NORWAY

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1. Introduction

The EU law principles of mutual trust, mutual recognition and the rule of law matter not only to the EU and its Member States, but also to third countries associated to the Union through international agreements. This is especially true for Norway, given the combined scope of the many agreements that link Norway to various parts of EU law. For almost thirty years now, Norway has been integrated into the EU internal market by the 1992 Agreement on the European Economic Area (EEA),[1] and as such been subject to, and benefitted from, the principle of mutual recognition.[2] With some caveats related to the institutional complexities of the EEA[3], the principle of mutual recognition works in much the same way within EEA law as within EU law – to the benefit of citizens and economic operators from both the EFTA-pillar and the EU-pillar of the EEA. Thus, the underlying issues of mutual trust between the national legal orders, especially as regards the rule of law and the effective judicial protection of fundamental rights, are essentially the same within the EEA as within in EU.

In Norway-EU relations, the EEA Agreement is supplemented by numerous other agreements, including several that cover fields where questions of mutual recognition, mutual trust and the rule of law are highly relevant. The list includes the agreements that link Norway to the

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[1] Agreement on the European Economic Area (EEA) [1994] OJ L1/3. For a general introduction in English, see HH Fredriksen and C Franklin, "On pragmatism and principles – the EEA Agreement 20 Years On", 52 [2015] *Common Market Law Review* 629. For all the details, see F Arnesen, HH Fredriksen HP Graver, O Mestad and C Vedder (eds.), *Agreement on the European Economic Area – a Commentary*, C.H.Beck et al (2018).

[2] By way of an example, see the EFTA Court's advisory opinion in Case E-4/20 *Tor-Arne Martinez Haugland and Others v the Norwegian Government* on the recognition of professional qualifications.

[3] E.g. in the field of competition law, where institutional problems related to cross-pillar recognition of decisions by the Commission and the EFTA Surveillance Authority has prevented the 2014 Damages Directive from being incorporated into EEA law. See further C Franklin, HH Fredriksen and IM Barlund, "National report on private enforcement of European competition law in Norway", in Bándi et al (eds.), *Private Enforcement and Collective Redress in European Competition Law*, Wolters Kluwer 2016, pp. 665-69 (XXVII FIDE Congress - Budapest 2016). Six years on, the directive is still stuck in the EEA Joint Committee.

Schengen area,[4] to the EU's common asylum system,[5] to the EU's arrest warrant and surrender procedure,[6] and to the EU rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[7]

In the seminal 2020 judgment in *I.N.*, the grand chamber of the CJEU held that the 2014 Agreement on the surrender procedure between EU Member States and Iceland and Norway was to be interpreted in line with the EU Framework Decision on the European arrest warrant and the surrender procedures between Member States.[8] A key question raised by the case was whether the Agreement on the surrender procedure meant that an Icelandic citizen arrested in an EU Member State due to an international wanted persons notice was shielded from extradition to a third country (*in casu* Russia) if his home state requested him to be surrendered to it instead. In *Petruhhin*, the CJEU had answered the same question in the affirmative within an EU law context, holding that the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law is less prejudicial to the exercise of the right to freedom of movement than extradition to a third State.[9] In *I.N.*, the CJEU held that the finding in *Petruhhin* could be applied by analogy to an Icelandic citizen, despite the fact that the EAW Framework Decision did not apply (paras. 71-74):

> Although Framework Decision 2002/584 does not apply to the Republic of Iceland, an EFTA State of which I.N. is a national, it must be recalled that that State, like the Kingdom of Norway, has concluded with the European Union the Agreement on the surrender procedure, which entered into force on 1 November 2019.
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> As is clear from its preamble, that greement seeks to improve judicial cooperation in criminal matters between, on the one hand, the Member States of the European Union and, on the other hand, the Republic of Iceland and the

[4] Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis (O.J. 1999, L 176/36).

[5] Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway (O.J. 2001, L 93/40)

[6] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (O.J. 2006, L 292/2)

[7] The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J. 2007, L 339/3).

[8] Case C-897/19 PPU *I.N.*, ECLI:EU:C:2020:262. For a much more thorough analysis of the case than what is permitted here, see the annotation by HH Fredriksen and C Hillion, The 'special relationship' between the EU and the EEA EFTA States and the free movement of persons in an extended area of freedom, security and justice", 58 (2021) *Common Market Law Review* 851-876.

[9] C-182/15 *Petruhhin*, EU:C:2016:630.

> Kingdom of Norway, in so far as the current relationships among the contracting parties, characterised in particular by the fact that the Republic of Iceland and the Kingdom of Norway are part of the EEA, require close cooperation in the fight against crime.
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> Furthermore, in the same preamble, the contracting parties to the Agreement on the surrender procedure have expressed their mutual confidence in the structure and functioning of their legal systems and their capacity to guarantee a fair trial.
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> In addition, it must be observed that the provisions of the Agreement on the surrender procedure are very similar to the corresponding provisions of Framework Decision 2002/584.

One reason why this judgment is of fundamental importance to the status of mutual trust under the Agreement on the surrender procedure was the fact that the Norwegian government argued before the CJEU that the preamble's reference to "mutual confidence" in the structure and functioning of their legal systems and their capacity to guarantee a fair trial was *not* to be equated to the EU law principle of mutual recognition referred to in Article 1(2) of the EAW Framework Decision.[10] The CJEU saw this differently, essentially securing homogeneous interpretation of the Agreement on the surrender procedure and the EAW Framework Decision.[11]

The CJEU followed this up in its 2021 judgment in *J.R.*[12] The case concerned the execution in Ireland of an arrest warrant issued by Lithuania based on a custodial sentence imposed by a Norwegian court. The CJEU reiterated Norway's "special relationship" with the EU and essentially equated a judgment from a Norwegian court to a judgment from an EU Member State.[13] Even clearer in this regard, however, was AG Kokott in her Opinion in the case, where she highlighted that Agreement on the surrender procedure meant that:

> "the European Union has expressed confidence in the Kingdom of Norway which reaches to the mutual confidence between Member States. In the case of this third State, it is therefore to be presumed, subject to rebuttal, that fundamental rights have already been protected hitherto and will also be protected in the future."[14]

Nevertheless, the complexities of the "Norway model" and their possible consequences for the reach of the EU law principles of mutual recognition and mutual trust in EU-Norway relations

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[10] See the Opinion of AG Tanchev, ECLI:EU:C:2020:128, paras. 57-59.

[11] The Norwegian government's pleadings in the case can only be explained by the desire of the then Minister of Justice from the right-wing Progress Party to limit the impact of the EU-Norway Agreements on Norwegian law, in particular criminal law and immigration law.

[12] Case C-488/19 *J.R.*, ECLI:EU:C:2021:206.

[13] Para. 60.

[14] Opinion of AG Kokott, ECLI:EU:C:2020:738, para. 61.

are not to be underestimated. The field of asylum law demonstrates this in no uncertain way, as Norway (and Iceland) participates in the Dublin system, but without having taken over the related Qualification Directive[15] or the Asylum Procedures Directive.[16] The abovementioned case of *I.N.* provided the CJEU with the opportunity to clarify the reach of mutual trust with regard the Dublin system, as I.N. was originally a Russian citizen granted asylum in Iceland. According to AG Tanchev, Iceland's association to the Dublin system entails that an EU Member States (*in casu* Croatia) is bound to trust that the Dublin III Regulation is correctly applied in Iceland and to presume that Iceland's decision to grant I.N. asylum was sound.[17] The CJEU went even further, however, when it stated that in the absence of "significant changes" in the situation in Russia, "the existence of a decision of the Icelandic authorities granting [I.N] asylum must... lead the competent authority of the requested Member State, such as the referring court, to refuse extradition, pursuant to application of Article 19(2) of the Charter".[18] The CJEU thus obliged the Croatian Supreme Court to recognize the Icelandic decision, taking for granted that Iceland's participation in the Dublin system puts it on the same footing as EU Member States when it comes to mutual recognition of asylum decisions. As Norway's and Iceland's association to the Dublin system is based upon the same agreement, this finding is equally relevant to Norwegian asylum decisions.

In the case of *L.R.*, however, the absence of the Qualification Directive and the Asylum Procedures Directive from the Norway-EU Agreements led the CJEU to conclude that German authorities could not reject as inadmissible an application for international protection with reference to the fact that Norway had rejected a previous application for refugee status by the applicant.[19] AG Saugmandsgaard Øe had argued that German authorities should be able to rely on the Norwegian decision as long as it could be verified that the Norwegian asylum system provides for a level of protection for asylum seekers equivalent to that laid down in Directive 2011/95[20], but the Court saw this differently:

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[15] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

[16] Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

[17] Opinion of AG Tanchev, paras. 101-110.

[18] Paras. 63-68 of the judgment.

[19] Case C-8/20 *L.R.*, ECLI:EU:C:2021:404.

[20] Opinion of AG Saugmandsgaard Øe, ECLI:EU:C:2021:221, paras. 89-101.

> "While the Agreement between the European Union, Iceland and Norway provides, in essence, for the implementation, by the Republic of Iceland and the Kingdom of Norway, of certain provisions of the Dublin III Regulation and states, in Article 1(4), that, for that purpose, references to 'Member States' in the provisions reproduced in the annex to that agreement are to be understood to include those two third States, the fact remains that no provision of Directive 2011/95 or Directive 2013/32 is reproduced in that annex.
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> Even assuming that, as the referring court states, the Norwegian asylum system provides for a level of protection for asylum seekers equivalent to that laid down in Directive 2011/95, that fact cannot lead to a different conclusion.
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> In addition to the fact that it is clear from the unequivocal wording of the relevant provisions of Directive 2013/32 that, as EU law currently stands, a third State cannot be treated in the same way as a Member State for the purpose of applying Article 33(2)(d) of that directive, such treatment cannot depend, on the risk of affecting legal certainty, on an assessment of the specific level of protection of asylum seekers in the third State concerned."[21]

Among the reasons why the status of the EU law principles of mutual trust, mutual recognition and the rule of law under the various EU-Norway agreements are not straightforward, are the fact that neither agreement includes any references to the EU Charter of Fundamental Rights nor provisions mirroring Articles 2, 6, 7 or 19 TEU.

Within the scope of the EEA Agreement, the EFTA Court has arguably remedied the situation by recognising fundamental rights as unwritten principles of EEA law,[22] but there are limitations on the Court's jurisdiction which may cast doubt on whether the judicial protection on offer in the EFTA-pillar does live up to the standards of EU law in all scenarios.[23] So far, the CJEU's approach to the EEA Agreement has been guided by trust in the legal orders of the participating EFTA States,[24] but it cannot be excluded that the Court's principled approach in the cases concerning the rule of law-crisis in certain EU Member States could have spill-over

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[21] Paras. 45-47 of the judgment.

[22] See, e.g., Case E-15/10 *Posten Norge* (principle of effective judicial protection) and Case E-21/16 *Pascal Nobile* (principle of judicial independence). See also the acknowledgment from the European Court of Human Rights in Case 45487/17 *LO and NTF v. Norway*, para. 107: "… the Court observes […], as clearly stated by the EFTA court […], that fundamental rights form part of the unwritten principles of EEA law".

[23] The EFTA Court has not been given jurisdiction to assess the legality of the decisions of the EEA Joint Committee, neither in direct actions nor by way of preliminary references from national courts, see Articles 36 and 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. See on this Fredriksen and Franklin, note 1 *supra*.

[24] See, e.g., Case C-368/05 P *Polyelectrolyte Producers Group*, ECLI:EU:C:2006:771, para. 68, extending the reasoning in Case C-50/00 P *Unión de Pequeños Agricultores*, ECLI:EU:C:2002:462, to the EEA EFTA States (*in casu* Norway).

effects on an Agreement that lacks provisions mirroring e.g. Articles 2 and 19 TEU. In particular in cases where the validity of an EEA-relevant EU legal act might be questioned *qua EU law*, it is an unfortunate fact that the judicial protection on offer within the EFTA-pillar is inferior to the situation within the EU, as neither the national courts of the EFTA States nor the EFTA Court has been given the opportunity to refer such questions the CJEU for a preliminary ruling. If an aggrieved EU citizen should bring this matter before the CJEU, e.g. by way of an action seeking annulment of the Commission's decision to agree in the EEA Joint Committee to the implementation of the said legal act into the EEA Agreement, the reasoning directed at Poland in Case C-619/1 could cause difficulties. As the European Union is a union based on the rule of law "in which individuals have the right to challenge before the courts the legality of any decision or other national measure concerning the application to them of an EU act",[25] is it acceptable to the CJEU that that is not necessarily the case within the EEA?[26]

Outside the scope of the EEA Agreement, the lack of supranational control mechanisms and the patchwork character of the entire "Norway model" bring about further uncertainty.

This national report is not the proper occasion on which to pursue the applicability of the principle of mutual trust to the EU-Norway Agreements (or indeed to EU relations with other neighbouring countries), but this rather lengthy introduction hopefully explains why a rather selective approach to the questionnaire is pursued in the following, and why we have taken the liberty to address certain issues not covered by the questions put. Some might argue that the legal framework for a Norwegian report on the EU law principles of mutual trust and the rule of law is so different from that of the EU Member States that it will contribute little to the internal EU law debate on these issues. We are of a different opinion, however, as the whole purpose of the EEA Agreement and several of the other EU-Norway agreements is to integrate Norway into various parts of EU law, putting Norwegian authorities and courts on par with national authorities and courts within the EU.

To an European audience, the two most relevant developments in Norway as regards the rule of law crisis in certain EU (and thus EEA) Member States are i) the debate about rule of law conditions for funding from the EEA Financial Mechanism (the EEA equivalent to the EU Structural and Investment Funds) and ii) the Norwegian Supreme Court's rulings in 2020, 2021

[25] Case C-619/18 *European Commission v Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, para. 46.

[26] The obvious solution to this problem is for the EEA EFTA States to make use of Article 107 EEA to open up for preliminary references to the CJEU on questions of the validity of EEA-relevant EU legal acts from either national courts or from the EFTA Court.

and 2022 on whether to enforce European Arrest Warrants from Poland. Accordingly, these matters will be put front and centre in the following.

2. A European Concept of the Rule of Law, but centred on the ECHR rather than on EU law

According to its Article 2, the Constitution of the Kingdom of Norway "shall ensure democracy, a state based on the rule of law and human rights". The constitutional basis notwithstanding, the dominant concept of the rule of law in Norway is heavily influenced by international sources, in particular by the case law of the European Court of Human Rights (ECtHR). Most, if not all, debates about core elements of the concept – such as legality, legal certainty, access to justice, the independence of the judiciary, respect of human rights, protection of the democratic process etc. – are centred on Norway's obligations under the European Convention of Human Rights (ECHR). The ECHR is incorporated as such into Norwegian law, through the 1999 Human Rights Act, with precedence over any conflicting legislative provisions.[27] In addition, constitutional amendments in 2014 introduced a new chapter on human rights heavily influenced by the ECHR.[28] Unsurprisingly, the Supreme Court has subsequently stated that the new human rights provisions in the Constitution are to be interpreted in light of their international models.[29] As a supplement to the ECHR and the case law of the ECtHR, the Venice Commission's 2016 Rule of Law Checklist has also served as a benchmark for the debate in Norway.[30]

As a result of the ECHR-centred approach to the concept of the rule of law, relatively little attention has been paid to the CJEU's recent case-law on the rule of law within the EU legal order. The prevailing view is that as long as Norway fulfils the rule of law obligations flowing from the ECHR, then any requirements that might follow from the EEA Agreement or

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[27] Act of 21 May 1999 No 30 relating to the strengthening of the status of human rights in Norwegian law, Sections 2 and 3.

[28] The occasion was the celebration of the 200th anniversary of the Constitution. (The Norwegian constitution of 1814 is one of the oldest constitutions still in force in the world, second only to the constitution of the United States.)

[29] E.g. HR-2015-206-A, para. 57. For an introduction in the English language, see the contribution by Justice Arnfinn Bårdsen to a seminar on comparative constitutionalism in Oslo 21-22 November 2016: "Interpreting the New Norwegian Bill of Rights", available from https://www.domstol.no/no/hoyesterett/om/statistikk/artikler/bardsen/interpreting-the-new-norwegian-bill-of-rights/. (Bårdsen is now the Norwegian judge at the ECtHR.)

[30] European Commission for Democracy through Law, *Rule of Law Checklist*, adopted by the 106th plenary session, Venice 11-12 March 2016.

any of the other EU-Norway agreements will also be fulfilled. For the same reason, the prevailing view is presumably that any potential rule of law problem related to any of the EU-Norway agreements viewed in isolation (such as the limited jurisdiction of the EFTA Court) is remedied by the jurisdiction of Norwegian courts to rule upon the effects of the agreements within the Norwegian legal order (and that the EU side, including the CJEU, will see this in the same way). Accordingly, to the extent that CJEU's recent case law on the rule of law has attracted attention in Norway, it is rather out of concern that the CJEU cannot be trusted as a guardian of the rule of law because it puts too much emphasis on the principle of mutual trust, thus requiring EU member states (and by extension Norway) to trust the courts and/or authorities of certain member states where such trust might not be justified. An example of this critique is found in the debate on whether to enforce European Arrest Warrants from Poland, see section 4 *infra*.

3. Instruments for enforcing and protecting the rule of law – the debate about the rule of law conditions for funding from the EEA Financial Mechanism

The EEA Agreement required from the EEA EFTA states that they establish a Financial Mechanism to help reduce the economic and social disparities between the EU regions, and ultimately to promote "a continuous and balanced strengthening of trade and economic relations between the Contracting Parties". [31] The Mechanism has operated on the basis of successive protocols to the EEA Agreement, each governing a particular period of activities.[32]

Covering the latest period (2014-2021), Protocol 38C envisages various connections between EEA funding and respect for the rule of law. First, and that was a novelty at the time of its conclusion, it includes "civil society, good governance, fundamental rights and freedoms", among priority sectors for country specific allocations, alongside the other usual economic, social and environmental priorities.[33] Second, it requires that 10% of the total of the country specific allocations are set aside for a fund for civil society.[34] Third, and perhaps more importantly for the observance of the rule of law, the same Protocol stipulates that "[a]ll pro-

[31] See Articles 115-117 EEA Agreement.
[32] Article 117 EEA; Further on the establishment and operation of the Mechanism, see P Christiansen, "Part VIII: Financial Mechanism" in *Agreement on the European Economic Area – a Commentary*, *supra* note 1, 891, esp. 894-901 as well as the Mechanism's informative website www.eeagrants.org. For the period 2014-2021, a total of €2.8 billion is provided by the three EEA EFTA States to a select group of 16 EU member states.
[33] Article 3(1)(d) Protocol 38C
[34] Article 3(2)(b) Protocol 38C. See also Article 10(2)(b) Protocol 38C.

grammes and activities funded by the EEA Financial Mechanism … shall be based on the common values of respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights including the rights of persons belonging to minorities".[35]

While purporting to enhance the economic and social cohesion within the EU, the EEA Financial Mechanism could also contribute to ensuring and bolstering the observance of common values, including the rule of law, in the EEA context in general, and in the EU "beneficiary states" in particular.[36] The formulation of the requirement that all Financial Mechanism activities be based on common values is seemingly inspired by the post-Lisbon Article 2 TEU that enshrines the Union's founding values with which Member States must comply as "a condition for the enjoyment of all of the rights deriving from the application of the Treaties to [them]".[37] Including such a clause, the parties to the EEA Agreement indeed agreed that those values would constitute both an objective as well as a condition for the operation of the Financial Mechanism. Its formulation comes close to an "essential element clause" that determines the whole operation of the Financial Mechanism. This is at least the way it has been understood as such by the Government of Norway,[38] which provides 95% of the funds. Such a development is particularly noteworthy given that the connection the Financial Mechanism establishes between financial support and common values predates the protracted EU adoption of its own conditionality mechanism in 2020, whereby EU financial transfers are now subject to the recipient states' observance of various principles, including the rule of law.[39]

Indeed, EEA financial support has been suspended on several occasions or withdrawn altogether, against the backdrop of EU institutions having established various beneficiary states' structural violations of the rule of law, viz. Hungary and Poland.[40]

Thus, in reaction to controversial legislative developments concerning the Justice system of Poland, which is the main beneficiary of EEA funding, the Norwegian Courts Administration withdrew from its cooperation with its Polish counterpart under the Justice programme

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[35] Article 1(2) Protocol 38C.

[36] Under the current regime, 15 Member States are "beneficiary states" of EEA funding: viz. XXX.

[37] Case C-896/19, *Repubblika*, EU:C:2021:31.

[38] https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=80886

[39] See Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJEU L433I, 22.12.2020, p. 1–10).

[40] As epitomised by the Commission's activation of the procedure of Article 7(1) TEU against Poland, and the European Parliament's activation of the same procedure against Hungary. See also the various infringement procedures which the Commission has been launching over the last years against Poland, Hungary - but also Romania - for breaching their obligations to provide effective judicial remedies (XXX).

financed under the EEA Financial Mechanism.[41] Following that decision, the Norwegian Government decided not to sign a planned agreement with Poland on cooperation in the justice sector under the EEA Financial Mechanism.[42] Though not formally related to the rule of law, EEA financial support was also suspended in relation to several Polish municipalities, provinces and country councils after they had declared themselves "LGBT- free zones".[43] In answer to a question in the Norwegian Parliament, the then Norwegian Minister of Foreign Affairs declared that "[t]hese municipalities cannot be considered to be able to fulfill the general objectives of actively sharing and promoting fundamental rights and freedoms", adding that they would "not receive … support as long as these declarations are available". [44]

Hungary also saw its EEA funding suspended and eventually withdrawn. While not a formal reaction to the otherwise established deterioration of the rule of law in the country, the suspension of funding was not entirely unrelated to it either. In 2014, Hungary decided unilaterally to change the agreed modalities for the distribution of EEA funds, so as to gain more control on the latter, in particular towards local civil society.[45] The conflict escalated after the Hungarian Police raided the offices of NGOs that had benefited from EEA funding.[46] Without agreement on the terms of EEA financial transfers,[47] the entire country allocation for Hungary under Protocol 38C was eventually withheld, an outcome to which the Orban government has bitterly reacted. Mimicking the obstructive conducts it has adopted in the EU context, Hungary has attempted to upset the institutional functioning of the EEA, e.g. by preventing the adoption the EEA Council joint conclusions,[48] while speciously arguing for an end to Norway's access to the single market on the basis of the EEA.[49]

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[41] Holmøyvik, Eirik: *For Norway it's Official: The Rule of Law is No More in Poland, VerfBlog,* 2020/2/29, https://verfassungsblog.de/for-norway-its-official-the-rule-of-law-is-no-more-in-poland/, DOI: 10.17176/20200229-214621-0.

[42] See: https://www.regjeringen.no/en/historical-archive/solbergs-government/Ministries/ud/news/2020/reconsider_cooperation/id2691680/

[43] https://notesfrompoland.com/2021/02/03/polish-region-loses-millions-in-norway-grants-due-to-anti-lgbt-resolution/ ; https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=80886

[44] Ibid. Our translation.

[45] https://eeagrants.org/news/suspension-of-eea-and-norway-grants-to-hungary

[46] https://euobserver.com/eu-political/125537 ; https://www.reuters.com/article/hungary-norway-idUSL5N0RA1TV20140909

[47] https://www.politico.eu/article/hungary-loses-norwegian-funds-as-rule-of-law-concerns-intensify/

[48] https://hungarytoday.hu/hungary-vetoes-final-declaration-of-eea-meeting/ ; http://www.nordiclabourjournal.org/nyheter/news-2021/article.2021-11-26.4825957081

[49] This was made clear by Hungarian authorities in summer 2021; see also https://hungarytoday.hu/norway-hungary-has-no-basis-to-take-legal-action-over-norway-grants/

This extraordinary situation, and the overall experience acquired in the implementation of Protocol 38C, will no doubt colour the on-going negotiations for establishing a new Protocol for the period starting in 2022.[50] The Norwegian Government has made clear its intention to beef up the significance of the common values, particularly the rule of law, in the operation of the Mechanism,[51] considering also the new tools that the EU has established to safeguard it, including the 2020 conditionality mechanism.

The articulation of a stronger rule of law conditionality mechanism in the context of the EEA FM will raise the question of its interaction with those EU's devices to safeguard the rule of law. One option would be to link the operation of the former with that of the latter, so that if the EU suspends financial transfer to an EU Member State that is also EEA Beneficiary State, or if the EU finally adopts a decision under Article 7(1) or 7(2) TEU, the EFTA States should then be automatically able to suspend the transfer of EEA funds, too. That option would then mean that the EEA funding is essentially subject to the same conditions as EU funding, and EU institutions interpretation of those conditions and compliance therewith. Alternatively, the EFTA states may opt for a distinct conditionality mechanism which, though referring to the common values as Protocol 38C did, would nevertheless operate entirely on the basis of the EFTA states' discretion, namely irrespective of whether the EU takes measures or not. A third option would blend the two previous options, thus permitting the EFTA states to rely on EU measures to safeguard the rule of law to justify the suspension EEA funding, while keeping the possibility to decide autonomously to sanction first, as they have successfully done under the current dispensation.

4. Impact on Mutual Recognition and Mutual Trust – the debate about the enforcement of European Arrest Warrants

4.1 Introduction

As noted in the introduction, Norway is associated to the European Arrest Warrant by virtue of the 2006 Agreement between the EU on the one hand and Iceland and Norway on the other on the surrender procedure between EU Member States and Iceland and Norway (the EU-IS/NO Surrender Procedure Agreement). After a lengthy ratification process on the EU side, the Agreement finally entered into force in 2019. In the Norwegian legal order, the Agreement is

[50] Due to long and difficult negotiations, the implementation of the earlier periods has always lagged behind their official starting time and end. Thus, the Financial Mechanism for 2014-2021 is still operational.

[51] https://www.regjeringen.no/en/aktuelt/address_eu_matters/id2911181/

implemented by the 2012 Arrest Warrant Act that entered into force on the same day as the Agreement.[52] The Surrender Procedure Agreement largely mirrors the EAW Framework decision. Still, in contrast to the EAW Framework Decision, the Surrender Procedure Agreement expressly refers to the ECHR in both its preamble and in Article 1(3). The latter provision states that the Agreement "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in the European Convention on Human Rights …" The simple reason for this adaptation is the fact that neither Article 6 TEU nor the EU Charter of Fundamental Rights has been adopted by Norway (or Iceland). It reflects the ECHR-centred approach to fundamental rights and the rule of law in Norway. As a result, the Arrest Warrant Act Section 8 (2) obliges Norwegian authorities to refuse an arrest warrant "if surrender would be in breach of the European Human Rights Convention".[53] The ECHR is *lex superior* to the Arrest Warrant Act, cf. the Human Rights Act section 3.

4.2 Case law of the Supreme Court of Norway

In March 2020, the Supreme Court decided its first case on the enforcement of an arrest warrant from Poland.[54] The Court, sitting in as a panel of three justices, questioned enforcement of the arrest warrant due to concern with the rule of law in Poland, focusing on a possible breach of Article 6 of the ECHR, but ultimately approved the surrender.

The appellant was a Polish citizen residing in Norway, suspected of committing four burglaries in Poland. Before the Supreme Court, he argued that the rule of law situation in Poland, especially after the amendments that entered into force in February 2020, had deteriorated to such an extent that enforcement of the arrest warrant would infringe his right to a fair trial, as guaranteed by Article 6 ECHR. The Supreme Court cited ECtHR case law and opined that the approach taken by the CJEU in Case C-216/18 *L.M.* was in compliance with the obligations flowing from the ECHR.[55] The Supreme Court proceeded to apply the two-step test developed by the CJEU in that case.[56] Citing extensively from recent reports from the Venice Commission, the Supreme Court held that there is "no doubt that the independence of the Polish judiciary and judges is threatened and subject to even more pressure now than before the amendments

[52] Act of 20 January 2012 No 4 relating to arrest and surrender to and from Norway for criminal offences on the basis of an arrest warrant.
[53] Arrest Warrant Act Section 8 (2).
[54] HR-2020-553-U. An unofficial English translation of the order can be found at the home page of the Supreme Court: https://www.domstol.no/en/supremecourt/rulings/2020/committee---criminal-cases/hr-2020-553-u/
[55] HR-2020-553-U, para. 11.
[56] HR-2020-553-U, para. 12.

[of 2020]".[57] It added, however, that general concerns does not suffice to prevent surrender as "case law from the European Court of Human Rights requires that there is a genuine risk that the very essence of the right to a fair trial is violated".[58] Crucially, the Supreme Court held that even if the judge who would be deciding in the criminal cases against the appellant should have been appointed in a politicised process or risks undue pressure or sanctions, "he or she may still be able to provide a fair trial in cases completely without political overtones or other factors giving reason to doubt his or her ability to act with independence and impartiality".[59] As the appellant had failed to provide evidence that there were circumstances in the case suggesting that he would not receive a fair trial, the Supreme Court upheld the decision from the Court of Appeal to enforce the arrest warrant from Poland.

Shortly after the decision in HR-2020-553-U, the same panel of three justices rejected another appeal in a Polish case, noting that no circumstances indicated that surrender to Poland would violate the appellant's right to a fair trial.[60] The panel referred to the order in HR-2020-553-U, without any further explanation considered necessary. The same approach was followed by other panels in a number of subsequent cases.[61]

Then, in October 2021, the Vestfold District Court opined that the situation in Poland had deteriorated to such an extent that a European Arrest Warrant from Poland could no longer be enforced.[62] The District Court did no object to the two-step test, but argued that the scale of the systemic problems was of such a magnitude that the evidence required under the individual assessment ought to be rather limited. It was noted that both the ECtHR and the CJEU had now concluded that the appointment procedure for Polish judges as well as the infamous Disciplinary Chamber violated European requirements as to the rule of law. The District Court concluded that the suspect had provided the evidence required to conclude that there were grounds to believe that his surrender to Poland would violate Article 6 ECHR.[63] After the Court of Appeal reversed that decision, and appeal was brought before the Supreme Court. Before it could

[57] HR-2020-553-U, para. 21.
[58] HR-2020-553-U, para. 22.
[59] HR-2020-553-U, para. 22.
[60] HR-2020-560-U.
[61] See *e.g*. HR-2020-1955-U and HR-2021-2367-U.
[62] TVES-2021-144871; Prof. Holmøyvik has commented on the decision in Verfassungblog: E. Holmøyvik: 'No Surrender to Poland', Verfassungblog, 2 November 2021, < https://verfassungsblog.de/no-surrender-to-poland/> visited 12 August 2022.
[63] TVES-2021-144871.

be decided, however, another case on an arrest warrant from Poland was admitted by the Supreme Court's Appeals Selection Committee and transferred to a chamber of five justices. The appellant in the latter case was a Norwegian citizen of Polish origin who was accused by Polish authorities of being involved in drug trafficking.

The Supreme Court upheld the approach taken in HR-2020-553-U, but only after a lengthy discussion of recent ECtHR and CJEU case-law and the status of the rule of law in Poland.[64] In contrast to the decision in HR-2020-553-U, the Supreme Court emphasised the importance of the principle of mutual recognition in the EAW.[65] With reference to CJEU Grand Chamber judgment in joined cases C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie*, the Supreme Court noted that the principle of mutual recognition constitutes the cornerstone of judicial co-operation in criminal matters within the EU, and added that this had to apply to the EU-IS/NO Surrender Procedure Agreement as well. The Supreme Court proceeded to explain that the Surrender Procedure Agreement has to be interpreted in line with the CJEU's interpretation of corresponding provisions of the EAW Framework Decision:

> "… CJEU case law relevant for the interpretation of the framework decision will also be relevant for the interpretation of the Parallel Agreement, and thereby also for the interpretation of the corresponding rules in the Arrest Warrant Act."[66]

As the CJEU had confirmed in *Openbaar Ministerie* that exceptions from the general rule on execution of arrest warrants must be interpreted strictly, the Supreme Court held that the same applied to the interpretation of the grounds for refusal in the Arrest Warrant Act. Intriguingly, the Supreme Court found it pertinent to add that section 10 of the Preamble to the EU's Framework Decision sets out that the EU Council pursuant to the rules in Article 7 TEU may suspend the implementation of the Framework Decision in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6 of the TEU.[67] The Court did not elaborate on this, however, as it simply noted that such a suspension of Poland has not been adopted.

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[64] HR-2022-863-A. An unofficial English translation of the order can be found at the home page of the Supreme Court: https://www.domstol.no/en/supremecourt/rulings/rulings-2022/supreme-court-criminal-cases/HR-2022-863-A/. After the order in this case, the appeal in the abovementioned case originating in the Vestfold District Court was summarily rejected by a panel of three justices, see HR-2022-1032-U.

[65] HR-2022-863-A, para. 17.

[66] Para. 20. Note that in the translation provided by the Supreme Court, the CJEU is referred to as the ECJ. We have taken the liberty to change that for reasons of coherence (here and in the following).

[67] Paras. 21.

Turning to the crux of the case, the question of whether enforcement of the arrest warrant would violate Article 6 ECHR, the Supreme Court stressed that it considered the CJEU's approach in *Openbaar Ministerie* compliant with ECtHR case law:

> CJEU case law clarifies the interpretation of the EU's framework decision in the cases where such grounds for refusal are asserted. As mentioned, this case law does not build directly on Article 6 of the ECHR, but on the parallel rule in the EU's Charter. However, the mentioned CJEU Grand Chamber judgment *Openbaar Ministerie* sets out in paragraph 56 that the CJEU's case law has "developed in the light of" that of the ECtHR under Article 6 of the ECHR.
>
> The way I read the CJEU's case law in this particular area, it sheds light and elaborates on – but does not limit – the obligations imposed by the ECtHR on the Convention States under Article 6 of the ECHR. Hence, there is reason to rely on the CJEU's case law also in the interpretation of section 8 subsection 2 of the Arrest Warrant Act, cf. Article 6 of the ECHR.[68]

The Supreme Court proceeded to apply applied the two-step test upheld by the CJEU in *Openbaar Ministerie*.

As to the first step of the test, the Supreme Court gave a highly critical assessment of the judicial situation in Poland, based on ECtHR and CJEU case law and rapports from the Venice Commission. However, the Court went even further than the ECtHR and the CJEU when concluding on the first step of the test as follows:

> "… the Polish judicial system undoubtedly suffers from *systemic and generalised deficiencies*. At a general level, these deficiencies create in my view a real risk of violations of the very core of the fundamental right to a fair trial. As the situation stands, Polish courts cannot be considered independent, including because many judges in the ordinary courts have not been appointed according to appropriate procedures. More important in our context, however, is the risk that the pervasive disciplinary system, in practice led by the Minister of Justice and directed at all judges in the country, prevents the judges from acting independently and impartially in each case."[69]

The decisive question was then whether there were substantial grounds for believing that the appellant ran a real risk of breach of his right to a fair trial because of these deficiencies (the second step of the test). The Supreme Court remarked that the systemic and generalised deficiencies in the Polish judicial system are now so extensive and pervasive that only a "relatively small amount of individual circumstances" are needed for an arrest warrant to be refused.[70] This

[68] Paras. 31 and 32.
[69] Para. 53.
[70] Para. 69.

means, according to the Court, that "it cannot be ruled out that arrest warrants also in more ordinary cases must sometimes be refused".[71] Nevertheless, in the concrete case before it, the Supreme Court considered the evidence that the appellant would not receive a fair trial in Poland to be too weak for the appeal to succeed.

4.3 Reactions and analysis

The Supreme Court's approach to arrest warrants from Poland has been met with criticism by scholars who question how systemic deficiencies of the scale found to exist in Poland can reasonably be held *not* to affect the right to a fair trial.[72] The critique is essentially a critique of the CJEU's two-step test as such, as it is argued that the second step of the test *de facto* erases the first step, thus undermining the importance of the general and systemic challenges to the rule of law in the assessment: The assessment of the general deficiencies becomes only a part of the overall assessment of whether there is a real risk of breach of the individual's right to a fair trial.[73]

An underlying issue is whether the rulings of the Supreme Court in these cases, and indirectly the CJEU's judgments in *L.M.* and *Openbaar Ministerie*, are compatible with the ECHR. As explained in section 4.2 *supra*, the Supreme Court dealt with this question in the 2022 decision and stressed that it considers the CJEU's approach compliant with ECtHR case-law. However, it has been argued that the ECtHR's recent judgment in *Advance Pharma SP.Z O.O v. Poland* casts doubt on that assessment. According to the ECtHR, fundamental deficiencies in the appointment of judges "undermined the very essence of the right to a 'tribunal established by law'".[74]

This national report is not the proper occasion on which to pursue these questions, but it ought to be stressed that the Supreme Court's approach to arrest warrants from Poland demonstrates a Court eager to emphasise the parallelism ("homogeneity") between the EU-IS/NO

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[71] Para. 70.

[72] See, already in 2020 as a reaction to the Supreme Court's order in HR-2020-553-U, T. Einarsen and E. Holmøyvik: 'Feil avgjørelser til feil tid: Høyesteretts nylige Polen-kjennelser', *Rett24*, 25 March 2020, < https://rett24.no/articles/feil-avgjorelser-til-feil-tid-hoyesteretts-nylige-polen-kjennelser> visited 12 August 2022.

[73] E. Holmøyvik: 'Overlevering til eit polsk rettsvesen i strid med EMK artikkel 6 – kommentar til HR-2022-863-A', *Juridika*, 6 May 2022, < https://juridika.no/innsikt/er-polen-en-rettsstat-hoyesterett-sa-ja> visited 12 August 2022.

[74] Holmøyvik, 2022, with reference to, e.g., ECtHR, 3 March 2022, *Advance Pharma SP.Z O.O v. Poland*, CE:ECHR:2022:0203JUD000146920, § 349.

Surrender Procedure Agreement and the EAW Framework Decision, both as regards the applicability of the principle of mutual trust and the interpretation and application of the Agreement in general. This is an approach fully in line with the CJEU's approach in *I.N.* and should put to rest any doubt as to applicability of the principle of mutual trust under the Surrender Procedure Agreement.[75] It is also an approach in line with the Supreme Court's approach to the EEA Agreement as well as to other parts of the EU-Norway patchwork, such as the 2007 Lugano Convention.[76]

It follows naturally from this CJEU-centred approach to the various EU-Norway agreements that the Supreme Court will be reluctant to conclude that CJEU case law is not fully compliant with ECtHR case law.[77] Still, if it proves impossible to bridge an emerging gap between CJEU and ECtHR case law on the status of the rule of law in certain EU Member States, the Constitution and the Human Rights Act demands that the ECHR will prevail within the Norwegian legal order. Thus, it is very much in Norway's interest that CJEU and ECtHR case law on the principle of the rule of law develops in tandem.[78]

Another question left open by the Supreme Court in its 2022 decision is the relevance, if any, of a possible EU Council decision under Article 7 TEU to suspend the implementation of the Framework Decision in one or more Member States. The fact that the Supreme Court found it pertinent to refer to this possibility, might be taken to suggest that it will give effect to such a decision also within the Norwegian legal order. If this is indeed the case, it is yet another sign of just how important the EU's response to rule of law crisis within the EU legal order is to Norway.

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[75] Cf. the comments on the *I.N.* case *supra* in section 1.

[76] As noted by the Supreme Court itself in the 2022 case, see HR-2022-863-A, para. 20.

[77] An earlier example of this is the 2016 *Holship* case, where the Supreme Court followed the CJEU's free movement oriented approach to the balancing of fundamental freedoms (*in casu* freedom of establishment) and fundamental rights (*in casu* the right to take collective action) in *Viking* and *Laval* (supported by an advisory opinion by the EFTA Court), only to see the ECtHR criticising this when the case was ultimately brought before it, see Case 45487/17 *LO and NTF v. Norway* (with further references). For all the details, see the annotation of the ECtHR's judgment by Hilde Ellingsen in 59 *Common Market Law Review* (2022) 583-604.

[78] It is worth mentioning here that the so-called Bosphorus presumption that shields EU member states (and, indirectly, the CJEU) from full review by the ECtHR is unlikely to apply to the EU-Norway agreements. In cases where the Supreme Court of Norway follows the CJEU's lead, such as in the cases discussed above, the result might be full (albeit indirect) review in Strasbourg of the CJEU's approach. One example of this is the *Holship* case mentioned in the previous footnote.