

# A 'special relationship' built on a patchwork – How the CJEU sees the EEA EFTA states

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**This contribution presents and analyses a recent judgment from the Court of Justice of the European Union that may prove to be very important both to the future of the European Economic Area and to the relationship between the EFTA States and the EU more generally.**

Professor Dr. Dr. Halvard Haukeland Fredriksen, University of Bergen

## Summary

With the Grand Chamber judgment in **Case C-897/19 I.N.**, the Court of Justice of the European Union (CJEU) firmly demonstrates its commitment to the object and purpose of the **Agreement on the European Economic Area (EEA)**: To extend the EU internal market to the participating EFTA States. Despite a number of differences in the legal context, the Grand Chamber ruled that the EEA Agreement protects an Icelandic citizen on vacation in an EU Member State from extradition to a third State in the same way as EU law protects EU citizens in such situations. Drawing not only on the EEA Agreement but also a number of the other agreements that exists between the EU and the EEA/EFTA States, the CJEU stated that Iceland has 'a special relationship with the European Union, which goes beyond economic and commercial cooperation'. In striking contrast to the approach advocated by the Norwegian government, the judgment strengthens the impression of the EEA/EFTA States as 'insiders' rather than 'outsiders' also in matters where the application of EEA law is affected by parts of EU law that fall outside the scope of the EEA Agreement, but which are covered by other agreements between the EEA/EFTA States and the EU. The full reach of such a more holistic approach to the legal relationship between the EU and the EEA/EFTA States remains to be mapped out, but it could be considerable. It may also be relevant for Swiss-EU relations, one way or the other.

## 1. Introduction

The continued success of the European Economic Area (EEA) depends on the Court of Justice of the European Union (CJEU) extending its interpretations of EU internal market law to situations governed by the EEA Agreement. Ever since the seminal judgment in **Case C-452/01 Ospelt**, the CJEU has done just that, thereby enabling 'the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States'. Within the scope of the EEA Agreement, citizens and economic operators from Iceland, Liechtenstein and Norway thus enjoy essentially the same rights in the EU as their EU counterparts. From the perspective of the three participating EFTA States, they find themselves, as stated by the CJEU in **Case C-81/13 UK v Council**, 'on the same footing as Member States of the European Union'.

The ability of the CJEU to secure uniform interpretation of corresponding provisions of EU and EEA law is tested, however, in cases where the interpretation and/or application of the former is influenced by parts of EU law that are not to be found in the EEA Agreement. There are two main categories of such cases – the ones where the relevant provisions of EU law are covered by (an)other agreement(s) between the EU and the EEA/EFTA States, and the ones where they are not. Examples of the former category are cases where the interpretation and/or application of EEA-relevant EU law is influenced by provisions of EU law that are reproduced in the agreements that links the EEA/EFTA States to the Schengen area, the EU’s common asylum system, the EU’s arrest warrant and surrender procedure, the EU rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters etc. A hotly debated example from the latter category is the provisions on EU citizenship found in Articles 20 ff. of the **Treaty on the Functioning of the European Union (TFEU)**, in particular related to the question of how far the lack of an EEA parallel to Article 21 TFEU can be ‘remedied’ by dynamic interpretation of the **Citizenship Directive (2004/38/EU)**.

When the Supreme Court of Croatia turned to the CJEU with the question of whether EU law offers an Icelandic citizen the same protection from extradition to a third State as the CJEU in **Case C-182/15 Petruhhin** concluded that EU citizens enjoy based on Articles 18 and 21 TFEU, the stage seemed to be set for a landmark judgment dealing with both categories of differences between EU and EEA law. However, as we shall see, the CJEU found a way to preserve homogeneity between EU and EEA law without having to deal with the fact that the concept of EU citizenship has no equivalent in EEA law nor in any of the related agreements between the EU and Iceland. The judgment may nevertheless prove to be a landmark one, as the CJEU appears to let its approach to the EEA Agreement be influenced by the existence of other agreements between the EU and the EEA/EFTA States, causing it to state that Iceland has ‘a special relationship with the European Union, which goes beyond economic and commercial cooperation’.

## 2. Case C-897/19 I.N.

### 2.1 The facts of the case

The facts of the case are quite straightforward, but at the same time rather extraordinary. I.N. is a former Russian official who fled Russia after being charged with corruption. According to I.N., the charges were brought against him in retaliation after he had revealed the corrupt practices of some of his superiors. On that basis, Iceland granted him asylum as a refugee in 2015 and then, four years later, Icelandic citizenship. Shortly after obtaining Icelandic citizenship, I.N. was arrested by Croatian border police while on holiday with his family. The arrest took place under an international wanted persons notice issued by Interpol’s Bureau in Moscow.

As Russia sought I.N.’s extradition based on the 1957 **European Convention on Extradition**, Croatian courts were confronted with the question of whether the protection against extradition to third countries established by the CJEU’s in Case C-182/15 *Petruhhin* applies to citizens of an EEA/EFTA and/or Schengen Associated State. In *Petruhhin*, the CJEU held Article 21 TFEU on the right of every citizen of the Union to move and reside freely within the territory of the Member States to trigger the applicability of non-discrimination obligation of Article 18 TFEU. On this basis, the CJEU inferred that a Member State which does not extradite its own nationals to a given third country, cannot extradite a national of another Member State either, as long as that other Member State has jurisdiction to prose-

cute that person for offences committed outside its national territory and does request his/her surrender, in accordance with the provisions of **Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States**.

Focusing on Iceland's status as a Schengen Associated State, rather than its status as an EEA/EFTA State, the Supreme Court of Croatia was of the view that I.N. had exercised his right to free movement within the Member States of the Schengen area. Noting the recent entry into force of the Agreement between Iceland (and Norway) and the EU on a surrender procedure, and adding that Croatia does not extradite its own nationals to Russia, the Supreme Court asked the CJEU whether Article 18 TFEU was to be interpreted as giving I.N. the same protection against extradition as that enjoyed by EU citizens.

## 2.2 The observations submitted to the CJEU

Before the CJEU, it became clear that Iceland's status as an EEA/EFTA State had to be taken into consideration. As they are reproduced in **the Opinion of the CJEU's Advocate General on the case**, the pleadings of the parties, institutions and governments who submitted written and/or oral observations all suggested that the basis for any analogous application of *Petruhhin* was not to be sought in Iceland's status as a Schengen Associated State, but rather in the free movement rights of the EEA Agreement, either Article 36 EEA (freedom to go to another EEA State in order to receive tourist services) or the Citizenship Directive.

As to whether the reasoning in *Petruhhin* could be transferred to EEA law or not, opinions differed. Predictably, I.N. argued for an affirmative answer, whereas the Russian government, equally predictably, took a different view. Of the three EU Member States who took part in the proceedings, Croatia and Greece supported analogous application of *Petruhhin* in the EEA, whereas Ireland didn't take a position on the relationship between EU and EEA law as its interest in the case lie elsewhere – as an opportunity to ask the CJEU to reconsider the interpretation of EU law established in *Petruhhin*!

More important to the future of the EEA, however, are the positions taken by the European Commission, the EFTA Surveillance Authority (ESA) and the two EEA/EFTA States that submitted observations – Iceland and Norway. Before the CJEU, the Commission, the ESA and the Icelandic government all agreed that the reasoning in *Petruhhin* should be extended to the EEA. Particularly important, given its role as the key EU institution in the everyday life of the EEA Agreement, was the Commission's insistence that even though certain pieces of the *Petruhhin* puzzle were missing, these could be made up for by other provisions of EEA law. Highlighting the object and purpose of the EEA Agreement, the 'privileged relationship' between the EU, the EU Member States and the EEA/EFTA States, the EFTA Court's ability to compensate for the lack of an EEA equivalent to Article 21 TFEU through expansive interpretation of the Citizenship directive in Cases **E-27/13 Gunnarsson** and **E-28/15 Jabbi** and the **EU-Norway/Iceland Surrender Procedure Agreement** as an instrument that is 'equivalent' to the EU Framework Decision on the European arrest warrant and the surrender procedures between EU Member States, the Commission concluded that *Petruhhin* should be extended to the EEA.

In striking contrast, the observations of the government of Norway, as they are reproduced in the Advocate General's Opinion, were far more reserved. At the hearing, Norway highlighted that there is no provision in the EEA Agreement equivalent to Article 21 TFEU and argued that it was solely for the Croatian Supreme Court to decide if I.N. was a recipient of services under Article 36 EEA. Furthermore,

the Norwegian government took the view that the Citizenship Directive was of no relevance, as it doesn't regulate extradition requests and criminal law falls outside the scope of the EEA Agreement.

If correctly reproduced by Advocate General Tanchev, these arguments of the Norwegian government are so weak that it is difficult to understand how they came to be presented to the CJEU. As noted by the Advocate General, established case-law makes clear that the CJEU is competent to provide a referring court with all the necessary information regarding EU law to enable it to resolve the dispute before it, and in this case this obviously included an assessment of whether a person such as I.N., given the facts of the case as presented by the Croatian Supreme Court, was a recipient of services under Article 36 EEA. Further, as also noted by the Advocate General, whether a restriction on free movement is grounded in criminal law, is of no relevance whatsoever. The case-law of the CJEU leaves no doubt that rules of criminal law can constitute restrictions on free movement (as the Advocate General noted with a reference to Case C-267/91 Keck), and it has been common ground ever since the entry into force of the EEA Agreement that this applies also to the EEA. There is no reason why that should be any different for free movement rights protected by the Citizenship Directive.

The explanation for this part of the Norwegian observations appears to lie in the desire for a ruling from the CJEU that intervenes in the current conflict between the Norwegian government and the EFTA Court concerning whether the Citizenship Directive confer derived rights of residence for third country nationals in the EEA State of which their sponsors are nationals (see the abovementioned Cases E-27/13 Gunnarsson and E-28/15 Jabbi and the pending "rematch" in Case E-4/19 Campbell). In a rather extraordinary move, the Norwegian government invited the CJEU to rule that rights based solely on Article 21 TFEU fall outside of the scope of the EEA Agreement. Obviously, there would be no reason for the CJEU to rule on this if the court was to conclude that Article 36 EEA was applicable in the case.

Furthermore, Norway argued that the Surrender Procedure Agreement that Iceland and Norway have concluded with the EU is 'a regular international treaty' that forms no part of EEA law, and which cannot be interpreted in the same way as the EU Framework Decision on the European arrest warrant and the surrender procedures between EU Member States. Even if the wording is similar, the context and objective is different. According to the Norwegian government, the Surrender Procedure Agreement lacks both the mutual trust objective of the EU Framework Decision and the overarching objective of an area of freedom, security and justice without internal frontiers stated in Article 3(2) TEU. Whereas Article 1(2) of the EU Framework Decision refers to 'the principle of mutual recognition', the Surrender Procedure Agreement only refers to 'mutual confidence' in its preamble. As a result, the priority that the ruling in *Petruhhin* gives to a request based on the EU Framework Decision above a request from a third country, should not be extended to requests based on the Surrender Procedure Agreement.

Returning to the EEA Agreement, the Norwegian government also found it pertinent to state that the obligation to facilitate cooperation enshrined in Article 3 EEA is less far-reaching than the principle of sincere cooperation of Article 4 TEU.

In short, the view of the Norwegian government was that the EEA Agreement should be interpreted as not offering an Icelandic (or Norwegian!) citizen the same protection against extradition to Russia as that which EU law offers EU citizens.

### 2.3 The Opinion of the CJEU's Advocate General

In his **Opinion** to the Grand Chamber, Advocate General Tanchev highlighted the 'multi-layered' complexity of the case, and thus indirectly the complexity of the legal relationship between the EU and the EEA/EFTA States. However, the Advocate General immediately identified Article 36 EEA as the legal basis to solve the case, noting the material put before the Court at the hearing made clear that I.N. was a recipient of tourist services at the time of his arrest. Just like its template in Article 56 TEU, Article 36 EEA includes the freedom for the recipients of services to go to other EEA States in order to receive services there, and tourists are to be regarded as recipients of services.

Consequently, there was no need for the Advocate General to assess whether the Schengen acquis as such entails a similar right to free movement (as apparently suggested by the Croatian Supreme Court in its referral), nor whether the Citizenship Directive does so (as argued by I.N., Iceland and the Commission). However, despite noting that the debate on whether rights afforded to EU citizens under Article 21 TFEU are transferable to EEA nationals was irrelevant to I.N.'s case, the Advocate General added by way of an *obiter dictum* that

*'scepticism on the relevance of case-law elaborated by the Court exclusively based on Article 21 TFEU, a sample of which is mentioned by the Commission at point 75 above, would seem to be founded, given that Article 21 TFEU entered the treaties in the Treaty of Lisbon of 2007, well after the entry into force of the EEA Agreement on 1 January 1994.'*

The 'sample' mentioned by the Commission was the judgment in **Case C-456/12 O. and B.**, in which the CJEU ruled that the Citizenship Directive does not confer derived rights of residence for third country nationals in the Member State of which their sponsors are nationals, but that such a derived right flows from Article 21(1) TFEU. The Norwegian government will surely use the Advocate General's dictum in the attempt to get the EFTA Court to reconsider the differing interpretation of the directive in *Gunnarsson* and *Jabbi*. However, regardless of one's view of the EFTA Court's reasoning in those decisions, the Advocate General's reference to Article 21 TFEU having entered EU law well after the entry into force of the EEA Agreement hardly adds much to the debate. Firstly, the provisions were actually introduced by the 1992 Treaty of Maastricht (Article 8a thereof), which was signed *before* the signature of the EEA Agreement. Secondly, and in any event, the crux of the 'Jabbi-debate' remains whether it is justified to interpret the Citizenship Directive, as incorporated into the EEA Agreement by the EEA Joint Committee in 2007, more expansively in the EEA than in the EU due to differences in the legal context, and that question cannot be answered by a simple reference to the existence of a different context.

Returning to the case at hand, the Advocate General relied on *Petruhhin* to confirm that a restriction on free movement could be justified by the desire to combat the impunity of a person who is present in a territory other than that in which he has allegedly committed an offence. This led him to the crux of the case: Whether use of the Surrender Procedure Agreement that Iceland and Norway have concluded with the EU constitutes an alternative means to prevent impunity which is less prejudicial to the exercise of the right to freedom of movement than extradition to a third State. Or put differently: Whether the CJEU's assessment of the EU Framework Decision on the European arrest warrant and the surrender procedures between EU Member States in *Petruhhin* could be extended to the Surrender Procedure Agreement.

Here too, the Norwegian government's eagerness to limit the reach of EEA law brought about an assessment from the Advocate General which may come back to haunt the EEA/EFTA States:

*'I agree with arguments made by Norway at the hearing that the principle of mutual trust, as it has come to evolve in the European Union since the Lisbon Treaty of 2007, has no application in EEA law. Notwithstanding the sui generis nature of the EEA legal system, and the proximity of the relations between EFTA and EU Member States described by ESA ..., and the provisions of the EEA Agreement referred to by the Commission ... on the privileged relationship of the EEA with the EU, the fact remains that mutual trust prior to the Lisbon Treaty was, in relative terms, in its infancy. As Norway notes ..., Article 3(2) TEU has no counterpart in the EEA Agreement.'*

However, again, the Advocate General opined that this difference between EU and EEA law was of no relevance to I.N.'s case, as the ruling in *Petruhhin* could not be understood to suggest that recourse to an European Arrest Warrant is the only alternative on which an accused can rely when a Member State invokes avoidance of impunity as a justified limitation to free movement and, furthermore, that the EU-Iceland/Norway Surrender Procedure Agreement indeed provides an alternative that guarantees against impunity to the same or similar extent as extradition.

Nevertheless, as Iceland had not formally requested the surrender of I.N., the Advocate General considered it premature to rule on whether Croatia should send I.N. back to Iceland. Instead, the Advocate General turned his attention to the fundamental rights protecting I.N. from exposure to conditions of inhuman and degrading treatment or punishment. As noted by the Advocate General, I.N. was protected from an extradition exposing him to inhuman and degrading treatment by no less than three legal instruments – the European Convention of Human Rights (ECHR), the EU Charter of Fundamental Rights and the EEA Agreement. By way of a reference to the case-law of the EFTA Court, the Advocate General acknowledged that the ECHR is a long-established source of EEA law, and that the Contracting Parties to the EEA Agreement are bound to fundamental rights when they derogate from EEA law. As the case-law of the CJEU makes clear that also the prohibition of inhuman or degrading treatment laid down in Article 4 of the EU Charter corresponds to that laid down in Article 3 of the ECHR, the Advocate General could conclude that the (thorny) issue of differences in the standard of protection by the three instruments did not arise in I.N.'s case.

In an interesting supplementary remark, the Advocate General added that Article 6 of the ECHR also protected I.N. against extradition to a third State where he would run a real risk of being exposed to a flagrant denial of justice, and added that Article 47 of the EU Charter ought to be interpreted accordingly.

For the Advocate General, the final question was then the importance that the Croatian Supreme Court had to attach to the fact that Iceland had granted I.N. asylum on the ground that he was indeed at risk of suffering inhuman and degrading treatment in Russia. This led to a detailed assessment of the agreements that links Iceland, directly and more indirectly, to the EU's common asylum system. Highlighting Iceland's participation in the **Dublin III Regulation**, the **Eurodac Regulation**, and the **European Asylum Support Office**, and drawing in Iceland's broader participation in the Schengen *acquis* as a Schengen Associated State, the Advocate General opined that Croatia and Iceland are bound to an obligation of

mutual trust that presupposes that the Dublin III Regulation is correctly applied in Iceland and establishes a presumption that Iceland's decisions to grant I.N. asylum was sound.

#### 2.4 The ruling of the Grand Chamber

The ruling of the Grand Chamber follows the approach of the Advocate General, but puts even more emphasis on the character of the relationship between Iceland and the EU, avoids any remarks that may be understood to 'talk down' the EEA Agreement or any of the other agreements that links Iceland to EU law, and strengthens even further the evidentiary value of the asylum decision made by Icelandic authorities.

Starting with the relationship between Iceland and the EU, the CJEU stated that:

*'... the Republic of Iceland has a special relationship with the European Union, which goes beyond economic and commercial cooperation. It implements and applies the Schengen acquis, as the referring court observes, but it is also a party to the EEA Agreement, participates in the common European asylum system and has concluded the Agreement on the surrender procedure with the European Union.'*

This 'special relationship' (French: 'relations privilégiées') was then later in the judgment linked to the interpretation of the EEA Agreement, as the Grand Chamber confirmed that the EEA Agreement aims at 'the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States' and that it is for the CJEU to ensure that common EU/EEA rules are interpreted uniformly. This led the Grand Chamber to conclude, as suggested by the Advocate General, that Article 36 EEA is to be interpreted in line with Article 56 TEU and therefore includes the freedom for EEA citizens to go to other EEA States in order to receive tourist services there.

Even more importantly, the Grand Chamber proceeded to let the proportionality test under Article 36 EEA be influenced by the other agreements between the EU and Iceland and, conversely, to let the interpretation of those agreements be influenced by the 'special relationship' of which the EEA Agreement is the cornerstone. Rather than distinguishing between the EEA Agreement on the one hand and the other agreements on the other, as suggested by the Norwegian government, the CJEU opted for a holistic approach where all the agreements form part of one special relationship, and where that special relationship informs the interpretation of them all – in line with their common objective to extend various parts of EU law to the relevant EEA/EFTA State(s).

Accordingly, by way of an introduction to the assessment of whether *Petruhhin* could be applied by analogy in the EEA, the Grand Chamber found it:

*'appropriate to add that not only the fact that the person concerned has the status as a national of an EFTA State, which is a party to the EEA Agreement, but also the fact that that State implements and applies the Schengen acquis, renders the situation of that person objectively comparable with that of an EU citizen to whom, in accordance with Article 3(2) TEU, the Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured.'*



Thus, the combination of the EEA Agreement and the Schengen Association Agreement allows the CJEU to preserve homogeneity between EU and EEA law, despite the fact that Article 3(2) TEU has no counterpart in the EEA Agreement (as highlighted by the Norwegian government and acknowledged by the Advocate General). By implication, the CJEU must be presumed to extend the homogeneity principle of EEA law to the Schengen Associations Agreement(s), as the situation of I.N. would otherwise hardly be 'objectively comparable' to that of an EU citizen.

The same approach is to be found in the CJEU's assessment of the evidentiary value of the asylum decision made by Icelandic authorities in I.N.'s case. As mentioned above, the Advocate General opined that Croatia and Iceland are bound to an obligation of mutual trust that presupposes that the Dublin III Regulation is correctly applied in Iceland and establishes a presumption that Iceland's decisions to grant I.N. asylum was sound. The CJEU goes even further, however, when it states that in the absence of 'significant changes' in the situation in Russia, or substantial and reliable information to demonstrate that I.N. obtained asylum by concealing the fact that he was subject to criminal proceedings in Russia, the existence of a decision of the Icelandic authorities granting I.N. asylum had to lead the referring court to refuse extradition, pursuant to application of Article 19(2) of the **EU Charter of Fundamental Rights**. Of particular importance for the EEA/EFTA States is the fact that the CJEU essentially obliges the Croatian Supreme Court to recognise the Icelandic decision without even bothering to recall that Iceland is not an EU Member State. Here too, the CJEU simply takes for granted that Iceland's participation in the Common European Asylum puts in on the same footing as the EU Member States, including when it comes to mutual recognition of asylum decisions.

Equally telling is the CJEU's assessment of the Surrender Procedure Agreement. Disregarding completely the Norwegian government's view of that agreement as a 'regular international treaty' that cannot be interpreted in the same way as the EU Framework Decision on the European arrest warrant and the surrender procedures between EU Member States, the CJEU equates those two instruments in the assessment of the protection that the free movement rights of EU/EEA law offers against extradition to third States. In the CJEU's laconic observation of the provisions of the Surrender Procedure Agreement as 'very similar to the corresponding provisions of Framework Decision', one may perhaps even be tempted to see some wonder at the approach suggested by the Norwegian government.

Be that as it may, the CJEU's conclusion was very clear also on this point: If the Croatian Supreme Court somehow should come to the conclusion that significant changes in the human rights situation in Russia has opened up for extradition of I.N., the *Petruhhin* ruling is to be applied by analogy. Hence, upon request, Croatia is obliged to surrender I.N. to Iceland, in accordance with the provisions of the Surrender Procedure Agreement, provided that the Iceland has, as a matter of principle, jurisdiction to prosecute a person such as I.N. for the relevant kind of corruption even if committed outside its national territory.

### 3. Analysis – a 'special relationship' built on a patchwork of agreements

The case of *I.N.* makes abundantly clear just how complex the legal relationship between the EU and the EEA/EFTA States have become. Further complexity is brought about by the fact that there are important differences in the number of agreements that each of the three EEA/EFTA States has concluded with the EU. To name just one example, Liechtenstein is not a party to the Surrender Procedure Agreement that proved to be decisive in *I.N.*, but it is a Schengen Associated State, and as such bound by



the **1996 Extradition Convention** which at long last entered into force in 2019. If this is sufficient to extend the ruling in *I.N.* to a Liechtenstein citizen in a similar situation, in particular in light of Liechtenstein's **reservations** to the Convention, remains open.

The complexity that faced the CJEU in *I.N.* is the result of the EEA/EFTA States having continually sought to connect themselves to many aspects of EU cooperation that are not covered by the EEA Agreement, through new agreements. With a somewhat self-centred but at the same time refreshingly critical perspective, the independent Norwegian EEA Review Committee of 2010-2012 described this as follows in its **final report** to government:

*'The accumulation of Norway's agreements could be described as a particularly "Norwegian" form of association with the EU, similar to a patchwork quilt, which has gradually grown as new agreements have been added on to it, with no overall framework or plan. In fact, Norway's relationship with the EU consists of a multiplicity of diverse agreements and provisions that are not formally connected, and that have evolved over time without having been planned, and with no clearly formulated design for what it should end up like.'*

As demonstrated well by the case of *I.N.*, this *ad hoc* patchwork approach is shared by Iceland. The same holds true for Liechtenstein and indeed also Switzerland. Consequently, the CJEU's holistic approach in *I.N.* to the Icelandic version of this patchwork is of considerable interest to all of the four EFTA States.

The essence of the Grand Chamber judgment in *I.N.* is that the CJEU is prepared to consider the EEA/EFTA States, and thus their citizens, as 'insiders' rather than 'outsiders' also in the cases where the application of EEA law is affected by parts of EU law that fall outside the EEA Agreement, but that are covered by other agreements between the EU and the involved EEA/EFTA State. Notwithstanding the Norwegian government's attempt to argue otherwise, this approach would appear to be fully in line with the various agreements' character as international treaties. Treaties are to be interpreted in line with their object and purpose (Article 31 of the Vienna Convention on the Law of Treaties), and the object and purpose of not only the EEA Agreement, but also the other agreements that associates the EEA/EFTA States to various parts of EU law, is just that – to extend those parts of EU law, as interpreted by the CJEU, to the EEA/EFTA States. As demonstrated by the judgment in *I.N.*, the 'gravitational pull' of the homogeneity objective of the EEA Agreement is now so strong that if the EEA/EFTA States really want a new agreement with the EU to reproduce only the wording, not the content, of a given part of EU law, they will have to say so explicitly (whether the EU would want to enter into such an agreement is another matter).

The Grand Chamber's holistic and 'EU like' approach is supported also by reasons of legal certainty and sheer practicability. The higher the number of exceptions and peculiarities in the relationship between the EU and the EEA/EFTA States, the harder it will be to make the EEA work in practice. The EEA law experts of the governments of the EEA/EFTA States may perhaps well feel able to handle a high number of such exceptions and peculiarities, but for everybody else this will be different. Even in the CJEU, with all its expertise, the knowledge of the peculiarities of the EEA is not always as good as the EEA/EFTA States hope for. Well-known examples of this are the remarks made more or less in passing in Cases **C-431/11 *UK v Council*** and **C-83/13 *Fonship*** that seemed to imply that Article 7(a) EEA

makes EU regulations directly applicable in the legal orders of all EEA States once incorporated into the agreement, which forced the EFTA Court to clarify that this is not the case (e.g. in [Case E-4/18 ESA v Iceland](#)). The lack of any follow up from the EU side in the EEA Joint Committee suggests that the EU acknowledges this particular peculiarity of EEA law. The point advanced here, however, is that the room for such EEA peculiarities must be considered as limited and that the EEA/EFTA States therefore ought to insist on deviations from homogeneity only in matters of great importance to them. What the remarks on Article 7(a) in *UK v Council and Fonnship* essentially demonstrate, and the judgment in *I.N.* now confirm, is that the CJEU approaches the EEA Agreement on the presumption that EU and EEA law is identical, so that the burden of proof lies with those arguing for a different solution in any given case. For the continued success of the EEA, this ‘default’ is important and something the EEA/EFTA States ought to want to preserve. Out of the two EEA/EFTA States appearing before the CJEU in *I.N.*, it is respectfully submitted that the Icelandic government appears to have had a better understanding of the need to preserve the long-term sustainability of the EEA than the Norwegian government.

The CJEU’s approach in *I.N.* needs to be taken into consideration also in the debate about future developments of the relationship between the EU and the EEA/EFTA States, and it may also be important for Swiss-EU relations. One important lesson is that the CJEU seems prepared to consider also the various agreements concluded between the EU and the EEA/EFTA States outside of the EEA framework as putting the EEA/EFTA States on the same footing as EU Member States, despite the fact that none of these agreements establish independent surveillance procedures equalling those found in the EEA Agreement (nor make use of ESA and the EFTA Court for that purpose). This will probably please those in the EEA/EFTA States who defend the current patchwork approach, as the upside of a possible “EEA 2.0” that gathers all the various agreements under the supervision of ESA and the EFTA Court is limited by the pragmatic and ‘EEA friendly’ approach of the CJEU. To a certain extent, one may say that the CJEU in *I.N.* both acknowledges the patchwork model and accepts it as workable, and that the result is a kind of judge-made (or at least judge-approved) EEA 1.1 as an alternative to academic dreams of a brand new EEA 2.0.

For Switzerland, a key question will be just how important the EEA Agreement is to the ‘special relationship’ that the CJEU sees between the EU and the EEA/EFTA States. Is the Swiss-EU agreement on the free movement of persons, which gives Swiss citizens the right to travel to EU Member States in order to receive services, combined with Swiss participation in the Common European Asylum System and the Schengen Association Agreement (including the abovementioned 1996 Extradition Convention), sufficient to guarantee a Swiss citizen in a similar situation the protection against extradition that the CJEU granted to *I.N.*? And if not, will the institutional set up of the still unsigned Framework Agreement suffice?

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Liechtenstein-Institut | [info@liechtenstein-institut.li](mailto:info@liechtenstein-institut.li) | [www.liechtenstein-institut.li](http://www.liechtenstein-institut.li)