The EEA Agreement and Presumption of Equivalent Protection of Human Rights

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The principle of presumption of Convention compliance or equivalent protection of human rights was created in the *Bosphorus* case of the European Court of Human Rights (ECtHR).[1] The case relates to the interplay between EU law and the European Convention on Human Rights (ECHR). In this contribution to the *liber amicorum* in honor of Robert Spano I will offer some reflections on the relevance of this principle for the EEA Agreement.[2]

The subject is of interest in Iceland, Norway, and Liechtenstein (the EFTA States) since the EEA Agreement extends the EU common market to these three States which are not members of the EU. Pursuant to the EEA Agreement, EU legislation in the field of the four freedoms, competition and state aid is to be made a part of the legal order of these three States. Moreover, it follows from the obligations under the EEA Agreement that secondary EU legislation in this field must be interpreted and applied in line with the EU legislation in the Members States to the EU following the principle of homogeneity. Therefore, it is tempting to jump to the conclusion that the principle of presumption or presumption of equivalent protection of human rights should also apply in cases before the ECtHR where the EFTA States take measures based on legislation stemming from the EEA Agreement.

I. Jurisdiction and Imputability – Article 1 ECHR

Viewed from the point of view of the ECHR and the ECtHR it follows from Article 1 of the ECHR that the High Contracting Parties are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. As a rule, the fact that an alleged violation follows from application and

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1 ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], 30 June 2005.

2 The Agreement on the European Economic Area of 2 May 1992 (*OJ*, 1994, L 1, p. 3) was concluded as an association agreement based on Art. 238 of the EC Treaty, now Art. 217 TFEU, between the European Communities and their Member States at that time. Presently only Iceland, Norway and Liechtenstein are on the EFTA side of the Agreement.

enforcement of internal legislation within the territory of the respondent State does not remove it from its jurisdiction or imputability. The final responsibility, from the point of view of the ECHR, therefore rests with the Contracting Parties. In line with this, the ECtHR found in the *Bosphorus* case that the applicant company, as the addressee of the impugned act, fell within the "jurisdiction" of the Irish State, with the consequence that its complaint about that act was considered compatible *ratione loci*, *personae* and *materiae* with the provisions of the Convention.[3] Accordingly, regarding the EEA Agreement, the responsibility with regard to implementation and application legislation rooted in the EEA Agreements rests with the EFTA States, not the EEA institutions.

II. Presumption of Equivalent Protection of Human Rights

The *Bosphorus* case concerned an aircraft registered in Turkey, *Bosphorus Airways*. It was seized by the Irish authorities when it was in Ireland for maintenance. From the point of view of Irish domestic law, the legal basis for the seizure was EEC Council Regulation No. 990/93 which, in turn, implemented the UN sanctions regime against the Federal Republic of Yugoslavia. In coming to the conclusion that no breach of the ECHR had taken place the ECtHR stressed the following special features of the Community legal order: (i) The EC regulation was "generally applicable" and "binding in its entirety" pursuant to Article 249 of the EC Treaty and a part of the domestic legal order and directly applicable without further need for measures to implement it. It found that the Irish authorities rightly considered themselves obliged to impound any departing aircraft that fell under Article 8 of the Regulation. (ii) Secondly, the ECtHR referred to the rights and duties under Article 234 of the EC Treaty (preliminary ruling) to refer matters of interpretation of EC legislation to the CJEU. In this regard it was pointed out that the Supreme Court of Ireland had no discretion in the matter as it had to make the preliminary reference, the ruling of the CJEU was binding on the Supreme Court and the ruling effectively determined the domestic proceedings by concluding that the regulation applied to the aircraft.

The ECtHR then went on to stress that the Convention as such does not prevent Contracting Parties from transferring sovereign powers to international organizations for the purpose of co-operation in certain fields. Furthermore, the Court examined whether it could be presumed that Ireland complied with its Convention requirements in fulfilling such obligations and whether any such presumption had been rebutted in the circumstances of the case.

In assessing whether such a presumption of Convention compliance or equivalent protection of human rights could be made at the relevant time, the Court described the main features for the protection of fundamental rights within the Community legal order. It held that repeated references by the CJEU to the Convention provi-

3 ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, cited above, § 137.

sions and the Court's jurisprudence, specific treaty provisions referring to protection of such rights and the Charter, as well as the control and enforcement mechanism offered by the Community allowed it to conclude that the protection of fundamental rights by EC law could be considered to be, and to have been at the relevant time, equivalent to that of the ECHR system and stated: "Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community."[4] Nevertheless, the Court stressed that such presumption could be rebutted if, in a particular case, it was considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[5]

The *Bosphorus* case implies that the ECtHR is ready to accept that the fact that the disputed decision was based on Community law may limit the discretional powers of the Court in assessing compliance with the Convention standards. This is attributable to some specific features of the Community legal order. Particularly relevant is that the Member States of the European Union have transferred sovereign powers to common institutions and created a legal order of their own. The following features are of importance in this respect: (i) direct applicability (direct effect) of regulations in the domestic legal order of the Member States; (ii) the independent enforcement mechanism reflected mainly in the binding nature of preliminary rulings in particular followed by the lack of discretion on the part of the Member States in interpreting and enforcing the EC rules; and finally (iii) standards for the protection of fundamental rights developed by the EC institutions which are considered equivalent to the standards offered by the Convention. Importantly, a specific reference is made to the importance of the Charter in that regard.

In sum, it follows from the *Bosphorus* case: (i) that Member States are responsible under the Convention for measures which they adopt pursuant to international legal obligations, including when such obligations stem from their membership of an international organization to which they have transferred part of their sovereignty; and (ii) that a measure adopted to honor such obligations must be deemed justified provided that the organization in question affords fundamental rights protection at least equivalent or compatible to that provided by the Convention.

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4 ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, cited above, § 165.0.

5 In earlier case law, the Court has stated as a general position that the text of Art. 1 of the Convention requires Member States to answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their "jurisdiction". See, in particular, cases ECtHR, *Ilaşcu and Others v. Moldova and Russia* [GC], 9 July 2004, § 311; *Gentilhomme, Schaff-Benhadji and Zerouki v. France*, 14 May 2002, § 20; *Banković and Others v. Belgium and Others* (dec.), 12 December 2002, §§ 59–61; *Assanidze v. Georgia*, 8 April 2004, § 137.

III. The EEA Agreement and Presumption of Equivalent Protection of Human Rights

A. Legal Characteristics of the EEA Agreement

Few words on the legal characteristics of the EEA Agreement are in order. As related above the participation of the EFTA States in the internal market requires that they make sure that EU legislation in the field of the four freedoms and competition is implemented into their national legal order and, in accordance with the principle of homogeneity, that they ensure that this legislation is applied, interpreted, and enforced in compliance with EU standards.

The legal nature of the EEA Agreement is shaped by two aims. On the one hand, the EU legislation should be implemented in the national legal system to enable individuals and economic operators to rely on it (direct effect). Moreover, this should be achieved without requiring the EFTA States to transfer sovereign powers to common institutions beyond the limits set by their constitutions. It follows that under the EEA Agreement transfer of state powers to common institutions is limited to certain decisions of the EFTA Surveillance Authority (ESA) and the EFTA Court in competition cases. Moreover, the EEA Agreement does not provide for direct applicability of secondary EC legislation in the national legal order of the EFTA States.

The obligation to implement the secondary legislation follows from Article 7 EEA. It stipulates that those acts referred to or contained in the annexes to the Agreement, or in the decisions of the EEA Joint Committee, shall be binding upon the Contracting Parties and must be made part of their internal legal order. Acts corresponding to a regulation shall as such be made part of the internal legal order of the EFTA States and acts corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation. It follows that EU regulations will not become a part of the domestic legal order unless specific measures on the national level are taken to implement it. Direct applicability and effect of secondary legislation, including EU regulations, are therefore dependent on this secondary legislation having been correctly implemented in the national legal order.

As regards the enforcement mechanism under the EEA Agreement, there are important similarities to the Community legal order, although there are also differences. As regards similarities, the ESA and the EFTA Court are the Union's counterparts of the Commission and the CJEU.[6] As regards differences, the preliminary rulings procedure under the Union order is the counterpart of the EEA advisory opinion procedure provided for in Article 34 SCA. Under this procedure courts and tribunals in the EFTA States are entitled to request the EFTA Court to

[6] See in particular Arts. 108–110 EEA. Despite certain similarities as regards the role of the Commission on the one hand, and the ESA on the other hand, important differences remain in that the ESA is more limited, especially regarding policy making and its role in the preparation and adoption of new legislation, where the Authority has no role.

interpret the EEA Agreement and secondary legislation which has been made part of it when such questions arise in relation to cases before them. However, the national courts are never obliged to request advisory opinions and they are never binding on them. From this it should be clear that there are fundamental differences between the EEA on one hand and the EU on the other.

At last, it should be mentioned that the principle of homogeneity finds among other provisions expression in Article 6 of the EEA Agreement as well as in Article 3 of ESA/Court Agreement which oblige the EEA institutions and the national courts of the EFTA States to have regard to the case law of the CJEU.

B. Protection of Fundamental Rights Under the EEA Agreement

The EEA Agreement does not contain specific provisions relating to fundamental rights. This does not of course mean that the EFTA States are not bound by fundamental rights when implementing and applying EU legislation at home or when the EEA institutions enforce it. The message is already clear in the preamble to the main text of the agreement where the Contracting Parties declare that they are convinced that the agreement will contribute to the construction of a Europe based on peace, democracy, and human rights. The presumption must therefore be that the economic structure set up by the EEA Agreement is based on democratic principles and fundamental rights. The issue is only which fundamental rights standards apply when questions arise in practical situations. On this matter the EEA Agreement itself is silent. This will now be explored further.[7]

1. Fundamental Rights Protection at the National Level of the EFTA States

It goes without saying that in the EFTA States fundamental rights standards must be upheld at the national level when the authorities and the domestic courts apply legislation deriving from the obligations under the EEA, just as in the case of any other legislation. The standards which must be followed are first and foremost the catalogues on human rights in the constitutions of these countries: in the case of Norway part E of the Constitution (Articles 92–113);[8] in the case of Iceland Chapter VII (Articles 65–76) of the Constitution of the Republic of Iceland;[9] and, in the case of Liechtenstein Chapter IV (Articles 27–44) of the Constitution.[10] In these countries the principle of constitutional review is firmly established giving the general courts the power to strike down, or rather not to apply legislation as uncon-

7 The author has written on this subject earlier. See for example D.Th. BJÖRGVINSSON, "Fundamental Rights in EEA Law" in *The EEA and the EFTA Court. Decentred Integration* (Hart, Oxford, 2014) 263–280. See also R. SPANÓ, "The EFTA Court and Fundamental Rights" (2017) 13(3) *European Constitutional Law Review* 475–492.

8 Constitution of the Kingdom of Norway of 17 May 1814 (Kongeriket Norges Grunnlov) (last consolidated 14 May 2020). See https://lovdata.no/dokument/NLE/lov/1814-05-17#KAPITTEL_5.

9 Constitution of Republic of Iceland (No. 33, 17 June 1944, as amended 30 May 1984, 31 May 1991, 28 June 1995 and 24 June 1999). See www.government.is/library/01-Ministries/Prime-Ministrers-Office/constitution_of_iceland.pdf.

10 Constitution of Liechtenstein of 1921 with Amendments through 2011. See www.constituteproject.org/constitution/Liechtenstein_2011?lang=en.

stitutional. It follows that all EEA legislation must in its content and application in concrete situations respect national constitutional standards on fundamental rights.

In addition, the ECHR is a part of domestic law in these countries. Moreover, they are committed to follow the case law of the ECtHR, even, as is the case in Iceland, when interpreting and applying constitutional provisions on human rights. It follows that when questions arise on the interpretation and application of EEA at the national level, and whether it is in accordance with fundamental human rights standards, it should from the outset be measured against constitutional provisions on human rights and common constitutional traditions as well as the ECHR as interpreted and applied by the ECtHR. Moreover, these countries are Contracting Parties to numerous human rights instruments on the international level, among others the UN International Covenant on Civil and Political Rights of 1966 and the International Covenant on Economic, Social and Cultural rights from 1966. In this regard Norway, Iceland and Liechtenstein are not that much different from the Member States of the EU, and for that matter unquestionably belong to the same common constitutional traditions as EU Member States.

2. *Fundamental Rights Standards When EU Legislation Is Applied by the EEA Institutions*

The issues related to the protection of fundamental rights within the Community and on behalf of the Community institutions are well documented and there is no need to repeat the story here.[11] In addition to the increased case law of the CJEU where these issues have been addressed earlier, the most important feature of the present situation is that the approach of the CJEU has been given expression in Article 6 TEU providing that the Union recognizes the rights, freedoms and principles set out in the Charter, which shall have the same legal value as the Treaties. Moreover, it states that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.

As regards the applicable standards for the protection of fundamental rights under the EEA Agreement, the EFTA Court has in numerous judgments referred to the ECHR and the jurisprudence of the ECtHR. The EFTA Court set the stage already in 1998 in the case of *TV 1000 Sverige*.[12] In the case the Court referred to Article 10 of the ECHR and the *Handyside* judgment of the ECtHR when interpreting Council Directive 89/552/EEC. There have been many judgments since where the EFTA Court has referred to the ECHR and the case law of the ECtHR.[13]

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11 See among others F. JACOBS, "Interaction of the Case-Law of the European Court of Human Rights and the European Court of Justice: Recent Developments" in *Dialogue Between Judges* (European Court of Human Rights, Strasbourg, 2005) 65–87; A. ROSAS, "Fundamental Rights in the Luxembourg and Strasbourg Courts" in *The EFTA Court. Ten Years On* (Hart, Oxford, 2005) 161–175.

12 EFTA, Case E-8/97, *TV 1000*.

13 EFTA, Case E-2/02, *Bellona* (access to court Art. 6 ECHR); Case E-3/11, *Sigmarsson*; Case E-5/10, *Dr Kottke*, § 26; Case E-2/03, Ásgeirsson (length of proceedings under Art. 6 ECHR and judgment of the ECtHR in the case *Pafitis and Others v. Greece*).

Of importance is the judgment in the *Clauder* case where the EFTA Court reaffirms its commitment to the ECHR and the case law of the ECtHR stating:

> "Finally, it should be recalled that all the EEA States are parties to the ECHR, which enshrines in Article 8(1) the right to respect for private and family life. According to established case law, provisions of the EEA Agreement are to be interpreted in the light of fundamental rights (see, for example, Case E-2/03 Ásgeirsson [2003] EFTA Ct. Rep. 18, paragraph 23, and Case E-12/10 *EFTA Surveillance Authority v. Iceland*, judgment of 28 June 2011 [...]. The Court notes that in the European Union the same right is protected by Article 7 of the Charter of Fundamental Rights."[14]

Another important case is the *Holship* case, where the EFTA Court states:

> "Fundamental rights form part of the unwritten principles of EEA law. The Court has held that the provisions of the ECHR and the judgments of the ECtHR are important sources for determining the scope of these fundamental rights (see Case E-2/03 Ásgeirsson [2003] EFTA Ct. Rep. 185, paragraph 23). The fundamental rights guaranteed in the EEA legal order are applicable in all situations governed by EEA law. Where overriding reasons in the public interest are invoked in order to justify measures which are liable to obstruct the exercise of the right of establishment, such justification, provided for by EEA law, must be interpreted in the light of the general principles of EEA law, in particular fundamental rights. Thus the national measures in question may fall under the exceptions provided for only if they are compatible with fundamental rights (see *Olsen and Others*, cited above, paragraph 226). It is for the referring court to assess whether certain overriding reasons in the public interest are compatible with fundamental rights in the light of Article 11 ECHR and the case law of the ECtHR (compare, for example, the ECtHR in *Sørensen and Rasmussen* v *Denmark*, cited above, paragraphs 54 and 58)."[15]

This case will be explored further below as it eventually reached the ECtHR which gave a judgment on 10 June 2021.

From these references to the ECHR in the EFTA Court's case law, and the case law of the ECtHR, it would seem justified to draw at least two conclusions. Firstly, in the implementation and enforcement of the EEA Agreement, fundamental rights have to be respected. Secondly, the main legal criteria is the ECHR as interpreted by the ECtHR.

Finally, as to the significance of the Charter in this regard and the purpose and meaning of the tangible reference to the Charter in the *Clauder* case one may perhaps draw the inference that the Charter carries importance in defining standards for protection of fundamental rights within the EEA system and, even, that to some extent the Charter is imported into the EEA by the jurisprudence of the EFTA Court.

Before drawing any such inferences, the judgment of the EFTA Court in the *Enes Deveci* case should be considered. In the case the defendant claimed, *inter alia*, that

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14 EFTA, Case E-4/11, *Clauder*, § 49. This approach is further confirmed in EFTA, Case E-15/10, *Posten Norge AS*, § 86; Case E-18/11, *Irish Bank*, § 63; Case E-14/11, *Schenker*, §§ 166–167; Cases 3/13 and 20/13 (joined), *Fred Olsen*, § 224; Case E-10/17, *Kystlink*; Case 1/20, *Kerim*; Case 4/19, *Campbell*.

15 EFTA, Case 14/15, *Holship*, § 123.

the respective EU provisions at dispute should be interpreted in accordance with the Charter, in particular Article 16 on the freedom to conduct a business which also finds expression in Article 3 of the respective directive. In response to these arguments, the EFTA Court states in paragraph 64 of the judgment:

> "The Court finds no reason to address the question of Article 16 of the Charter. The EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union. The actors of a market are, *inter alia*, undertakings. The freedom to conduct a business lies therefore at the heart of the EEA Agreement and must be recognized in accordance with EEA law and national law and practices."

On this point Robert Spanó remarks that in this judgment the EFTA Court "perhaps prudently, found a way to evade addressing the issue of the normative impact of the EU Charter for EEA fundamental rights. However, it seems clear that the Court will, again, be faced with this question in the foreseeable future."[16]

C. EEA and the Presumption of Equivalent Protection of Human Rights

Now to the question of whether a similar presumption of Convention compliance or equivalent protection can be made in relation to decisions taken in the EFTA countries, Iceland, Norway, and Liechtenstein, based on legislation deriving from the obligations under the EEA Agreement. The question is justified since the EEA, as described earlier, concerns the application and enforcement of the same legislation as would be the case in a Member State of the EU.[17] Therefore it may seem tempting to conclude that the arguments, offered by the majority in *Bosphorus*, apply equally when assessing the discretion of national authorities when applying and enforcing legislation derived from the EEA Agreement and in establishing the presumption of Convention compliance. A counter-argument is the fact that the legal nature of the Community legal order on which the arguments of the majority in the *Bosphorus* case are based, does not apply to the EEA Agreement, as the structure and legal nature of the EEA Agreement, in important aspects, is very different from the EU. Firstly, the transfer of sovereign powers is much more limited under the EEA. Secondly, there is no direct applicability, either of the main text of the EEA Agreement or the secondary Community legislation deriving from it, unless it has first been implemented in the domestic system. Thirdly, there is no binding preliminary ruling procedure equal to the one within the Community, since it is formally up to the national courts to decide if they want to use the advisory opinion procedure, and even if they do so, whether to follow the opinion given by the EFTA Court. Fourthly, the arguments used by the majority to substantiate the presumption of Convention compliance are mostly irrelevant in the

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16 See R. SPANÓ, "The EFTA Court and Fundamental Rights", *op. cit.*, 481.

17 It is noted that EEC Council Regulation No. 990/93 was never made a part of the EEA Agreement. Therefore, the EFTA States were not obliged under the EEA Agreement to enforce the UN Security Council Resolution No. 1074 (1996) in their domestic legal order, although it was binding for them under public international law. However, the arguments offered by the majority relate not only to EEC Council Regulation No. 990/93, but to the EC Treaty and the secondary legislation in general, including the rules on the internal market, which are part of the EEA Agreement.

context of the EEA Agreement, one example being that the EFTA States are not bound by the Charter.[18] It would require very different arguments from those offered in the *Bosphorus* case to arrive at the conclusion that the protection of fundamental rights within the EEA legal order is equivalent to the one offered by the Convention.

This approach has now been confirmed in a decision of the ECtHR of 5 November 2019.[19] The facts of the case are that the applicant, *Konkurrenten.no AS*, had been denied *locus standi* by the EFTA Court. One of the issues addressed in the decision was whether the matters complained of had been the result of structural shortcomings in the EFTA Court regime.

The ECtHR referred to the *Bosphorus* case to assess whether a similar presumption could be made about the regime set up by the EEA Agreement. However, despite general references to fundamental rights in the EFTA Court's case law, the ECtHR found that such a presumption could not be made in relation to the EEA law *inter alia* for the lack of direct effect and the supremacy of the EEA and because the EEA did not contain any reference to the Charter or any reference whatsoever to other legal instruments having the same or similar effect, such as the Convention.

The ECtHR was also confronted with this issue in its judgment in the *Holship* case of 10 June 2021.[20] In this case the Norwegian government submitted that EEA law provided for the protection of human rights which was comparable to the protection provided for by the Convention, and that there was a presumption of compliance with the Convention which was the same as or similar to that set out in the *Bosphorus* case. It was argued that that presumption had not been rebutted in the case at hand, as there had been no "manifestly deficient" protection of Convention rights.

From the outset the Court reiterated its findings in *Konkurrenten.no AS v. Norway* and rejected this argument on mostly similar grounds. After reiterating the *Bosphorus* principle as well as the position taken in the *Konkurrenten.no AS* decision, the Court stated that the basis for the presumption established by *Bosphorus* is in principle lacking in the EEA Agreement, firstly, and in contrast to EU law, because there is no direct effect and no supremacy within the framework of the EEA Agreement itself. Secondly, and although the EFTA Court has expressed the view that the provisions of the EEA Agreement "are to be interpreted in the light of fundamental rights" in order to enhance coherency between EEA law and EU law,[21] the EEA Agreement does not include the EU Charter of Fundamental

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18 See D. Th. Björgvinsson, "Presumption of Convention Compliance", in A. Eide, J.Th. Möller and I. Ziemele (eds.), *Making Peoples Heard. Essays on Human Rights in Honour of Gudmundur Alfredsson* (Martinus Nijhoff, Leiden, 2011) 293–304. On the Interplay Between EC Law, EEA Law and the ECHR, U. Bernitz, M. Johansson and N. Wahl (eds.), *Liber Amicorum in Honour of Sven Norberg: A European for All Seasons* (Bruylant, Brussels, 2006) 87–99. Also by D. Th. Björgvinsson, "The EEA Agreement and Fundamental Rights" in *Liber Amicorum Luzius Wildhaber. Human Rights – Strasbourg Views. Droits de l'homme – Regards de Strasbourg* (N.P. Engel Verlag, Kehl am Rhein, 2007), 25 *et seq.*

19 ECtHR, *Konkurrenten.no AS v. Norway* (dec.), 5 November 2019.

20 ECtHR, *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway* ("Holship"), 10 June 2021.

21 See, *inter alia*, the EFTA Court's judgment in its case E-28/15, *Yankuba Jabbi* [2016], § 81.

Rights, or any reference whatsoever to other legal instruments having the same effect, such as the Convention. Then it went on, stating:

> "107. As regards, in particular, the latter feature, the Court observes, however, as clearly stated by the EFTA court in the *Holship* case, that fundamental rights form part of the unwritten principles of EEA law [...]. The respondent Government provided several examples from the EFTA court in this regard. Since this reflects the position which previously pertained under EU law, prior to successive EU Treaty amendments, according to which fundamental rights were first recognized as general principles of EU law, the Court considers that the fact that the EEA agreement does not include the EU Charter is not determinative of the question whether the *Bosphorus* presumption could apply when it comes to the implementation of EEA law, or certain parts thereof.
> 108. However, given one of the other features of EEA law identified by the Court in the *Konkurrenten.no* decision – the absence of supremacy and direct effect, added to which is the absence of the binding legal effect of advisory opinions from the EFTA Court – and given that the existence of procedural mechanisms for ensuring the protection of substantive fundamental rights guarantees is one of the two conditions for the application of the *Bosphorus* presumption, the Court leaves it to another case, where questions in relation to the procedural mechanisms under EEA law may arise, to review this issue. It therefore proceeds on the basis that for the purposes of this case the *Bosphorus* presumption does not apply to EEA law. The Court is therefore required to determine whether the restriction was necessary for the purposes of Article 11 of the Convention."[22]

The ECtHR then went on to balance the rights under Article 11 of the ECHR and Article 31 of the EEA Agreement on freedom of establishment. It discusses the balancing exercise undertaken by the Supreme Court (of Norway) and noted *inter alia* that the Supreme Court engaged in an extensive assessment of the conflicting fundamental right to collective action relied on by the applicant unions and the fundamental economic freedom under EEA law on which the employer relied. It indicated that the boycott must, among other things, be reconciled with the rights that follow from the EEA Agreement and that in consideration of proportionality a fair balance had to be struck between these rights. It also stressed the wide margin of appreciation in this field, in view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labor and management and given the high degree of divergence between the domestic systems in this field. With regard to the EEA Agreement the Court stated:

> "117. Firstly, the Court accepts that protecting the rights of others granted to them by way of EEA law may justify restrictions on rights under Article 11 of the Convention (see paragraph 91 above). However, it also notes that for a collective action to achieve its aim, it may have to interfere with internal market freedoms such as those at issue in the case before the Supreme Court. As noted by the Borgarting High Court in the present case, creating difficulties for the company in respect of loading and unloading, and the possible negative financial consequences flowing therefrom, would have been an important point of the boycott (see paragraph 22 above). In the

[22] *Ibid.*, §§ 107–108.

> same way that a right to strike does not imply a right to prevail, the degree to which a collective action risks having economic consequences cannot, therefore, in and of itself be a decisive consideration in the analysis of proportionality under Article 11, paragraph 2 of the Convention (see *Ognevenko v. Russia*, no. 44873/09, § 73, 20 November 2018). Even when implementing their obligations under EU or EEA law, the Court observes that Contracting Parties should ensure that restrictions imposed on Article 11 rights do not affect the essential elements of trade union freedom, without which that freedom would become devoid of substance.
> 118. Secondly, as follows from paragraphs 98 and 110 above, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary, in conformity with EU or EEA law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention. As highlighted in the submissions of the applicant unions in the present case, however, there is a risk that a domestic court which finds itself in a position such as that in which the Supreme Court found itself in the present case may balance a right under the Convention against a right under the EEA Agreement in a manner that would generally only be appropriate had the issue before it been a matter of conflicting fundamental rights under the Convention. From the perspective of Article 11 of the Convention, EEA freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality under Article 11, paragraph 2. The risk just referred to is one which, while ensuring full compliance with their obligations under EEA or EU law, domestic courts must seek to avoid.
> 119. However, in the present case [...] central to the domestic court's finding was its characterisation of the purpose and nature of the announced boycott. While the Supreme Court did not approach the case before it strictly from the angle of the proportionality of the restriction imposed on the trade unions' exercise of rights under Article 11 of the Convention, but concentrated to a great extent on the effects of the boycott on the freedom of establishment of the company targeted, the Court considers that it nonetheless remained within its wide margin of appreciation and advanced relevant and sufficient grounds to justify its final conclusion in the particular circumstances of this case."[23]

D. Comments on the *Holship* Case

The *Holship* case is interesting for the purpose of this paper. One aspect of this is if it could possibly be interpreted as a retreat from the *Bosphorus* case.[24] In the context of the EEA Agreement a possible retreat is present because the case gives more weight than before to the references of the EFTA Court to fundamental rights. Hans Petter Graver goes further in arguing that the judgment may be a sign of a more assertive ECtHR towards the EU. It may also indicate that the ECtHR does not regard the protection of labor rights and other rights protected by the ECHR

[23] ECtHR, *Holship*, cited above, §§ 117–119.

[24] Some have argued that this had happened in earlier case law: ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2009, § 365; *Michaud v. France*, 6 December 2012, §§ 114–115. The Court repeated that condition in its judgment ECtHR, *Avotiņš v. Latvia*, 23 May 2016, §§ 105 and 109–112. See in more detail T. Roes and B. Petkova, "Fundamental Rights in Europe after Opinion 2/13: The Hidden Promise of Mutual Trust" in C. Landfried (ed.), *Judicial Power: How Courts Affect Political Transformations* (Cambridge University Press, Cambridge, 2018). These cases however did not concern the EEA Agreement.

as at least "equivalent" to those for which the Convention provides, with implications for the application of the *Bosphorus* doctrine.[25]

Another way to interpret the judgment is that the ECtHR is actually moving closer to some kind of acceptance of presuming equivalent protection of fundamental rights based on the EEA Agreement by emphasizing that fundamental rights form part of the unwritten principles of EEA law according to the case law of the EFTA Court and that this reflects the position which previously pertained under EU law, prior to successive EU Treaty amendments, according to which fundamental rights were first recognized as general principles of EU law. It further adds that the fact that the EEA agreement does not include the EU Charter is not determinative of the question whether the *Bosphorus* presumption could apply when it comes to the implementation of EEA law, or certain parts thereof. Despite this, it however decides in this case that it would proceed on the basis that the presumption does not apply. It is moreover indicated that this issue might be further reviewed in another case if needed.

Concluding Remarks

This paper offers some reflections on the relevance of the presumption of equivalent protection of human rights developed in the *Bosphorus* judgment for the EEA Agreement, primarily in the light of the *Holship* judgment of the ECtHR. This judgment could possibly be viewed as a move from the *Bosphorus* case in the sense that it may be a sign of a more assertive ECtHR towards the EU. Another approach is that the case represents some retreat from the position taken in *Konkurrenten.no AS v. Norway* where the ECtHR decided not to apply the presumption of equivalent protection of fundamental rights in the context of the EEA Agreement. The *Holship* judgment may however be a sign of the ECtHR moving closer to accepting to some degree the applicability of the principle in the context of the EEA Agreement. Interestingly, either way, it would seem that the EU and the EEA Agreement are moving closer to each other from the perspective of the ECtHR when it comes to the protection of fundamental rights.

The issue is complicated and any firm conclusions on this would have to rest on more detailed research into the issue than offered in this paper. It can hardly be viewed as more than a preliminary reflection on the issue. Hopefully this may encourage other researchers to take a closer look at it.

[25] H.P. Graver, The *Holship* Ruling of the ECtHR and the Protection of Fundamental Rights in Europe (2022) 23 *ERA Forum* 19–32.