacher, C. (ed), *The Fundamental Principles of EEA Law: EEA-ities*, Springer, New York, 2017.

law originates from EU law but has a unique *sui generis* nature³. While it is a distinct legal order of its own, there is a similar requirement of effectiveness (*effet utile*). Two fundamental principles of EEA law are homogeneity and reciprocity⁴. The approach to some of the fundamental principles is a variation of EU law due to the fact that legislative power was not to be transferred by the EEA Agreement from the States that adhered to the dualistic principles to deal with international law. Instead of primacy and direct effect in the EU, there is quasi-primacy and quasi-direct effect⁵.

Iceland celebrated 25 years of the EEA Agreement in 2019.⁶ However, since the Agreement is not above criticism,⁷ the decision was taken to assess its pros and cons objectively and a Committee was appointed, led by Björn Bjarnason.

This Committee issued a report in September 2019, assessing the benefits and detriments of EEA membership in light of the “consequences and functioning of the EEA Agreement in Iceland.”⁸ The report also discussed the constitutional status of EEA law in Iceland, outlining that the degree to which the Icelandic constitution accommodates EEA membership requires clarification, specifically in the form of either the formal insertion of an article/clause on membership into the constitution, or an official declaration of constitutional acceptance through 25 years of continued use.⁹

³ EFTA Court, Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, para. 59.

⁴ Case E-12/13 *EFTA Surveillance Authority v Iceland* [2014] EFTA Ct. Rep. 58, paragraph 68.

⁵ Páll Hreinsson, General Principles, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016), p. 388.

⁶ In a seminar, held February 6th, 2019, on the impact of the EEA Agreement on Icelandic society: Guðlaugur Þór Þórðarson, Minister of Foreign Affairs (Independence Party) emphasized the importance of this agreement in his opening speech. “*It is our great fortune that we, as a sovereign state, chose to enter into an international agreement, which was tailored to our interests and on our own terms*”, the Minister stated. In his speech the Minister also pointed out that the EEA Agreement entailed virtually unrestricted access to one of the largest markets in the world and that the Agreement provided Iceland with residential and as well as employment opportunities everywhere in the EEA-area. At the same time, Iceland could and can choose not to be participant in matters where Iceland's interests do not coincide with the interests of the EU (ie. fisheries policy). The seminar was held by the International and European Law Institute of the University of Reykjavik, in collaboration with the Ministry of Foreign Affairs and the EU Delegation in Iceland. The speech is available online at: <https://www.stjornarradid.is/raduneyti/utanrikisraduneytid/utanrikisradherra/stok-raeda-utanrikisradherra/2019/02/06/Avarp-a-malstofu-um-ahrif-EES-samningsins-a-islenskt-samfelag/> (last accessed on 15 February 2020).

⁷ In the Parliament (*Alþingi*), later that same day, the Minister was heavily criticized for his speech which was said to demonstrate that his policy is not in line with Iceland's best interests. See *Alþingi*. 149. löggjafarþing — 63. fundur, 6. February 2019 available online at: <https://www.althingi.is/altext/raeda/149/rad20190206T152025.html> (last accessed on 15 February 2020).

⁸ An English translation of the Foreword, Commemorative Statement, Executive Summary and Fifteen Points on Improvements of the ‘Report of the Working Group on the EEA co-operation’ (September 2019) is available online at: <https://www.government.is/lisalib/getfile.aspx?itemid=918d3e73-e465-11e9-944d-005056bc4d74> (last accessed on 15 February 2020). The full report (2019) in Icelandic is available online at: <https://www.government.is/lisalib/getfile.aspx?itemid=918d3e72-e465-11e9-944d-005056bc4d74> (last accessed on 15 February 2020).

⁹ *Ibid*, see page 13 point 2.

Such a clarification is needed because the current constitutional/statutory framework is not functioning effectively in Iceland. Three elements construct what we can call its core constitutional identity based on independence and sovereignty vis-à-vis international law, a specific constellation that affects the operation of EEA law in the country:

1) a national constitution limiting the transfer/share of any legislative power to international organizations and the adoption of a doctrine of strict dualism to incorporate public international law¹⁰;

2) a legislative decision, proposed by the Government at the time, that opted for the incomplete/incorrect incorporation of the obligation's incumbent under Protocol 35 of the EEA Agreement¹¹ (Article 3 of EEA Act no. 2/1993); and

3) a judicial trend of interpreting and constructing the relationship between national law and EEA law within the limits of a rule of interpretation as in public international law (but ignoring the twin rule of conflict prescribed by Protocol 35 to secure the precedence of application/quasi primacy in case of conflict as in EU law).

These factors have led to a situation where, in too many recent cases, European rights are disregarded due to the application of conflicting national law, rather than law implemented under the EEA Agreement. Having adjudged this situation to be unacceptable, the EFTA Surveillance Authority (ESA or Authority) a monitoring body disposing of similar supervision powers to the European Commission under the EEA Agreement, has sent a number of important letters to Iceland in this regard:

1) a letter of formal notice¹² requiring proper implementation of the EEA Agreement and further compliance with Protocol 35 and Article 3 of the EEA Agreement.¹³

¹⁰ Doctrinal studies abound on the EEA Agreement and the concept of sovereignty (*fullveldi*) in Iceland. Law Professor Davíð Þór Björgvinsson in 2014 prefers to use the term *authority to transfer state power to international organizations*. In his view, as the Constitution does not entail any provision that deals specifically with this, it has become a question shaped by the rule of interpretation and customary tradition. Björgvinsson, D. Þ., “*Enn um fullveldi og EES*”, 2014 available online at: <https://uni.hi.is/davidth/2014/05/21/enn-um-fullveldi-og-ees/> (last accessed on 15 February 2020). See also Baldur Þórhallsson, ‘Iceland: A reluctant European’, in Erik Eriksen and John Erik Fossum (eds), *The European Union's Non-Members: Independence under Hegemony?* Routledge, 2015, on pp. 120 and 123.

¹¹ Article 119 of the EEA Agreement reads as follows: “The Annexes and the acts referred to therein as adapted for the purposes of this Agreement as well as the Protocols shall form an integral part of this Agreement.” Since Protocol 35 is an integral part of the Agreement, this is a potential breach of Treaty obligations.

¹² ESA. Letter to the Icelandic Ministry of Foreign Affairs of 13th December 2017. Decision No: 212/17/COL. Letter of formal notice to Iceland concerning Iceland's implementation of Protocol 35 to the EEA Agreement, available online at <<http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=4071>> (last accessed on 15 February 2020).

¹³ Article 3 of the EEA Agreement provides: “The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement.”

2) a letter of formal notice¹⁴ and a subsequent reasoned opinion¹⁵ concerning Iceland's failure to fulfil its obligations arising from the general principle of State liability for breaches of EEA law under the EEA Agreement applicable to judicial breaches (case *Kolbeinsson*¹⁶).

For the author, these issues are strongly interrelated and constitute essential questions in EEA law. This study contextualizes the main content of the letters in a broader trend of constitutional resistance to international/European law, and searches for potential solutions to provide for effective implementation and execution of the EEA Agreement in Iceland. It does so by combining a perspective based upon public (international) law (respect for sovereignty and constitutional independence and identity) with the obligation to provide effective protection of individual rights arising from Iceland's obligations under the EEA Agreement (including the authority and effectiveness of EEA law and an access to justice perspective).

2. A context of constitutional and judicial resistance to international and EU/EEA law

Much has been written about global constitutional convergence in the field of EU law and in comparative constitutional law and on the role of national courts in these processes of integration/convergence.¹⁷ However, at the same time, a *nouvelle vague* of constitutional resistance seems to be gaining ground to the edicts of international institutions, not only in Europe but also worldwide.¹⁸ Hirschl has pointed to a paradox embedded in this global constitutionalism: the more expansive such trends of constitutional convergence become, the greater the likelihood of

¹⁴ ESA. Letter to the Icelandic Ministry of Foreign Affairs of 17 June 2015. Letter of formal notice to Iceland concerning State liability for breach of EEA law by a court adjudicating at last instance available online at: <http://www.eftasurv.int/media/decisions/752617.pdf> (last accessed on 15 February 2020).

¹⁵ ESA. Reasoned opinion delivered on 20th January 2016 in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice available online at: <http://www.eftasurv.int/media/esa-docs/physical/775380.pdf> (last accessed on 15 February 2020).

¹⁶ EFTA Court, Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234, paragraph 77.

¹⁷ To name just a few of see Alter, K, Helfer, L and Madsen, MR (eds), *International Court Authority*, Oxford University Press, Oxford, 2018; and De Witte, B., Mayoral, J. A., Jaremba, U., Wind, M., and Podstawa, K. (eds), *National Courts and EU Law*, Cheltenham, UK: Edward Elgar Publishing, 2016.

¹⁸ Davies, G, & Avbelj, M (eds), *Research Handbook on Legal Pluralism and EU Law*, Edward Elgar Publishing, Cheltenham, Gloucestershire, 2018; Derlén, M, and Lindholm, J (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives*, Bloomsbury Publishing Plc, London, 2018; Mayoral, J. A., and Wind, M., "Introduction. National courts vis-à-vis EU law: new issues, theories and methods". In *National Courts and EU Law*, Cheltenham, UK: Edward Elgar Publishing, 2016; Perisin, T, and Rodin, S (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union*, Bloomsbury Publishing Plc, London, 2018; and Wind, M (ed.), *International Courts and Domestic Politics*. Studies on International Courts and Tribunals, Cambridge University Press, Cambridge, 2018.

dissent and resistance.¹⁹ Other recent contributions refer to a concerted backlash against international courts and have empirically mapped a variety of patterns of such resistance.²⁰

In particular, the CJEU is struggling for legitimacy, due to periodical challenges emanating from domestic constitutional and supreme courts in a number of EU Member States.²¹ As Sarmiento notes, commenting on three important cases: “The German Constitutional Court is unimpressed with the quality of the reasoning of the Court of Justice (European Central Bank and *OMT* ruling). The Danish Supreme Court is upset with the activism of the Court of Justice (*Ajos/Dansk Industri* case). The Italian Constitutional Court is horrified with the approach towards fundamental rights of the Court of Justice in *Taricco I*.”²² Due to its historic legal influence on Iceland, the *Ajos*²³ case in Denmark deserves particular attention. Here, the Danish Supreme Court rejected the principle of the primacy of non-written general principles of EU law over national law.²⁴

¹⁹ Hirschl, R., “Opting Out of “Global Constitutionalism”, *Law & Ethics of Human Rights*, 2018, vol. 12 (1), pp. 1-36.

²⁰ Hofmann, A., “Resistance against the Court of Justice of the European Union”, *International Journal of Law in Context*, 2018, vol. 14 (2), pp. 258-274; and Madsen, M., Cebulak, P. and Wiebusch, M., “Backlash against international courts: explaining the forms and patterns of resistance to international courts”. *International Journal of Law in Context*, 2018, vol. 14(2), pp.197-220.

²¹ Komárek, J., “The Struggle for Legitimacy through Law in the EU”, in D Innerarity, J White, CA and A Errasti (eds), *A New Narrative for a New Europe*. Rowman & Littlefield Publishers, 2018, pp. 143-159. See also ruling from German Constitutional Court of 5 May 2020 at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2_bvr085915_en.html (last accessed on 15 February 2020) and Press release 32/2020 “ECB decisions on the Public Sector Purchase Programme exceed EU competences” available at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html> (last accessed on 15 February 2020).

²² On 21 June 2016 the German Constitutional Court finally accepted the European Central Bank’s OMT programme, after having made a reference of validity to the Court of Justice. On 6 December 2016 the Danish Supreme Court ruled that non-written general principles of EU Law are not binding in the Danish legal order. The Italian Constitutional Court, on 26 January 2017; made a reference openly inviting the Court of Justice to overrule its past decision (*Taricco I*). See Sarmiento, D., “An Instruction Manual to Stop a Judicial Rebellion (“before it is too late, of course”)”, *Verfassungsblog*, 2 February 2017, available online at <https://verfassungsblog.de/an-instruction-manual-to-stop-a-judicial-rebellion-before-it-is-too-late-of-course/> (accessed on 15 July 2019).

²³ On 6 December 2016, the Supreme Court of Denmark delivered its judgment in the *Ajos* case (Case no. 15/2014, *DI acting for Ajos A/S v. The estate left by A.*). The Danish Court surprisingly disregarded the guidelines provided by the Court of Justice of the European Union in its preliminary ruling of April 19, 2016. Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*. ECLI:EU:C:2016:278.

²⁴ In spite of being recent, there is extensive bibliography on the *Ajos* case and judicial resistance in Denmark. See Haket, S.W., “The Danish Supreme Court’s *Ajos* judgment (*Dansk Industri*): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order”, *Review of European Administrative Law*, 2017, vol. 10(1), pp.135–7981; Oldgaard, R.K., Elkan, D. and Schaldemose, G.K., “From cooperation to collision: The ECJ’s *Ajos* ruling and the Danish Supreme Court’s refusal to comply”. *Common Market Law Review*, 2018, vol. 55(1), pp.17–53; Krunke, H. and Klinge, S., “Dinamarca y el caso *Ajos*. Lo que se perdió en Maastricht y Lisboa”, *Teoría y Realidad Constitucional*, , 2018, no. 41, pp. 381-406; Madsen, M.R., Olsen, H.P. and Šadl, U., “Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court’s Decision in the *Ajos* Case and the National Limits of

In the context of the EEA Agreement, a question to explore is whether resistance to the incoming tide of EEA law is happening in Iceland and whether it pays off for domestic courts to disregard this law.

Baudenbacher notes that only on two occasions has the ESA taken an infringement action before the EFTA Court against Iceland and Norway on the basis that either of the respective Supreme Courts has failed to have due regard to EEA law.²⁵ These actions have led to both countries amending its legislation.²⁶

However, these are not the only cases where judicial breaches of EEA law have occurred in Iceland. Most important cases covered in this study resulting from a Supreme Court judgment are listed in the the Letter of Formal Notice on Protocol 35 (mentioning 13 judgments that in ESA's opinion violate implemented EEA law)²⁷ (see section 3.1.); and the ESA decision from 2016 on case *Pór Kolbeinsson*²⁸ (see section 3.2.). There are other cases where ESA has formally

Judicial Cooperation". *European Law Journal*, 2017, vol. 23(1-2), pp.140–150; Neergaard, U., and Engsig Sørensen, K., "Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the *Ajos Case*", *Yearbook of European Law*, 2017, vol. 36, pp. 275–313; Sadl, U. and Mair, S., "Mutual Disempowerment: Case C-441/14 Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S v The estate left by A." *European Constitutional Law Review*, 2017, vol. 13(2), pp.347–368; Terkelsen, O., "The Ajos case and the Danish approach to international law". *European Public Law*, 2018, vol. 24(2), pp.183–193; Nielsen, R and Tvarnø, C.D., 'Danish Supreme Court Infringes the EU Treaties by its Ruling in the Ajos Case', *Europaraettslig Tidsskrift*, 2017, vol (2), pp. 303-326.

²⁵ Baudenbacher, C., *Judicial Independence: Memoirs of a European Judge*, Springer, New York, 2019, p. 84. In an earlier book, Baudenbacher notes, under section 4.6 "No Room for Manoeuvre" Claims in Iceland and Liechtenstein, that "Icelandic courts have usually folloed EFTA Court's rulings but there seem to be some tricky questions in the aftermath of Kolbeinsson and Sævar Jón Gunnarsson cases", see, "Reciprocity", in Baudenbacher, C. (ed), *Fundamental Principles of EEA law*, Springer, New York, 2017, p. 55.

²⁶ In 2009, the ESA took action against Iceland on the basis of an incompatible interpretation of Icelandic rules under the Directive on transfer of undertakings (877/187/EEC). The Supreme Court of Iceland had ruled on 25 February 2005, case 375/ 2004 *Blaðamannafélag Íslands gegn Frétt ehf.*, that a claim for unpaid wages which fell due before the transfer could not be based on the national rules implementing the directive so that the new employer was not liable to pay the wages owed to worker. The Parliament reformed the legislation in 2010 (Act 72/2002) and the case was closed on 15 June 2010, decision available online at: <http://www.eftasurv.int/press-publications/press-releases/internal-market/nr/1273>. (last accessed on 15 February 2020). The other case concerns Norway (case *STX*) and the case is resolved since Norway has changed its legislation. ESA. Letter of formal notice to Norway concerning posting of workers on 25 October 2016 (disregard of EEA law by the Norwegian Supreme Court), available online at: <http://www.eftasurv.int/media/esa-docs/physical/Letter-of-formal-notice---Complaint-against-Norway-concerning-posting-of-workers---1.pdf>. (last accessed on 15 February 2020).

²⁷ EFTA Surveillance Authority. ESA. Letter to the Icelandic Ministry of Foreign Affairs of 13th December 2017. Decision No: 212/17/COL. Letter of formal notice to Iceland concerning Iceland's implementation of Protocol 35 to the EEA Agreement', available online at <<http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=4071> (last accessed on 15 February 2020).

²⁸ EFTA Surveillance Authority. ESA. Reasoned opinion delivered on 20th January 2016 in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice available online at: <http://www.eftasurv.int/media/esa-docs/physical/775380.pdf> (last accessed on 15 February 2020).

started actions against Iceland following Supreme Court decisions.²⁹ And, last but not least, there seem to be problems in the aftermath of the *Sævar Jón Gunnarsson* case³⁰. Here a serious judicial breach of EEA law in the area of consumer credit/mortgage law was dismissed by the ESA on the grounds that the relevant domestic legislation was later changed by Iceland³¹. The legislation involved the indexation of credit to inflation *ex post* with no information provided to consumers *ex ante* on total cost of credit.³² A national case claiming State liability for a judicial breach of EEA law was started later on by the consumer association *Hagsmunasamtök heimilanna* (Homes Association) with a probable ending of a procedural similar to above case *Þór Kolbeinsson*, no domestic remedy available for a judicial breach of EEA law. An appeal before Landsréttur is currently under way.³³

Following from all the above, it can be further argued that national resistance could represent a serious problem in Iceland and the ambivalent

²⁹ See for instance the following procedures: 1) Letter of Formal Notice of 19 April 2012 after the Supreme Court's exchange rate indexation cases at: <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=3225> (last accessed on 15 February 2020); 2) Reasoned opinion subsequent to the Reykjavík District Court's *Hrafnhildur Njálsdóttir* case and Supreme Court case No. 187/2007 on conditions requiring reinvestment and residence in Iceland incompatible with EEA law: <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=3441> (last accessed on 15 February 2020); 3) Reasoned opinion following case 166/2013 *Commerzbank AG v Kaupthing hf* and the *De Nederlandse* bank case: <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=4155> (last accessed on 15 February 2020); 4) Reasoned opinion following Case No. 7912010 on 9 December 2010 before the Icelandic Supreme Court, the ESA sent a reasoned opinion: <http://www.eftasurv.int/media/public-documents/630035.pdf> (last accessed on 15 February 2020); and 5) Reasoned opinion on Iceland's breach of its notification obligations under Directive 98/34 as concerning technical regulations adopted in 2012: <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=2299> (last accessed on 15 February 2020).

³⁰ EFTA Court, Case E-27/13, *Sævar Jón Gunnarsson v. Landsbankinn* [2014] EFTA Ct. Rep. 1093.

³¹ In accordance with the second paragraph of Article 31 SCA, if an EFTA State has put a stop to the infringement before the end of the time-limit fixed by the reasoned opinion, ESA may no longer bring an action before the EFTA Court. A prior shortcoming would thus not be admissible as an action for failure to fulfil obligations. In general ESA never considers complaints concerning legislation which is no longer in force. The primary purpose of the infringement procedure is to ensure that the EFTA States fulfil their obligations under the Agreement in the general interest, not to provide individual redress. It is for the national courts to uphold actions by individuals seeking the annulment of national measures or financial compensation for the damage caused by such measures.

³² The complaint refers specifically to the disregard of the Supreme Court of the EFTA Court's ruling in case E-27/13 (*Sævar Jón Gunnarsson*) and the wrong implementation and interpretation of national law in the light of Directive 87/102/ECC which obliges financial institutions to disclose ex-ante the total cost of credit to consumers. See case 243/2017, ruling of Supreme Court of 26 November 2015) and EFTA Court case E-27/13, *Sævar Jón Gunnarsson v Landsbankinn hf.*, [2014] EFTA Ct. Rep. 1090. The decision from ESA to close the case on 27 March 2018 is available online at: <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=4192> (last accessed on 15 February 2020) More information on the matter by the Homes Association of Iceland at <http://www.heimilin.is/varnarthing/english/resources.html> (last accessed on 15 February 2020).

³³ There is currently an appeal before Landsréttur. The ruling from the District Court (in Icelandic) is available at: <https://www.herads-domstolar.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=f8978ffb-b912-455b-bd91-4673b4ec817e> (last accessed on 15 February 2020).

response (at best) to constitutional convergence in the country also represents evidence that global constitutionalism is not the only game in town.³⁴ Although not as extreme as in other cases of European/Scandinavian judicial resistance, some of the trends detected fit Hirsch's theory. Constitutional dissent, deference to local authority, improper use of the doctrine of "acte clair", and "opting out" from the EEA legal framework can also be viewed as forms of reaction against the centralization of authority and the decline of the local in an increasingly — constitutionally and otherwise — universalized reality.³⁵

Despite these impediments, it is also important to remember that the authority and effect of EEA law remains unchanged in Iceland, at least in theory.³⁶ No case exists that may be painted as a direct declaration of war by the Supreme Court of Iceland *vis-à-vis* judicial made general principles of EEA law (parallel to *Ajos*³⁷ in Denmark), for example. No citizens are being criminally prosecuted and incarcerated on the basis of a wrong application/interpretation of EEA law as in the current NAV case in Norway.³⁸ What we see, nevertheless, is a series of rulings by the Icelandic Supreme Court, which has no strict obligation to refer cases under the EEA Agreement, in which the authority of EEA law is ignored under the empire of domestic law, a trend that deprives citizens and economic operators of their European rights.³⁹ The problem has been particularly acute in the area of consumer/mortgage law where EEA implemented law seems to be systematically set aside and disregarded.⁴⁰

³⁴ On this topic see most recent contribution by Franklin, C.N.K., Hannesson, O.I., Rúnarsson, O.B., Baur, G. and Steiner, E., "National Report for Norway – with perspectives from Iceland and Liechtenstein", in "National Courts and the Enforcement of EU law", FIDE XXIX Congress, The Hague, 2020, forthcoming.

³⁵ In section 4 see Icelandic scholars that detect these trends (Margrét Einarsdóttir, Gunnar Þór Pétursson and Ólafur Ísberg Hannesson) and compare with Hirschl, R., "Opting Out of "Global Constitutionalism." [2018] *Law & Ethics of Human Rights*, 12 (1), 1–36.

³⁶ On the authority of EEA law in Iceland see Méndez-Pinedo, M.E. and Hannesson, O.Í., *The authority of European law. Exploring primacy of EU law and effect of EEA law from European and Icelandic perspectives*, Lagastofnun/Law Institute –University of Iceland, Reykjavík, 2012.

³⁷ Supreme Court of Denmark, Case C-441/14 *Dansk Industri*, 6 December 2016.

³⁸ ESA's letter of 11 March of 2020 to Ministry of Labour and Social Affairs of Norway available at: http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=5286&fbclid=IwAR3nhfEwrIxMLP9Bo3eoHaaP4sM5sFj6OhXpS_OH4YXv1KIMVNeOFNYQbBs (last accessed on 15 February 2020).

³⁹ For a recent review of the interaction between the two courts see Hannesson, O.Í., "Advisory Opinions in the EEA: The Icelandic Supreme Court and the EFTA Court", *European Law Review*, 2018, vol. 6, pp. 858-879.

⁴⁰ The litigation supported by the Homes Association of Iceland in the last decade shows that, no matter more extensive rights secured by implemented EEA rules in Iceland, other incompatible national law will be applied de facto, depriving consumers of higher level of protection. Incompatible national law is either pre-existent to EEA implemented rules or adopted ex-post. More information on the matter by the Homes Association of Iceland at <http://www.heimilin.is/varnarthing/english/resources.html> (last accessed on 15 February 2020).

3. Authority and effectiveness of EEA law under review. Two important unresolved problems in Iceland of constitutional relevance

The success of the EEA Agreement depends upon uniform implementation and application of the common rules in all EEA States (namely, the 27 EU MS and Iceland, Liechtenstein and Norway). To secure this goal, another treaty (the SCA) was signed and a two-pillar system of supervision and judicial control was created.⁴¹ The EU Member States are monitored by the EU Commission, and the three EFTA States, by the ESA. The latter is accorded powers approximating those of the Commission in the exercise of its surveillance role. A two-pillar structure has also been established in respect of judicial review: the EFTA Court (which is also based in Luxembourg) operates in parallel to the Court of Justice of the European Union and exercises its jurisdiction with regard to the above-mentioned EFTA States which are parties to the EEA Agreement. The Court is mainly competent to deal with infringement actions brought by the ESA against an EFTA/EEA State with regard to the implementation, application or interpretation of EEA law rules, and dispenses advisory opinions to courts in EFTA/EEA States on the interpretation of EEA rules and for appeals concerning decisions taken by the ESA. The jurisdiction of the EFTA Court over the EFTA/EEA States is therefore similar (but not identical) to the jurisdiction of the Court of Justice of the European Union over EU Member States.⁴²

As noted above, the ESA has decided to address two important unresolved problems in Iceland that undermine the authority and effectiveness of EEA law to the detriment of individual citizens and economic operators who cannot enforce their own rights. One problem concerns perceived deficiencies with respect to domestic EEA Act 2/1993, which fails to adequately transpose the obligation that unconditional and sufficiently precise implemented EEA law should prevail over conflicting national provisions in case of conflict (Article 3 vis-à-vis obligations under the Protocol 35 EEA Agreement). The other refers to State liability for judicial breaches (by the Supreme Court) of EEA law, an issue now well

⁴¹ See Agreement between the EFTA States on the establishment of a surveillance authority and a Court of Justice with protocols. OJ L 344, 31.12.1994.

⁴² Under the EEA Agreement (Article 108(1)), and the parallel Surveillance and Court Agreement (SCA) (Article 5(1)), the ESA functions to monitor compliance with EEA law obligations in a somewhat comparable manner to that of the Commission in the EU legal order, a sort of 'guardian' of the Treaties. Furthermore, in accordance with Article 31 SCA, if the ESA deems a Contracting Party has infringed EEA law through the failure to fulfil an obligation imposed by the EEA Agreement or SCA; the ESA may "deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations". Non-compliance by the State in question within the allocated time period may result in the ESA bringing the issue before the EFTA Court in an action for infringement of EEA law. If the EFTA Court confirms a breach of EEA law, the EEA State in question has to take action to remedy the breach. The ESA, however, is not vested with powers analogous to Article 260 TFEU; since there is no imposition of financial penalties for non-compliance with EEA law.

established under the *Köbler*⁴³ jurisprudence of the Court of Justice of the European Union (CJEU), a judgment that the ESA has considered to be applicable to the EEA Agreement, and upheld by the EFTA Court in the *Kolbeinsson*⁴⁴ case. Both letters are addressed to the executive (specifically to the Ministry of Foreign Affairs), but they refer to cases of legislative and judicial resistance to EEA law.

3.1 Legislative resistance. The precedence in application of domestic law in case of conflict with EEA law (Article 3 EEA Act 2/1993 and Protocol 35 EEA Agreement)

The authority of EEA law is strongly linked to its correct implementation, its effectiveness in practice and the judicial protection of individual rights deriving from its provisions. In accordance with the view of the ESA on Protocol 35 to the EEA Agreement, EEA implemented law must prevail in circumstances in which it conflicts with domestic law (both adopted *ex-ante* and *ex-post*). This is necessary, as otherwise, it would be difficult to give practical effect to the application and enforcement of EEA law in the domestic legal order (lack of primacy and direct effect).⁴⁵

The core question is the following. The ESA is of the opinion that Article 3 of Iceland's EEA Act 2/1993 (EEA Act or *Lög nr. 2/1993 um Evrópska efnahagssvæðið*) inadequately implements obligations under Protocol 35 of the EEA Agreement into domestic law,⁴⁶ following a series of rulings from the Supreme Court which disregard EEA-based law.⁴⁷

The Authority states in its letter that the "Supreme Court maintains that an interpretation on the basis of Article 3 EEA Act nr. 2/1993 cannot lead to the wording of Icelandic legislation being disregarded".⁴⁸ However, Protocol 35 also requires precedence in application where interpretation cannot result in

⁴³ CJEU. Case C-224101 *Köbler*. EU:C:2003:513.

⁴⁴ EFTA Court. Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234.

⁴⁵ Protocol 35 of the EEA Agreement on the implementation of EEA rules reads: "Whereas this Agreement aims at achieving a homogeneous European Economic Area, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the European Economic Area; and Whereas this consequently will have to be achieved through national procedures;
Sole Article

For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases."

⁴⁶ Article 3 EEA Act 2/ 1993 states that "[s]tatutes and regulations shall be interpreted, in so far as appropriate, in conformity with the EEA Agreement and the rules laid down therein". In Icelandic: "Skýra skal lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur sem á honum byggja."

⁴⁷ See case-law mentioned in the letter and also Hannesson, O.Í, "Advisory Opinions in the EEA: The Icelandic Supreme Court and the EFTA Court", *European Law Review*, 2018, vol. 6, pp. 858-879.

⁴⁸ ESA. Letter of 13 December 2017, para. 36, 38 and 49. Letter available online at <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=4071> (last accessed on 15 February 2020).

compatibility, and thus demands a significant degree of judicial cooperation from national courts.⁴⁹ The ESA notes that there has been only but a single case in which the Supreme Court concluded that implemented EEA provisions prevail over domestic law, contrary to the obligations assumed in Protocol 35.⁵⁰

The ESA's decision to send such a letter should not come as a surprise for those following EEA law, since the problem is rather well-known.⁵¹ The core of the issue arises from the fact that Protocol 35 EEA Agreement tries to combine classic international law (entailing a lack of transfer of supranational powers and respect for dualism and national domestic law) with the constraints of supranational EU law, requiring primacy over domestic law (and sometimes direct effect). The provision contains a commitment requiring State parties to adopt, if necessary, a statutory provision to solve cases of possible conflicts between implemented EEA rules and other statutory provisions, to the effect that EEA rules prevail in these cases. In a nutshell, it requires what is usually a rule of conflict (to give precedence of application to a rule of national law implementing EEA law and not supremacy of EEA law itself) in case other tools fail to do so (such as consistent interpretation of national law in light of EEA law). In spite of its clear wording, the Icelandic legislator adopted Article 3 EEA Act 2/1993 (implementing Protocol 35) and omitted or "forgot" about that obligation of result (a rule of conflict giving precedence/quasi primacy to EEA law) mentioning only a (pre-existing) single rule of friendly interpretation.⁵²

The ESA is not alone in this view of Article 3 of the EEA Act 2/1993. The view that the Icelandic legislative provisions seem to run contrary to the obligations assumed via the EEA Agreement may be derived from the statements of the EFTA Court in its seminal cases *Restamark*,⁵³ E-1/01 *Hörður Einarsson*⁵⁴ and E-1/07 *Criminal proceeding against A*.⁵⁵ A related case is *Karl K. Karlsson*⁵⁶

⁴⁹ See, further, on the meaning of Protocol 35, Thomas Burri and Benedikt Pirker, 'Constitutionalisation by Association? The Doubtful Case of the European Economic Area', *Yearbook of European Law*, 2013, vol. 32 (1), pp. 207, 222-224.

⁵⁰ Supreme Court. Case No. 477/2002 *Hörður Einarsson v The Icelandic State* of 15 May 2003. See also para. 29 of Letter ESA from 13 December 2017, available online at <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=4071> (last accessed on 15 February 2020).

⁵¹ This is the second time a letter is sent. A similar letter was sent on 11 April 2012 referring to three judgments from the Supreme Court of Iceland where precedence in application was given to purely domestic law over EEA- based implemented law. The Government of Iceland did not reply publicly to the letter. See Report from 2019 on the EEA Agreement, pp 101-102, available online at: <https://www.stjornarradid.is/lisalib/getfile.aspx?itemid=013b2f1a-e447-11e9-944d-005056bc4d74> (last accessed on 15 February 2020).

⁵² Although in the explanatory memorandum preceding the Act 2/1993 another possible rule for interpretation was laid out, implemented EEA –domestic law as *lex specialis vis-a-vis* general Icelandic law. This other rule of interpretation was applied in case Einarsson by the Supreme Court of Iceland, case nr. 477/2002 *Hörður Einarsson gegn íslenska ríkinu*.

⁵³ EFTA Court, Case E-1/94 *Restamark*, [1994–1995] EFTA Court Report 15.

⁵⁴ EFTA Court, Case E-1/01 *Einarsson* [2002] EFTA Court Report 1.

⁵⁵ EFTA Court, Case E-1/07 *Criminal Proceedings Against A* [2007] EFTA Court Report 246.

⁵⁶ EFTA Court, Case E-4101 *Karlsson* [2002] EFTA Ct. Rep. 240.

though it does not deal with the so-called “quasi-primacy” of EEA law, but with its quasi-direct effect and State liability.⁵⁷ For Þórisson, the conclusion is clear: the dualistic nature of the Icelandic legal order is at the root of constitutional concerns over the implementation of EEA law.⁵⁸

In order to conclude this section, it is important to note that the problem stated originates more than 25 years ago in Iceland’s initial legislative implementation of the EEA Agreement, but it is only now that the ESA has taken action, probably due to the series of rulings on the part of the Supreme Court in the last decade.

3.2 Judicial resistance and national restrictions on State liability for judicial breaches of EEA law. The *Kolbeinsson* saga

Another important legal issue still unsettled in EEA law is whether there is a clear State liability for (manifest) judicial breaches of EEA law (in rulings by Supreme Courts) parallel to the EU legal order in spite of the fact that, 1) under the EEA and SCA Agreements, courts of final instance do not have an obligation (in principle) to request advisory opinions from the EFTA Court to receive an interpretation of EEA law (similar to preliminary rulings on questions of interpretation from the CJEU by courts of the EU MS); and 2) that advisory opinions are (also in principle) not legally binding upon national courts.

In the EU legal order, Member States are liable for damages caused to individuals for breaches of EU law for which the State is responsible (*Francovich*⁵⁹). In *Köbler*⁶⁰ the CJEU clearly confirmed that this principle also applies to infringements of EU law stemming from a decision of a judicial body adjudicating at last instance. According to the Court of Justice, in the light of the essential role played by the judiciary in the protection of the rights derived by individuals from EU rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of EU law attributable to a decision of a court of a Member State adjudicating at final instance. According to the CJEU, this

⁵⁷ A commentary of the cases in relation to this problema can be found in Einarsdóttir, M., “Forgangsaðhrif EES-réttar í íslenskum rétti”, *Tímarit Lögréttu* 2014, pp. 75-86.

⁵⁸ Stefán Geir Þórisson, ‘Icelandic Bar’ in Baudenbacher, C. (eds). *The Handbook of EEA law*, Springer, New York, 2016, p. 319.

⁵⁹ Judgment in *Francovich*, Joined Cases C-6190 and C-9190, EU:C: 1991:428.

⁶⁰ Judgment in *Köbler*, C-224101, EU:C:2003:513, paragraphs 39 and 40. For a comment of case *Köbler* see Varga, S. “The application of the Köbler doctrine by Member State Courts”, *ELTE Law Journal*, 2016 (2) available online at <https://eltelawjournal.hu/the-application-of-the-kobler-doctrine-by-member-state-courts/> (last accessed on 15 February 2020) and “Why is the Köbler principle not applied in practice”, *Maastricht Journal of European and Comparative Law*, 2016, vol. 23 (6), pp. 984-1008, available online at: <https://doi.org/10.1177/1023263X1602300605>.

principle of state liability under EU law requires a manifest infringement of EU law on behalf of a court of last instance, usually a Supreme Court⁶¹.

Furthermore, in the EU pillar, the State liability for breaches of EU law (including judicial breaches) has been developed in other case-law (as per the case of *Ajos*⁶²); and connected to the rights and obligations of highest national courts under Article 267 TFEU (cases *Melki and Abdeli*⁶³ and *case A v. B. and others*⁶⁴). Infringement actions have been taken by the Commission in the last decade on the basis of judicial violations of EU law in cases *Commission v. Italy*⁶⁵ and *Commission v. Spain*.⁶⁶ In both cases the infringement action is exercised against Member State and not the judiciary itself, and as such the independence of national courts is guaranteed. Both cases seem to indicate, however, that the Commission and the CJEU will no longer refrain from holding the State responsible for judicial infringements and are taking a stricter approach. In this regard, the breach of obligation to refer to the ECJ preliminary questions on interpretation of EU law also qualifies as violation of EU law and may lead to an infringement case initiated by the Commission (case *Commission. vs. France*⁶⁷ in relation with the CILFIT doctrine on *acte clair*⁶⁸).

Under the EEA Agreement, the principle of State liability for breaches of EEA law has been clearly established by the EFTA Court in the cases *Erla Maria Sveinbjörnsdóttir*⁶⁹, *Karlsson*⁷⁰, *Nguyen*⁷¹ and *HOB -vín ehf*⁷², though it should be

⁶¹ A court of final instance in the case in question, rather than necessarily the highest instance in the judicial pyramid. Taking into account the specific nature of the judicial function, the CJEU has also held that state liability for infringement of EU law by a national supreme court can be incurred only in the exceptional case where the court has 'manifestly infringed the applicable law'. CJEU, Case C-173/03 *Traghetti del Mediterraneo*, C-173103, EU:C:2006:391 at para. 32, 42 (and later case C-168/15 *Tomášová*, ECLI:EU:C:2016:602 at para. 24) . For a comment on *Traghetti* see Toledano Cantero, "Passivity of authorities and/or courts and remedies against it. Liability of judges". Presentation held at European Judicial Training Network, Brussels, 10 April 2019 - AD/2019/02 available online at: <http://www.ejtn.eu/PageFiles/17840/Rafael%20Toledano%20Cantero%20EJTN%20AD-2019-02%20Brussels%2010-04-19.pdf> (last accessed on 15 February 2020).

⁶² *Ibid*, para 43 (obligation for judges not to substitute State liability for other principles of EU law).

⁶³ *Melki and Abdeli* (n 53) paras 44 and 45.

⁶⁴ *A v B and Others* (n 55) para 38.

⁶⁵ This case refers to the failure of a Member State to fulfil obligations with a construction contrary to Community law of national legislation by case-law and administrative practice. CJEU, Case C-129/00 *Commission v. Italy* EU:C:2003:656.

⁶⁶ Here a single wrong ruling/interpretation on VAT from the Supreme Court of Spain was considered sufficient to give rise to an action of non-compliance under TFEU Article 258. See CJEU, Case C-154/08 *Commission v. Spain* EU:C:2009:695. See also comment on this case by López Escudero, M. 'Case C-154/08, *Commission v. Spain*, Judgment of the Court of Justice (Third Chamber) of 12 November 2009, not yet reported'. *Common Market Law Review*, vol. 48, issue 1(2011), pp. 227-242.

⁶⁷ Case C-416/17 *European Commission v. French Republic* EU:C:2018:811.

⁶⁸ Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* EU:C:1982:335.

⁶⁹ EFTA Court, Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95.

⁷⁰ EFTA Court, Case E-4101 *Karlsson* [2002] EFTA Ct. Rep. 240

⁷¹ EFTA Court, Case E-8107 *Nguyen* [2008] EFTA Ct.Rep.224.

⁷² EFTA Court, Case E-2112 *HOB-vin ehf*, [2012] EFTA Ct. Rep. 1092.

noted that the basis for the establishment of the doctrine was not grounded in the *Francovich* jurisprudence but directly on the EEA Agreement. What is uncertain is whether the *Köbler*⁷³ doctrine, involving breaches by the judicial branch, has been clearly established by the EFTA Court.

The Supreme Court of Iceland has on two occasions applied Icelandic law in conflict with EEA law in such a serious way (in its *Kolbeisson I* and *II* rulings)⁷⁴ that the question about State liability for judicial breaches has been advanced by the ESA.⁷⁵ The outcome of the cases was that no EEA law rights and no national remedies for exercise of those more extensive rights were available for Mr. Kolbeinsson.

At European level, in the case *Kolbeinsson*,⁷⁶ the ESA submitted that many of the principles established in *Köbler*⁷⁷ concerning judicial breaches of EU law (including misinterpretation) also apply to the EEA legal order provided there was a “manifest infringement”⁷⁸. As a conclusion, the EFTA Court noted (albeit *obiter dictum*), that the referring Icelandic court had not posed such a question but, if an EEA/EFTA State were to incur liability for judicial breaches of EEA law, that breach would have to be manifest in character (para 77).⁷⁹ The nature of this *obiter dictum* complicates the matter somewhat and leads to opposing interpretations.⁸⁰

⁷³ EFTA Court, Case E-210 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234 and CJEU, Judgment in *Köbler*, C-224101, EU:C:2003:513. In particular, the *Kolbeinsson* case is available online at <https://eftacourt.int/download/2-10-judgment/?wpdmdl=1362> (last accessed on 15 February 2020).

⁷⁴ Supreme Court of Iceland, Case nr. 246/2005, *Þór Kolbeinsson I* and case nr. 405/2011 *Þór Kolbeinsson II*. In the first case, applying national tort rules (self-responsibility for an accident at work as an employee/carpenter) the Supreme Court denied an individual of more extensive rights deriving from EEA law (employer’s responsibility and the extra right to financial compensation). Later, in a second case, when Mr. Kolbeinsson sought damages for a judicial breach of EEA law, the Supreme Court ruled that Icelandic procedural law precludes individuals from seeking damages when the Supreme Court does not apply EEA law (principle of *res iudicata*). It was held that the requested remedy simply did not exist under national law.

⁷⁵ The ESA letter of formal notice on Protocol 35 to Iceland from December 2017 detected many other cases where Icelandic law was applied in conflict with EEA law but without relating them to the *Köbler* doctrine. ESA. Letter to the Icelandic Ministry of Foreign Affairs of 13th December 2017. Decision No: 212/17/COL. Letter of formal notice to Iceland concerning Iceland’s implementation of Protocol 35 to the EEA Agreement’, available online at <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=4071> (last accessed on 15 February 2020).

⁷⁶ EFTA Court, Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234, in particular paragraph 77.

⁷⁷ EFTA Court, Case E-210 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234 and CJEU, Judgment in *Köbler*, C-224101, EU:C:2003:513. *Kolbeinsson* case is available online at <https://eftacourt.int/download/2-10-judgment/?wpdmdl=1362> (last accessed on 15 February 2020).

⁷⁸ The Norwegian Government disagreed arguing that there was not a legal basis in the EEA Agreement to sanction the incorrect application/interpretation of EEA law by national courts. Since there is no obligation to refer to request an interpretation, there can be no sanction for incorrect application (para. 70). The Icelandic Government (defendant) did not elaborate on this point but simply stated in the written pleadings that State liability under EEA law is an exception and not a general rule.

⁷⁹ In its letter of 17 June 2015, para. 39, the ESA also refers to the Judgment of the CJEU in case *Traghetti del Mediterraneo*, C-173103, EU:C:2006:391, paragraph 35.

⁸⁰ Gísladóttir, S. I., *The Saga of Þór Kolbeinsson. Challenges of Imagining State Liability for Judicial Infringements of EEA Law in Iceland*. Master’s thesis supervised by M. Elvira Méndez Pinedo,

As it is the case in EU law, liability of the state is to be enforced before national courts, and, in principle, according to national rules. The problem is that, based on national rules restricting this possibility and in purely domestic cases, liability for judicial acts cannot be incurred or could only be incurred under strict conditions. In EU law (on the basis of the principle of primacy), national courts adjudicating on *Köbler*-type claims are required to set aside domestic rules hindering the effective application of the right in question.⁸¹ For that reason, the CJEU has also declared that the principle of State liability under EU law also precludes provisions of national law which in practice make the application of *Köbler*-type liability impossible.⁸²

The *Kolbeinsson* saga in Iceland represents a textbook example of judicial liability and resistance to EEA law, combined with a national restriction on State liability for judicial breaches of EEA law. Since the case-law in the EU pillar is so clear on these issues (at least in theory⁸³), it leads to the ESA starting the first step of infringement procedures and declaring officially both in 2015 (via a letter of formal notice)⁸⁴ and 2016 (via a reasoned opinion)⁸⁵ that Iceland was in violation of the EEA Agreement. In view of the ESA, it seems that by excluding, under national provisions, any State liability for damages caused to individuals by breaches of EEA law by a court adjudicating at final instance (on the basis of an incorrect interpretation of EEA law), Iceland has failed to fulfil its obligations arising from the general principle of State liability for breaches of EEA law under the EEA Agreement which extends to liability for breaches by the judicial branch. The Icelandic Government, on the contrary, has always objected to the Authority's conclusions regarding the scope of the general principle of State liability for breaches of EEA law under the EEA Agreement. It has never agreed that *Kolbeinsson* confirmed that the general principle of State liability under the EEA Agreement extended to liability for judicial breaches.⁸⁶

University of Iceland, 2012, available online at <https://skemman.is/handle/1946/13082?locale=en> (last accessed on 15 February 2020).

⁸¹ CJEU, Case 106/77 *Simmmenthal*, EU:C:1978:49.

⁸² CJEU, Case C-160/14 *Ferreira da Silva e Brito*. ECLI:EU:C:2015:565 para. 60.

⁸³ State liability for Judicial breaches in EU law is settled in theory but, in practice, research has proven that the situation might be far from perfect in all 27 EU Member States. See Varga, S. "The application of the *Köbler* doctrine by Member State Courts", *ELTE Law Journal*, 2016 (2) and from same author, "Why is the *Köbler* principle not applied in practice", *Maastricht Journal of European and Comparative Law*, 2016, vol. 23 (6), pp. 984-1008.

⁸⁴ Letter of 15 June 2015 Letter of formal notice to Iceland of 15 June 2015 concerning State liability for breach of EEA law by a court adjudicating at last instance available online at <http://www.eftasurv.int/media/decisions/752617.pdf> (last accessed on 15 February 2020).

⁸⁵ Reasoned Opinion to Iceland of 20 January 2016 concerning Iceland's failure to fulfil its obligations arising from the general principle of State liability for breaches of EEA law under the EEA Agreement available online at <http://www.eftasurv.int/media/esa-docs/physical/775380.pdf> (last accessed on 15 February 2020).

⁸⁶ According to the Icelandic Government, the EFTA Court's reference to judgment in *Köbler* is unclear and the subject matter falls outside the scope of the questions referred to the Court. In spite of the arguments put forward by Iceland, the ESA defend its interpretation and concludes that the possibility that a State may be rendered liable for judicial decisions contrary to EEA law does not

As was the case with the previous letter from the ESA, this issue is still unresolved. As Fredrikssen has pointed out, the rulings from the Supreme Court of Iceland in the *Kolbeinsson*⁸⁷ cases hardly contribute anything to the discussion from the perspective of EEA law; they only make it clear that the application of an EEA law principle of State liability for judicial wrongdoing will necessitate changes in the rules on *res iudicata* in the Icelandic Code of Civil Procedure. In his view, it also "remains to be seen whether the EFTA Surveillance Authority will pursue the apparent conflict between an EEA law principle of State liability for judicial wrongdoing (which ESA argued in favour of before the EFTA Court in *Kolbeinsson*) and the Icelandic rules on *res iudicata*".⁸⁸ Last but not least, it looks like the *Sævar Jón Gunnarsson* aftermath case in the area of consumer/mortgage credit law (see section 2) is heading on the same direction, as an appeal is currently pending before Landsréttur.⁸⁹ Unfortunately, this case as well as the letter from the ESA prove that the role of Supreme Court affording consumer protection under EEA law is far from standards set by EU law and the CJEU's case-law, something that some Icelandic scholarship seems to ignore.⁹⁰

4. Judicial, legislative, executive or constitutional resistance?

Ever since the EEA Agreement was being negotiated, debates have ensued in Iceland concerning whether acceptance of the Agreement contravened the Icelandic Constitution.⁹¹ The legal conclusion of the specialists commissioned to study the problem at the time and again today (25 years and 18 reports later) is that, in spite of constitutional constraints, the ordinary legislator can, without

pose any risk to the independence of the courts. Nor is the finality of the decisions of the courts called into question: The principle of State liability requires compensation for loss, but not a revision of the final judgment. For a comparison between State liability in EU and EEA law see Magnusson, S. and Hannesson, O.Í., "State liability in EEA Law: towards parallelism or homogeneity?", *European Law Review*, 2013 (2), pp. 167-186.

⁸⁷ Supreme Court of Iceland, Case nr. 246/2005, *Pór Kolbeinsson I* and case nr. 405/2011 *Pór Kolbeinsson II*.

⁸⁸ Fredrikssen, H.H., "The EFTA Court and the Principle of State Liability: Protecting the Jewel in the Crown", in Baudenbacher, Carl; Speitler, Phillip; Pálmarsdóttir, Bryndís; EFTA Court, EFTA Court (eds), *The EEA and the EFTA Court: Decentred Integration*, 2014, pp. 317-334, and especially on p. 325 and 331, available at <http://bora.uib.no/bitstream/handle/1956/10120/Fredriksen+ch+26.pdf;sequence=3> (last accessed on 15 February 2020).

⁸⁹ EFTA Court, Case E-27/13, *Sævar Jón Gunnarsson v. Landsbankinn* [2014] EFTA Ct. Rep. 1093. Baudenbacher has noted that there are no "room for manoeuvre" claims in Iceland. "Icelandic courts have usually followed EFTA Court rulings but there seem to be some tricky questions in the aftermath of *Kolbeinsson* and *Sævar Jón Gunnarsson* cases". See Baudenbacher, C. *Fundamental Principles of EEA law. EEA-ities*, Springer, New York, 2017, on p. 55.

⁹⁰ See Jónsson, E., "Þattur Hæstiréttar in þrún neytendarverndar", *Hæstiréttur í hundrad ár, Hið íslenska bókmenntafélagið*, 2020, pp. 133-161. Concerning problems of Icelandic application of EEA consumer/mortgage credit law this article does not examine any literature other than Icelandic legal journals, in spite of relevant doctrine published internationally on the issue; and focuses only on domestic cases adopting court's perspective and argumentation. It concludes that the Supreme Court has done a good work improving consumer protection in Iceland after EEA Agreement.

⁹¹ Méndez-Pinedo, M. E., *EC and EEA Law. A Comparative Study of the Effectiveness of European Law*, Europa Law Publishing, Groningen, 2009, p. 115.

amendments of the current constitution in force, transfer powers of the state to international organizations to a certain extent in certain circumstances.⁹²

The core problem of this study therefore comprises a dual political and legal nature. The constitutional identity of Iceland (and in particular, Article 2 of the Constitution, which implicitly forbids any general transfer, share or pooling of competences to a supranational/international organisation⁹³) relies on a specific understanding of sovereignty, legally imprecise but politically emotional, which is only partially explained by Iceland's history and relatively recent independence⁹⁴. In fact, the Icelandic Constitution and abovementioned domestic act implementing the EEA Agreement (EEA Act no. 2/1993) is closed towards EEA law and relies on a strict dualism to deal with it.⁹⁵ This has led to a political situation where the Parliament (both in ordinary and in a constitutional role) has avoided for more than 25 years taking any formal step to clarify the relationship between EEA law and national law with the consequence that the decision is left (in practice) to the judicial branch. The implementation and execution of the EEA Agreement works mostly in practice (some would say more or less "smoothly") but at a price of leaving certain issues unresolved.⁹⁶

The political context has led to a legal grey area, with consequences for private individuals and economic operators. While the procedural autonomy of domestic supreme courts is greater in the context of the EEA legal framework (SCA Agreement) when compared to the EU model, such autonomy is only sustainable as long as there are neither open conflicts between national law and EEA implemented law nor judicial breaches of EEA law (and State liability doctrine). As long as the judiciary complies with the *obligation de résultat* (concerning the protection of individual rights and access to justice) and loyalty duties that are prescribed by the EEA treaty, the status quo will work in practice.

⁹² See Report of the Working Group on the EEA Cooperation (2019) pp. 259-282 available online at <https://www.stjornarradid.is/lisa-lib/getfile.aspx?itemid=013b2f1a-e447-11e9-944d-005056bc4d74> (last accessed on 15 February 2020).

⁹³ Constitution of the Republic of Iceland (Act. no. 33/1944). Article 2 provides: "Alþingi (Parliament) and the President of Iceland jointly exercise legislative power. The President and other governmental authorities referred to in this Constitution and elsewhere in the law exercise executive power. Judges exercise judicial power."

⁹⁴ Bergmann, E., "Sense of Sovereignty. How national sentiments have influenced Iceland's European policy", *Stjórnmal og stjórnsýsla vefitímarit*, 2009, issue no. 2, pp. 203-223. As an example, society is divided and polarised around issues such as eventual accession to the EU in the period 2009-2015 on grounds of sovereignty.

⁹⁵ There used to be a similar problem regarding the European Convention of Human Rights until a constitutional reform took place in the 90s. In practice, the Supreme Court's interpretive approach towards the ECHR meant that it was, to a large extent, possible for Icelandic citizens to demand their rights under non-incorporated human rights treaties - even in the presence of national legislation barring such a result. That extended version of the rule of interpretation could even be seen as a direct application of the Convention. On this issue, see Hannesson, O. Í, "The Status of Non-Implemented EEA Law in Iceland: Lessons from the Judicial Reactions of the Supreme Court to International Law", *Nordic Journal of International Law*, 2011 (80), pp. 425-458.

⁹⁶ See on this problem Einarsdóttir, M., "Incorporation and Implementation – The Execution of the EEA Agreement by the Icelandic State", *Nordic Journal of European Law*, 2019, vol. 2 (1), pp. 1-23.

However, as recent research has shown (see below Einarsson, Pétursson and Hannesson), the Icelandic Supreme Court has, on several occasions, decided to give precedence to conflicting national law over duly implemented EEA law, leading to private individuals suffering a denial of their European rights without the State liability principle coming to the rescue due to the strict conditions for its exercise and the lack of national remedies for judicial breaches of EEA law (see section 3 on *Kolbeinsson*). It is precisely for these reasons that the ESA has determined that there is a structural problem in Iceland concerning Protocol 35 and Article 3 of Act 2/1993, which deprives EEA law of its authority and effectiveness, to the detriment of private individuals.

Iceland is therefore trapped in a dilemma that has become very public: how to defend its understanding of sovereignty and constitutional identity against the need to secure the application and enforcement of EEA law and provide judicial protection of individual rights.

This dilemma is not new.⁹⁷ Some judicial resistance towards EEA law was previously detected although there were too few cases to determine the existence of a general trend.⁹⁸ However, as Einarsdóttir concluded as early as 2014, if a consistent EEA friendly interpretation of domestic law is not possible, the Supreme Court will allow Icelandic general law to prevail, with the result that EEA implemented rules do not have any precedence in application.⁹⁹ In her view, Article 3 of Act 2/1993, as interpreted by the Supreme Court¹⁰⁰, fails to respect the obligations assumed by Iceland under Protocol 35 of the EEA Agreement.¹⁰¹

⁹⁷ On 16 February 2020, the Supreme Court of Iceland celebrated its 100 anniversary, see the collection of articles by several authors in the recent book, *Hæstiréttur 100 ár*, Hið íslenska bókmenntafélag, Reykjavík, 2020, 556.

⁹⁸ A letter was sent by ESA to Iceland on 11 April 2012 referring to three judgments from the Supreme Court of Iceland where precedence in application was given to purely domestic law over EEA-based implemented law. The Government of Iceland did not reply publicly to the letter. See Report from 2019 on the EEA Agreement, pp 101-102, available online at: <https://www.stjornaradid.is/lisalib/getfile.aspx?itemid=013b2f1a-e447-11e9-944d-005056bc4d74> (last accessed on 15 February 2020).

⁹⁹ Einarsdóttir, M., “Forgangssáhrif EES-réttar í íslenskum rétti”. *Tímarit Lögréttu*, 2014, pp. 75-86. From the same author see also previous publication “Forgangssáhrif réttilegra innleiddra EES-reglna”, *Tímarit Lögréttu*, 2010, pp. 25-36.

¹⁰⁰ Einarsdóttir finds that the Supreme Court of Iceland departed from considering EEA-implemented rules as *lex specialis* taking precedence over other (conflicting) domestic law in case *Einarsson* and followed a different path, in cases nr. 220/2005 (Tobacco case) and nr. 274/2006 (Prosecution against X). In these other later cases Icelandic law is applied without any consideration or reference to the EEA Agreement or to the EEA Icelandic Act 2/1993. In a more recent case nr. 10/2013 (*Landsbankinn hf. against Flugstraumi ehf.*) the Supreme Court finds that Article 3 of the Act 2/ 1993 contains only a rule of friendly interpretation that can never lead to the non-application of conflicting domestic law nor the interpretation *contra-legem* of Icelandic law.

¹⁰¹ Einarsdóttir, M., “Forgangssáhrif EES-réttar í íslenskum rétti”. *Tímarit Lögréttu*, 2014, p. 85. “Telur rétturinn þannig að í 3. gr. eesl. felist einungis lögskýringarregla sem taki „eðli máls samkvæmt til þess að orðum í íslenskum lögum verði svo sem framast er unnt gefin merking sem rúmast innan þeirra og næst kemst því að svara til sameiginlegra reglna sem gilda eigi á Evrópska efnahagssvæðinu. Slík lögskýring [geti] á hinn bóginn ekki leitt til þess að litið verði fram hjá orðum íslenskra laga [...]”. See also on State liability for judicial breaches of EEA law

Pétursson has also analysed the most recent jurisprudence of the Icelandic Supreme Court up to 2017 and agrees with Einarisdóttir that it had steered away from the possible *lex specialis* solution adopted in the seminal *Einarsson*¹⁰² case (interpreting Art. 3 of Icelandic Act no 2/1993), demonstrating judicial reluctance to comply with duties under the EEA Agreement.¹⁰³ His conclusions are also clear: at least in some important and relevant instances, the Icelandic Supreme Court has gone against EU directives and relevant ECJ decisions on the basis of Icelandic laws.¹⁰⁴

In his doctoral dissertation defended in 2013 on the topic, Hannesson concluded that there were too few cases to affirm a general disregard of EEA law by the Supreme Court of Iceland¹⁰⁵. However, by 2018, his conclusions had changed due to new empirical data (more recent rulings). In his latest publication, undertaken after a thorough analysis of the Icelandic reception of the EFTA Court's advisory opinions, he now agrees with ESA's view that the Icelandic courts fail in practice to grant correctly implemented EEA provisions precedence over purely Icelandic law, contrary to the obligations outlined in Protocol 35.¹⁰⁶

Einarisdóttir, M., "Bótaábyrgð vegna brota á EES-rétti sem rekja má til æðstu dómstóla", *Tímarit lögfræðinga*, 2011, vol. 61(1), pp. 5-33 and Einarisdóttir, M., "Incorporation and Implementation – The Execution of the EEA Agreement by the Icelandic State", *Nordic Journal of European Law*, 2019, vol. 2 (1), pp. 1-23.

¹⁰² Supreme Court of Iceland, case nr 477/2002.

¹⁰³ Pétursson studies particularly three cases. In Icelandic Supreme Court case no. 79/2010, Council Directive 85/374/EEC concerning liability for defective products had been incorporated into Icelandic law with act no. 25/1991. The directive called for liability for producers and importers of products. However, Act no. 25/1991 went further, wrongly adding suppliers to the list of those liable. The court stated that this clear rule of the Icelandic act could not be interpreted in line with the directive according to art. 3 of act no. 2/1993 so that suppliers would not be liable. This run contrary to the ECJ preliminary decision no. C-402/03 where the ECJ stated that liability for defective products according to *Council Directive no. 85/374EEC* could not be extended to include suppliers as well as producers and importers. A rule including supplier liability was to be found in Danish law as was the case in Iceland in case no. 79/2010. Despite the ruling of the ECJ in this case the Supreme Court reached a verdict in accordance with the wrongly implemented Icelandic law. Secondly, in case no. 10/2013 the court cited case no. 79/2010 when denying a petition for an advisory opinion of the EFTA Court. Finally, in case no. 92/2013 the court cited both cases mentioned above as reasoning for applying the Icelandic rule not in accordance with an EU directive. In this case the court even went against an advisory opinion of the EFTA court. See Pétursson, G. Þ., "Forgangur EES-reglna. Hvað er að fréttu af bókun 35?" in Ólafsdóttir, S. Í. (ed.), *Fullveldi í 99 ár. Safn ritgerða til heiðurs dr. Davíð Þór Björgvinssyni sextugum*, Hið íslenska bókmenntafélag, Reykjavík 2017, pp. 201-223, specially pp. 214-219.

¹⁰⁴ *Ibid.*, pp. 214-215.

¹⁰⁵ See Part II (Hannesson) in Mendez-Pinedo, M.E. and Hannesson, O. Í., *The authority of European Law. Exploring primacy of EU law and effect of EEA law from European and Icelandic perspective*. Lagastofnun/Law Institute, Reykjavík, 2012 and doctoral dissertation "Giving effect to EEA law: examining and rethinking the role and relationship between the EFTA Court and the Icelandic National Courts in the EEA legal order" defended at the European University Institute, 2013. More information available online at: <https://cadmus.eui.eu/handle/1814/28418> (last accessed on 15 February 2020).

¹⁰⁶ Hannesson, O. Í., 'Advisory Opinions in the EEA: The Icelandic Supreme Court and the EFTA Court', *European Law Review*, 2018, vol. 43 (6), pp. 858-879, specially on p. 866. Hannesson

In an earlier article, Hannesson had argued for a potential means for Icelandic courts to give non-implemented EEA law effect, an issue that is usually problematic in a pure dualistic system, and one that is not always explored by doctrine, since it is difficult to solve. Hannesson maintained that since essential similarities exist between the legal systems of the EEA and the ECHR concerning this problem, a similar method might be conceivable in relation to the effect of non-implemented EEA law in Iceland as that employed in relation to the ECHR.¹⁰⁷ Last but not least, Hannesson has studied in depth when and how the Icelandic Supreme Court has decided to refer a question to the EFTA Court for an advisory opinion.¹⁰⁸ Some of his findings are extremely interesting since they point to misuse of the *acte éclairé* doctrine elaborated by the CJEU.¹⁰⁹

The above observations lead the present author to conclude this section with the affirmation that, in spite of the unresolved problems of EEA in Iceland originating in the Constitution and EEA Act 2/1993 (a legislative act proposed by the executive), at present, the tension is due mostly to the role of the Supreme Court disregarding and/or undermining the authority and effect of the EEA

refers to the reluctance to refer cases to the EFTA Court for advisory opinions under Article 34 SCA specifically when Icelandic law is unambiguous, pointing to the tensions between homogeneity required under EEA law and autonomy and sovereignty as a dualist State (p. 858). He also notes the Icelandic Supreme Court's inclination to apply the *acte éclairé* doctrine, whereby the domestic law is interpreted in a manner as to preclude any ambiguity or room for interpretation requiring a referral. While, in his view, this test is only justifiably applicable in conflict regarding non-implemented EEA law; the Court appears to apply it indiscriminately (p. 866). Additionally in regard to criminal cases and other cases amongst private parties, Hannesson finds that the Supreme Court has omitted to interpret (implemented) EEA law on the grounds that such activities fall under the empire and are governed by Icelandic law (p. 867).

¹⁰⁷ Hannesson analysed how the Icelandic Supreme Court applied the ECHR after it was ratified but before it was incorporated into domestic law. E.g. in case *no. 1992:174* the court construed the Icelandic criminal code in concurrence with art. 6 ECHR, deciding that the Icelandic state should pay for interpretive services for a foreign man even though this was clearly opposite to the statutory rule. See Hannesson, O. Í, "The Status of Non-Implemented EEA Law in Iceland: Lessons from the Judicial Reactions of the Supreme Court to International Law", *Nordic Journal of International Law*, 2011 (80), pp. 425-458, specially on pp. 439 and 455.

¹⁰⁸ Generally, the Supreme Court is compliant with the findings of the EFTA Court, employing them almost as if they have binding effect. Supreme Court Cases *no. 169/2011*, *191/2012* and *506/2016* are all examples of the court using an advisory opinion as the framework for its reasoning and conclusion. However, if an Icelandic statutory rule is very clear and the court does not see how it can be interpreted in another manner (in the light of EEA law) it is very reluctant to request an advisory opinion. Similarly, the Supreme Court is less likely to refer a case to the EFTA Court if there is a strong and firm interpretative precedent on the matter in question. See Hannesson, O.Í, "Advisory Opinions in the EEA: The Icelandic Supreme Court and the EFTA Court", *European Law Review*, 2018, vol. 6, pp. 858-879, specially on pp. 858 and 866-867.

¹⁰⁹ The methodology for how the Icelandic courts decide to refer cases to the EFTA Court is well demonstrated in the Icelandic Supreme Court case *no. 212/2005 HOB-vín I*. According to Hannesson, a worry some trend is taking place. The Icelandic Supreme Court has recently shifted towards citing EU law jurisprudence, claiming that the CJEU has already resolved a particular matter, as a basis for denying requests for advisory opinions to be sent to the EFTA Court. See Hannesson, O.Í, "Advisory Opinions in the EEA: The Icelandic Supreme Court and the EFTA Court", *European Law Review*, 2018, vol. 6, pp. 858-879, specially on pp. 863 and 868.

Agreement in some important cases. Since the independence of the courts is protected by the division of powers and the rule of law, this problem demands examination from a combined constitutional/international law/EU-EEA law perspective. This methodology implies an integration of all perspectives into a single one, keeping the essence and nature of every legal order and making them compatible with a common approach.

5. A false dilemma: sovereignty and constitutional identity vs. access to justice under the EEA Agreement

In order to resolve the impasse described above, we need to proceed in two steps. Firstly, we must refocus on the key issues involved. Secondly, we must apply the proper legal framework and method. EEA law is a *sui generis* legal order of hybrid nature, a mix between public international law and EU law. This means that we have to look at the problem from at least both perspectives and integrate them into a unique EEA perspective.

From a public international law perspective, we may refocus on the authority of an international treaty for a contracting party, that is to say, the binding force of the EEA Agreement for Iceland. In this sense, we may refer to the relatively novel idea (Haas) of a twin reciprocal bond between sovereign rights and sovereign obligations vis-a-vis the international/European community.¹¹⁰ The principles of loyalty (Art. 3 EEA Agreement) and the customary rule of *pacta sunt servanda* constitute a solid justification, if such a case arises, for prospective ESA infringement actions against Iceland for breaches of Treaty obligations.

On the other hand, from an EU supranational law perspective, we should place the principal focus on the protection of individual rights, due to the fact that EU law is a novel legal order that produces legal effects for individuals, since the European legal integration process brings together citizens, nations and institutions (*Van Gend en Loos*¹¹¹). Here the most important principles to consider are the doctrine of effectiveness as well as the other seminal principles of EU law (primacy, direct effect, indirect effect and State liability).

A similar *raison d'être* lies behind the EEA Agreement, which is also an international treaty *sui generis* with a similar *obligation de résultat* regarding the protection of individual rights (as interpreted by the EFTA Court on the basis of homogeneity and the *Restamark, Einarsson and Sveinsbjórnadóttir* cases¹¹²). In EEA law, we refer to other seminal principles. While the authority and effect of EEA law lacks primacy and direct effect, consistent interpretation and State liability

¹¹⁰ Although his contribution has made press headlines in very important media, it is perhaps not correct to describe it as a novel idea since it is one of the foundational notions of international legal theory. Haas, R. N., "World Order 2.0. The Case for Sovereign Obligation", *Foreign Affairs*, January/February 2017, available online at: <https://www.foreignaffairs.com/articles/2016-12-12/world-order-20> (last accessed on 15 February 2020).

¹¹¹ CJEU, Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963], ECR I.

¹¹² Baudenbacher, C., Tresselt, P. and Orlygsson, T. (eds). *The EFTA Court: Ten Years on*. Hart Publishing, Oxford, 2005, pp. 28-29.

serve as core principles in ensuring that the EEA legal order remains effective and homogenous. As in the EU legal order, the judicial protection of individual rights works, on a daily basis at national level, in a decentralized system in which national courts effectively act as courts of European law. A European level exists as a complementary avenue for citizens (for the final interpretation and application/enforcement of EU/EEA law). As Andenas has very well argued, there is no role for sovereignty in the interpretation of EEA law, no wider margin of appreciation or room for action for Member States compared to EU law. In his words: “preserving national sovereignty in the fields covered by the EEA Agreement is not the object and purpose of the EEA Agreement”.¹¹³

Two solutions seem possible in order to build the bridge between Icelandic constitutional law and EEA law that Protocol 35 requires and include European fundamental rights. Both are constructed from a citizen’s perspective of access to justice (ie. effective judicial protection of individual rights, access to an independent court and a fair trial) and respecting both law derived from the EEA Agreement and Icelandic constitutional law in force¹¹⁴.

The first solution involves securing the outcomes that EEA law requires and the associated rights for individuals and economic operators on the basis of national law by judicial interpretation, while respecting the margin of appreciation of which States dispose under international law.¹¹⁵ This entails employing the concept of *lex specialis* for EEA implemented law (vis-à-vis domestic conflicting law) and considering Protocol 35 as both a rule of interpretation and a rule of conflict. This is a pragmatic solution, which respects both the EEA Agreement and the Icelandic Constitution as long as rights are guaranteed. The hypothesis behind this option is that, on account of the current design of the EEA Agreement and EEA procedural law (SCA Agreement), the duty of consistent interpretation can be applied coherently at the same time as respecting pluralism and dualistic legal

¹¹³ Andenas, M., “Sovereignty“, in Baudenbacher, C., *Fundamental principles of EEA law, EEA-ities*, Springer, New York, 2017, pp. 91-108, and specially on p. 91.

¹¹⁴ The new Icelandic Constitution voted on 20 October 2012 would not solve the issue either since it does not contain a clause giving primacy or precedence in application to the EEA Agreement. It only refers to international human rights treaties. Björgvinsson has concluded that fundamental rights are unwritten principles of EEA law. Although the EFTA Court has no clear mandate to protect fundamental rights, it has often referred to the European convention of Human Rights (ECHR) and the European Court of Human Rights in Strasbourg/ECtHR). The fact remains that the EU Charter of Fundamental rights, which was given the same legal binding force within the EU system as the EU treaties by the Treaty of Lisbon, is not part of the EEA legal system. The EEA Agreement is silent on the matter of fundamental rights (but referred in its preamble). The ECtHR has never cited the EEA Agreement nor the EFTA Court. But all the EEA EFTA states are members to the ECHR. See on this issue Björgvinsson, D. Þ., “Fundamental Rights in EEA Law”. *The EEA and the EFTA Court. Decentred Integration*. 20th Anniversary of the EFTA Court, EFTA Court (ed), Oxford 2014, pp. 263-280, specially on pp. 264, 266, 273-276 and 279-280.

¹¹⁵ Mendez-Pinedo, M.E., “Primacy/Supremacy”. *Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]*, Oxford Constitutional Law, 2017, available online at: <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e488?prd=MPECCOL> (last accessed on 15 February 2020).

orders in the EEA Agreement, provided that the Supreme Court fulfils its duties.¹¹⁶ However, on the other hand, as Franklin and others point out: “avoiding EEA law neutralises the effectiveness of EEA law beyond the case at hand. Thereby, even though the Supreme Court may reach the materially correct decision this will not necessarily provide the appropriate precedent for future litigants.”¹¹⁷

The second solution involves acknowledging that the former approach is not working in the practice of judicial interpretation and cannot work in some cases (as reality seems to confirm); and engaging in constitutional and/or statutory reform securing and anchoring the authority (primacy as precedence of application in case of conflict) and effectiveness of EEA implemented law over national law. A recent survey of Icelandic literature and qualified scholars seems to favour this choice on the basis of clarity and legal security¹¹⁸.

Thorarensen is of the opinion that a constitutional reform is needed. In her view, a provision allowing for an exception (ie. by acknowledging the pooling/sharing of legislative power in favor of international organizations under certain circumstances, might be necessary to clarify the scope and limitation to sovereignty in current constitutional law.¹¹⁹ Going even further, Magnússon has argued that, given the increased importance and still relatively unclear position of international law in the Icelandic legal system; the Icelandic constitution should be reformed in order to include a rule giving primacy and direct effect to binding international law.¹²⁰ Petursson and Runarsson advocate instead a minor constitutional or legislative reform to give full effect to Protocol 35. In their view, Article 3 of the EEA Act ought to be more than a simple principle of consistent interpretation. A statutory change, following upon the Norwegian model, would give priority to the implemented EEA principles when in conflict with domestic law without requiring “priority over constitutional principles.”¹²¹ In the most recent

¹¹⁶ On this solution see Méndez-Pinedo, M. E. and Hannesson, O.Í, *The authority of European law. Exploring primacy of EU law and effect of EEA law from European and Icelandic perspectives*. Reykjavík, Law Institute, 2012.

¹¹⁷ Franklin, C.N.K., Hannesson, O.I., Rúnarsson, O.B., Baur, G. and Steiner, E., “National Report for Norway – with perspectives from Iceland and Liechtenstein”, in “National Courts and the Enforcement of EU law”, FIDE XXIX Congress, The Hague, 2020, forthcoming, in section 3.2.

¹¹⁸ Furthermore, it is necessary to remember that the Supreme Court generally follows its precedents so without a change in the law; how could it make a U-turn after having deviated from the lex specialist approach? This might be a practical problem to the first solution. There is a structural deficit and legislative reform is needed.

¹¹⁹ Thorarensen, B., “Stjórnarskrárákvæði um framsal ríkisvalds. Þarfar eða óþarfar breytingar á stjórnarskrá?”, in Ólafsdóttir, S. Í. (ed.), *Fullveldi í 99 ár. Safn ritgerða til heiðurs dr. Davíð Þór Björgvinssyni sextugum*, Hið íslenska bókmenntafélag, Reykjavík 2017, pp. 113-141, specially on pages 140-141.

¹²⁰ Magnússon, S., “Er þörf á stjórnarskrárákvæði um stöðu þjóðaréttar?”, in Ólafsdóttir, S. Í. (ed.), *Fullveldi í 99 ár. Safn ritgerða til heiðurs dr. Davíð Þór Björgvinssyni sextugum*, Hið íslenska bókmenntafélag, Reykjavík 2017, pp. 143-165, specially on p. 165.

¹²¹ Petursson, G. Þ and Runarsson, O. B., ‘Consistent interpretation in the case-law of the Icelandic Supreme Court 1994-2016’ in Franklin, C.N.K. (ed.), *The Effectiveness and Application of EU and EEA Law in National Courts. Principles of Consistent Interpretation*, Intersentia, Cambridge, 2018, pp. 363-410, on particular p. 409.

publication on the issue, Einarsson and Stefánsson also conclude on the need to carry out statutory reform.¹²² Last but not least, Sigurdsson foresees that the Icelandic legislator will choose to amend Act 2/1993 so as to properly implement Protocol 35, rather than to defend publicly that the status quo is working well (a claim that has been falsified by empirical data (case-law) and doctrinal work).¹²³ In view of the above, Franklin and others have concluded that “it seems that the Icelandic legislation and practice poses great risks to the effectiveness of EEA law in Iceland”.¹²⁴

In connection with the Icelandic Supreme Court, Baudenbacher has proposed that Iceland ought to reform its restrictive procedural law (the appeals system that allows the Supreme Court to reframe or stop what he calls “political” cases from being referred to the EFTA Court. Most importantly, he refers to the need for the Supreme Court to better respect Article 6(1) ECHR, which guarantees the right to a fair trial. However, on the other hand, he also acknowledges that if the current system functions and the Supreme Court co-operates with the EFTA Court in practice, then reform is unnecessary and could represent an unduly politicised legislative burden.¹²⁵

So, while Icelandic doctrine agrees on the need for some reform of Article 3 of EEA Act (solution 2), there is no consensus on its substance since a statutory reform, similar to the Norwegian approach, might probably be sufficient (though this is not certain, in which case a constitutional amendment would be required, opening the Pandora’s box of pending constitutional reform¹²⁶). To the best of our

¹²² Einarasdóttir, M. and Stefán Már Stefánsson, S. M., “Beiting innleiddra EES-reglna í íslenskum rétti í ljósi bókunar 35”, in Örlygsson (et al), *Hæstiréttur í Hundrað ár*, Hið íslenska bókmenntafélag, Reykjavík, 2020, pp. 341-357.

¹²³ Sigurdsson, J. “Iceland’s Problematic Implementation of Protocol 35 to the EEA Agreement” (provisional title), Master thesis, University of Iceland, June 2020. This thesis includes a comprehensive assessment of the current status of Protocol 35 in the EEA and legal issues in a European and Icelandic context. The focus is on the current infringement procedure pertaining to Iceland’s implementation of Protocol 35, headed by the ESA according to Article 31 SCA. The thesis sets out to assess the efficiency of the infringement procedure generally, with the objective of predicting the likely outcome of this particular case. According to Sigurdsson, this procedure is bound to push Iceland for the first time publicly to either properly comply with Protocol 35 or put forth the seemingly hopeless argument why the current status quo sufficiently fulfils the obligation undertaken by Iceland according to the EEA Agreement. The conclusion is that most likely, before this case ever reaches the EFTA Court, the Icelandic legislator will amend Act 2/1993 so as to properly implement Protocol 35. The most feasible way to achieve this via statutory law would be to enact a provision to the effect that implemented EEA law prevail over purely domestic law unless other later legislation expressly states otherwise. Such legislation could serve to fulfil Protocol 35 and still not undermine the value of a *lex posterior* interpretation.

¹²⁴ Franklin, C.N.K., Hannesson, O.I., Rúnarsson, O.B., Baur, G. and Steiner, E., “National Report for Norway – with perspectives from Iceland and Liechtenstein”, in “National Courts and the Enforcement of EU law”, FIDE XXIX Congress, The Hague, 2020, forthcoming, section 2.2. on Protocol 35 EEA Agreement.

¹²⁵ Baudenbacher, C., *Judicial Independence: Memoirs of a European Judge*, Springer, New York, 2019, p. 97.

¹²⁶ Any constitutional reform would probably raise the issue that a new constitutional draft was put into national referendum on 20 October 2012 but current majority in the Parliament does not

knowledge, taking into account the primary public legal sources (the legislation and case-law from the Courts), this issue is still unresolved and no official executive/legislative action whatsoever has yet been taken.¹²⁷ While frequently debated at political level and in doctrinal writings, no specific case on Article 3 EEA Act 2/1993 and Protocol 35 EEA Agreement has ever made it to the courts due, probably, to the theoretical nature of the discussions involved.¹²⁸ It does not help, either, that there seems to be a general scepticism in Nordic legal tradition towards unwritten principles as bases for legal rights and obligations, as Fredriksen has noted recently in a general report on EEA law.¹²⁹

Together with the need to clarify the constitutional status of EEA law in Iceland and its preference for reform, the most important conclusion finding of the 2019 Report on the EEA Agreement is the importance of access to justice and judicial protection of socio-economic fundamental rights. As it notes: “the EEA is a unique international partnership because of the extensive consideration it gives to individuals and the unequivocal rights it confers. The EEA Agreement places great emphasis on the important role of individuals in the exercise of the rights that they acquire with the Agreement and the judicial protection afforded to these rights. This is clear, for instance, from the provisions on freedom of movement. The idea of depriving citizens of these rights in the name of national sovereignty amounts to a contradiction in terms.”¹³⁰

This view is mirrored by eminent scholars. David Þor Björgvinsson, in the first place, has explained how sovereignty and constitutional identity cannot be used to justify denial of access to justice, to weaken effective judicial protection

pursue this constitutional reform process. A primacy clause in the constitution would also be qualified as by political EU-EEA opponents as an attack on sovereignty, creating pushback/backlash against EEA Agreement.

¹²⁷ In this sense, reference must be made to the conclusions of the Experts Committee nominated by the Ministry of Foreign Affairs to study the effect of Protocol 35 EEA Agreement within the constitutional legal order. In August 2018, this working group concluded that article 3 of Act n2 2/1993 on the EEA Agreement, as it has been interpreted by the courts, does not fulfil the international obligations required by Protocol 35. In their view, one realistic way to get out of the impasse is to suggest a statutory reform of Article 3 Act 2/ 1993. That would constitute a response to the ESA letter from 13 December 2017 and that would also probably mean the end of any potential action for breach of Treaty obligations. According to this working group, this is the only possible way out in this situation and no other proposals were advanced. See Iceland. Ministry of Foreign Affairs, *Starfshópur vegna innleiðingar Íslands á bókun 35 við EES-samninginn*. (3 August 2018). *Skýrsla starfshóps vegna innleiðingar Íslands á bókun 35 við EES-samninginn* [unpublished and non-disclosed, only conclusions available].

¹²⁸ Art. 25 of the Procedural Act No 91/1991 says that legal questions cannot be brought to the court, only a dispute between parties.

¹²⁹ Fredriksen, H.H., “Part I: General Report: EEA law in and beyond the text of the Main Part of the EEA Agreement”, p. 129 in Arnesen et al, *Agreement on the European Economic Area. A commentary*, Beck-Hart-Nomos and University of Oslo, Baden-Baden, 2018, pp. 124-143 and especially on unwritten principles of EEA law pp. 129-136 and, particularly, in pp. 130-131.

¹³⁰ Report of the Working Group on the EEA co-operation’ (September 2019, on p. 9 available online at: <https://www.government.is/lisalib/getfile.aspx?itemid=918d3e73-e465-11e9-944d-005056bc4d74> (last accessed on 15 February 2020). The Report does not mention, however, the issue of State liability for judicial breaches of EEA law (case *Kolbeinsson* from EFTA Court in relation with case *Köbler* in EU law).

and to remove EEA rights for citizens and companies in Iceland.¹³¹ Similar views have been expressed by Baudenbacher, referring to the reciprocity principle as a matter of EEA law which gives rights to citizens and economic operators which can be enforced in courts¹³²; Arnesen, for whom individual rights are also grounded by recital 8 to the EEA Agreement¹³³; and Hreinsson, who, grounding the question on the need to secure access to justice and effective judicial protection of individual rights in EEA law, also refers to Article 6 of the European Convention of Human Rights.¹³⁴

This conclusion is similar in the EU pillar, where it must be noted that the CJEU seems not to accept that constitutional identity justifies exceptions to primacy, the possible reason being that the identity clause inserted in the EU Treaties (Lisbon) is addressed to EU institutions (including the CJEU), and not to EU Member States.¹³⁵

6. Conclusions

There is currently a problem of constitutional (legislative and judicial) resistance to European Law in Iceland and two important and strongly interrelated issues of EEA law remain unresolved:

1) the precedence in application of domestic law, in certain cases of conflict with EEA implemented rules (on the basis of Article 3 EEA Act 2/1993 and in breach of Protocol 35 EEA Agreement); and

2) the national restriction on State liability for judicial breaches of EEA law (as a principle and the consequent lack of necessary remedies at national level for private parties (*Kolbeinsson*)).

The letters from the EFTA Surveillance Authority (ESA) to the Icelandic Government in 2015, 2016 and 2017 regarding these essential issues of EEA Law have not been officially replied to. The letters (starting point of infringement actions) concern both legislative and judicial violations of State obligations vis-à-vis the EEA Agreement by Iceland and are of constitutional importance. Both legal

¹³¹ On the concept of sovereignty (“fullveldi”) and European and international law see respectively Björgvinsson, D. Þ., “EES og framsal ríkisvalds”, in Davíð Þór Björgvinsson D. Þ., (eds), *Afmælisrit: Þór Vilhjálmsson sjötugur*, 2000 pp. 77-109, Orator, Reykjavík, pp. 77-109 and Björgvinsson, D. Þ., “Fullveldi og þjóðréttarsamstarf”, *Lögmannablaðið*, 2018, vol. 24 (4), pp. 10-14. See also the special book dedicated to this judge/professor on the occasion of 99 years of Icelandic sovereignty: Ólafsdóttir, S. Í. (ed.), *Fullveldi í 99 ár. Safn ritgerða til heiðurs dr. Davíð Þór Björgvinsyni sextugum*, Hið íslenska bókmenntafélag, Reykjavík, 2017.

¹³² Baudenbacher, C., Reciprocity, in *Fundamental principles of EEA law, EEA-ities*, Springer, New York, 2017, p. 35.

¹³³ Arnesen et al, *Agreement on the European Economic Area. A commentary*, Beck-Hart-Nomos and University of Oslo, Baden-Baden, 2018, pp. 162-164.

¹³⁴ Hreinsson, P., “General principles of EEA law”, in Baudenbacher, C., *The Handbook of EEA law*, Springer, New York, 2016, pp. 349-389, especially referring to effectiveness of EEA law in pp. 376-378, and provisional conclusion on p. 378.

¹³⁵ Rauegger, C., “National constitutional rights and the primacy of EU law: M.A.S.”, *Common Market Law Review*, 2018, vol. 55(5), pp.1521–1547, on p. 1542. This constitutional identity construction has received pushback in several Member States.

problems of constitutional and European relevance are still unresolved and haven't been taken further by the ESA before the EFTA Court.

It is evident that the Icelandic authorities and the Icelandic courts are having difficulties in trying to resolve the tension between sovereign rights and sovereign obligations that are embedded in EEA law: between judicial independence and procedural autonomy, on one side; and homogeneity and loyalty, on the other side. Constitutional identity and independence, however, cannot justify a derogation from one of the main objectives of EU-EEA law, namely to provide European rights for EEA nationals and economic operators.

How can sovereignty and constitutional identity be balanced with access to justice under the EEA Agreement? This is a very difficult question with no easy answer if the legislative and judicial branches do not stand by their obligations, that is to say, if Iceland's Parliament does not enact amending legislation (regarding Article 3 EEA Act 2/1993) and if the Supreme Court disregards EEA law in its judicial interpretation. The conclusion of the study is therefore conditional. It is arguable that in practice, Iceland ensures the effectiveness of European rights on a flexible, case-by-case basis in its present state without the requirement of unwanted constitutional reform, essentially granting EEA law an outcome quasi-primacy basis of sorts (*de facto* but not *de iure*) in most cases that are of lesser national interest. Thus, if and when this outcome is correct, sovereignty and access to justice live together and reform is not necessarily essential beyond the 2019 Government report's request for clarification (under the threat of potential State liability). However, if and when EEA nationals' rights (implemented at domestic level) are not adequately protected by any power of the State, as implied by the ESA on the basis of selected domestic case-law of the Supreme Court, then legislative/constitutional reform may be required or may at least be advisable in order to honour obligations under Protocol 35 of the EEA Agreement.

Here it is argued that no matter what choice is taken, in order to escape the impasse (judicial interpretation versus constitutional/statutory reform) the main objective and outcome must always be kept in mind: to secure access to justice in both a formal and substantive manner, that is to say, access to both national/European courts, system of effective remedies and best judicial protection of European rights.

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