Tribunals in the Nordic States and Referrals to the European Courts

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1 Introduction

The five main Nordic states[1] are set across two pillars of European law: EU law, and EEA[2] law. Practically speaking, European law – be it EU law in Denmark, Finland, and Sweden,[3] or EEA law in Iceland and Norway[4] – is designed by its very nature to be effective. For this to occur, it has been the cornerstone of the EU/EEA legal orders that national courts and tribunals of the individual states can (and in some cases, must) make, respectively, references for preliminary ruling to the Court of Justice of the European Union (CJEU) in EU Member States,[5] or requests for an advisory opinion of the EFTA Court in EFTA-EEA states.[6] Collectively, these two judicial procedures can be called 'referrals' to the European Courts.[7]

Between 1973 and 1993, Denmark was the only Nordic state that was truly part of European law. Whilst Finland, Iceland, Norway, and Sweden had Free Trade Agreements with the EU,[8] none of them enabled judicial cooperation and dialogue between the CJEU and national courts and tribunals in those states. In 1994, the Agreement on the European Economic Area (EEA) entered into force, as did the operation of the EFTA Court with the Surveillance and Court Agreement (SCA), bringing the four non-EU Nordic states into European law through the introduction of the EFTA pillar of the EEA. Thereafter in 1995 however, Finland and Sweden moved to the EU pillar of the EEA, by acceding to the EU and becoming EU Member States. Ever since, Denmark, Finland, and Sweden have been part of the EU pillar of the EEA, and Iceland and Norway being part of the EFTA pillar of the EEA.

What constitutes a national 'court' in the five Nordic states is reasonably clear, with them all respectively playing their part in fulfilling their obligations under European law. The five Nordic states are established European democracies, with a judicial structure that ensures that the rule of law is observed.[9] What is more testing however, and a construction where there is less

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1 For present purposes and practical consideration, the Faroe Islands, Greenland, and Åland are not considered.

2 The European Economic Area.

3 EU Member States.

4 EFTA-EEA states.

5 Article 267 Treaty on the Functioning of the European Union (TFEU).

6 Article 34 Surveillance and Court Agreement (SCA). The SCA supplements the Agreement on the European Economic Area (EEA). However, the EEA Agreement is signed by all EU Member States and Iceland, Liechtenstein, and Norway; whereas the SCA is only signed by Iceland, Liechtenstein, and Norway.

7 In this contribution, the 'European Courts' are the Court of Justice of the European Union (CJEU), and the EFTA Court. No distinction is necessary for the Court of Justice and the General Court within the CJEU, unless otherwise stated.

8 See, Ulf Bernitz, 'The EEC-EFTA Free Trade Agreements with Special Reference to the Position of Sweden and the Other Scandinavian EFTA Countries' (1986) 23 Common Market Law Review 567.

9 In the EU legal order, Article 19(1) TEU, second paragraph, states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

agreement than what a national 'court' is, however, is what constitutes a national 'tribunal' in the five Nordic states.

The interpretation of what a national 'tribunal' is varies from one state to another – both in the Nordic states, and European states at large – and there is no underlying explicit definition in European law for what constitutes a tribunal that can help cater for this void. Who may make referrals to the European Courts is constitutionally significant, given the central role that the preliminary reference procedure plays in EU law,[10] and the role that the advisory opinion procedure plays in EEA law.[11]

Tribunals in some states are considered integral parts of states' administrations, whereas in others, they are part of the judicial system. But that distinction is not always clear-cut in itself, because some tribunals in a state might be administrative, and other tribunals might be judicial. The internal organisation of a states' administrations and judiciaries, inclusive of the way they have tribunals, has historically been purely a matter of national law. This is no longer so, as both state administrations and judiciaries have extensive obligations under European law. Obligations can vary as to whether bodies in national legal orders are considered administrative, or judicial; or in some cases, both.

Tribunals – the conception of which includes the likes of boards of appeal, review bodies, appeals officers and such – are an extensive part of the way that the Nordic states' function. Thus, the question can rightly be asked: can 'tribunals' make references for a preliminary ruling to the CJEU,[12] or make a request for an advisory opinion from the EFTA Court,[13] when they have a dispute before them in which an interpretation of European law is needed? By analysing primary law of the legal orders, and the arising case-law of the CJEU and EFTA Court, this question can begin to be answered.

This article is structured as follows. Section 2 sets out the initial issues of the two referrals procedure to the respective European Courts, before then attempting to put shape to the material differences between courts and tribunals, which gives rise to the conundrum. Section 3 then analyses the referrals made by tribunals in the Nordic-EU Member States of Denmark, Finland, and Sweden to the CJEU over the past fifty years, and the CJEU's response to such references. Section 4 analyses the referrals made by tribunals in the Nordic-EFTA-EEA states of Iceland and Norway to the EFTA Court over the past thirty years, and the EFTA Court's reasoning. Section 5 contextualises the approach of the two European Courts over time, given the evolution of rule of law concerns. Conclusively, section 6 considers what the ramifications of all this case-law are for the workings of tribunals in Nordic states, and what may be done to ensure the effectiveness of EU/EEA law in the Nordic states.

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[10] See, Takis Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 Common Market Law Review 9.

[11] See, Skúli Magnússon, 'On the Authority of Advisory Opinions: Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court' (2010) 13 Europarättslig Tidskrift 528.

[12] For tribunals in EU Member States (27: including Denmark, Finland, and Sweden).

[13] For tribunals in EFTA-EEA states (3: including Iceland and Norway).

2 Referrals to the European Courts

Which bodies in EU Member States and EFTA-EEA states may refer questions to the CJEU and the EFTA Court under the reference for a preliminary ruling procedure and the request for an advisory opinion procedure raises a number of issues when all courts and tribunals of all the states of the EEA are taken into account.[14] This section considers what the procedures are for referrals to be made (section 2.1), how judiciaries are understood in European law (section 2.2), and how a tribunal might be defined (section 2.3).

2.1 The Referral Procedures

When a case is placed on the docket of the CJEU or EFTA Court through either of the referral procedures, there is no systemised method under which the admissibility of a case is checked as regards the nature, composition, and structure of the referring body. Within the EU pillar of the EEA, the reference for a preliminary ruling procedure is one of the most well-known functions of the CJEU,[15] and is the source of the vast majority of cases that the upper Court of Justice within the CJEU hears.[16]

Article 267 of the Treaty on the Functioning of the European Union (TFEU) states,

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
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> (a) the interpretation of the Treaties;
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> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

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[14] For magisterial analysis in the EU legal order, see, Morten Broberg and Niels Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (Third Edition, Oxford University Press 2021). pp. 43-88.

[15] For a perspective on referrals from courts in Denmark, see, Ole Due, 'Danish Preliminary References' in David O'Keeffe and Antonio Bavasso (eds), *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International 2000). From an early perspective in Finland, long before that state's accession, see, Kari Joutsamo, *The Role of Preliminary Rulings in the European Communities* (Academia Scientiarum Fennica 1979).

[16] For useful summary, see, Allan Rosas, 'The Preliminary Rulings Procedure' in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (John Wiley & Sons, Inc 2016). Note that in December 2022, the CJEU proposed a change to the Statute of the CJEU to the Council, so that the General Court could hear referrals from national courts and tribunals. This possibility of changes to the Statute result in EU primary law as a result of the changes made by the Treaty of Nice. At the time of writing (January 2023), it remains to be seen if such changes to the Statute will be made.

> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court….

The procedure is well known by national courts and tribunals across EU Member States,[17] even if its usage varies.[18]

In the other EFTA pillar of the EEA is the advisory opinion procedure. Article 34 SCA provides,

> The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.
>
> Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.
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> An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.

Article 34 SCA is not a preliminary reference procedure like that in the EU Treaties,[19] but it is indeed modelled on Article 267 TFEU. Admittedly, Article 267 TFEU regarding the CJEU and Article 34 SCA regarding the EFTA Court do not have the exact same wording, but there is no reason for departing interpretations of the two provisions,[20] which is to ensure referrals to the European Courts and the effectiveness of European law. As the EFTA Court has stated in *Irish Bank Resolution Corporation*, the referral procedures have 'the same purpose'.[21]

For one former President of the EFTA Court, the differences between the procedures of the preliminary reference procedure of the CJEU and the advisory

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17 Other than Broberg and Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (n 14)., reference can also be made to Carl Otto Lenz, 'The Role and Mechanism of the Preliminary Ruling Procedure' (1994) 18 Fordham International Law Journal 388.

18 See, Morten Broberg and Niels Fenger, 'Variations in Member States' Preliminary References to the Court of Justice—Are Structural Factors (Part of) the Explanation?' (2013) 19 European Law Journal 488; Morten Broberg, Niels Fenger and Henrik Hansen, 'A Structural Model for Explaining Member State Variations in Preliminary References to the ECJ' (2020) 45 European Law Review 599.

19 For early analysis, see, Martin Johansson and Maria Westman-Clément, 'Advisory Opinions from the EFTA Court' in Mads Andenas (ed), *Article 177 References to the European Court: Policy and Practice* (Butterworths 1994).

20 For the EFTA Court, advisory opinions are, 'a specially established means of judicial co-operation between the [EFTA] Court and national courts [and tribunals] with the aim of providing the national courts [and tribunals] with the necessary elements of EEA law to decide the cases before them.' Case E-1/95, *Ulf Samuelsson v Svenska staten*, 20 June 1995, para. 13.

21 Case E-18/11, *Irish Bank Resolution Corporation Ltd v Kaupþing hf*, 28 September 2012, para. 44.

opinion procedure of the EFTA Court are 'hardly visible'.[22] The intended result is the same: the potential (and sometime obligation) of courts and tribunals to engage in judicial cooperation with the CJEU and EFTA Court, to ensure the effectiveness of European law at national level.

2.2 The Judiciary

In EU law, as a result of extensive case-law of the CJEU, there are standards for whether a referring body is able to successfully obtain answers to referred questions. This is an issue of admissibility, and not jurisdiction. One of the more pressing issues is that of the judicial independence of the referring body. In other words, a referring body must be exercising *judicial* function, or opposed to administrative function, if it is to receive answers to the question(s) referred. Whilst the CJEU has, as will be demonstrated, not always held a consistent standard for what a referring body is, it will be seen that the present rule of law backdrop of contemporary Europe has forced a rethink in how judicial cooperation through the referral procedures are to function in the present era.

How each European state sets up its judicial bodies has historically been up to each state to decide for themselves. For most states, the reason why the courts of each look the way they do today is for historical reasons, rather than of deliberate decision that caters for a modern state.[23] With most European states today being EU Member States, or part of the EEA, it is the case that EU/EEA law and the EU/EEA legal orders have, rather conspicuously and indirectly, brought about profound changes in the way in which national courts and tribunals engage in decision-making, the sources of law that they utilise, and the judicial dialogue they engage in.

No more profoundly is this seen than vis-à-vis the preliminary reference procedure, provided for in Article 267 TFEU,[24] in which national courts and tribunals of EU Member States, may (and in some cases, must) refer questions to the CJEU for an interpretation of EU law. In other words, the way in which the rule of law is applied by national courts and tribunals in the EU legal order, with law coming from a range of sources such as national law and EU law, has undergone profound change.

The inevitable question arises therefrom however, is how to determine whether a referring body in the Nordic states – a tribunal[25] – is sufficiently judicial or not. The notion of a 'court' or 'tribunal' in Member States is not defined by EU law. The EU Treaties are purposefully vague, and merely, instead, provide that the CJEU 'shall ensure that in the interpretation and application of

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[22] Carl Baudenbacher, 'The EFTA Court: An Actor in the European Judicial Dialogue' (2004) 28 Fordham International Law Journal 353. p. 359.

[23] The exception in the Nordic states here is Iceland, which in recent years created a Court of Appeal (*Landsréttur*). That said, there were problems with the initial appointments to that national court, which resulted in the European Court of Human Rights (ECtHR) finding a violation of Article 6 of the European Convention on Human Rights (ECHR). *Guðmundur Andri Ástráðsson v Iceland*, Case no. 26374/18, ECtHR (Grand Chamber), 1 December 2020.

[24] Treaty on the Functioning of the European Union (TFEU).

[25] It is automatically assumed that the national *courts* in the Nordic states are sufficiently judicial, but that presumption is always rebuttable.

the Treaties the law is observed',[26] and that questions coming before 'any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the [CJEU] to give a ruling thereon'.[27]

It is within this bound of Article 19 of the Treaty on European Union (TEU) and Article 267 TFEU that the CJEU has long been deciphering what a 'court' or 'tribunal' is for the purposes of the preliminary reference procedure, in which it has set down several criteria in its case-law over many decades for the criteria that must be in place for a referring body to be considered sufficiently judicial. In essence, the CJEU stated that what a referring body is is to be decided autonomously by EU law, and that it is not for EU Member States to decide what counts as a referrable body, who might be tempted to filter or amend such an understanding.[28] In light of the doctrine of the effectiveness of EU law, the CJEU is therefore willing to accept cases in Member States, potentially, from a range of different bodies, if they are sufficiently judicial.

In the Nordic states, the courts are structured in different ways, broadly along an east-west divide.[29] On the one hand – the west – there is Denmark, Iceland, and Norway,[30] which has a unified court structure, handling administrative, civil, criminal, and public law disputes. On the other hand – the west – there is Finland and Sweden, with a divided court structure, with general courts for civil and criminal disputes, and administrative courts for administrative and public law disputes.

Notwithstanding this divide, however, is a category of bodies that takes place below them all, in a category that can best to described as 'tribunals'. Whilst not formally part of the judiciary, they, in some instances, are quasi-judicial entities, that perform something resembling judicial decision-making. In other instances, they can be merely exercising administrative function.[31]

Whilst it is up to each Nordic state (and indeed any EU Member State or EFTA-EEA state) to set up their judiciary in a manner reflective of its judicial traditions, it is no longer the case that such states have a completely free hand. As per the Article 19 TEU, the structure and operation of national judiciaries is

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[26] Article 19(1) TEU.

[27] Article 267 TFEU, second paragraph.

[28] On Member States (and higher instance national courts) not being allowed to filter which courts can make referrals, see, Graham Butler, 'Lower Instance National Courts and Tribunals in Member States and Their Judicial Dialogue with the Court of Justice of the European Union' (2021) 4 Nordic Journal of European Law 19.

[29] Thomas Bull, 'Institutions and Division of Powers' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart Publishing 2018). pp. 61-62.

[30] Whilst Norway is not an EU Member State, it is a state of the European Free Trade Association (EFTA), applying the Agreement on the European Economic Area (EEA Agreement). With the EFTA-EEA arrangement comes with it an independent judicial body, the EFTA Court, which performs similar functions to the CJEU for Norway.

[31] For consideration as regards Denmark, see, Inger Marie Conradsen and Michael Gøtze, 'Administrative Appeals and ADR in Danish Administrative Law' in Dacian C Dragos and Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014).

now under increased scrutiny by private actors and the European Commission. The given reason is the evolution of what can be described as firmer 'rule of law' criteria that is necessitated of all European states.[32]

2.3 Defining a Tribunal

Whilst Article 267 TFEU (and Article 34 SCA) fails to elaborate on what is actually meant by a 'court' or 'tribunal' of a Member State (or Contracting Party), an interesting note for the purposes at hand is the use of the actual terms of 'court' and 'tribunal'.

In the English language version of the EU Treaties, both are utilised. However, in some other language versions, such as the Nordic languages, no such distinction is made,[33] and a single term is utilised, assumingly, that captures both concepts. Whether the terms in those languages are broad enough to capture both courts and tribunals within their ordinary or plain meaning is an open question. But regardless, it has this been left to the CJEU (and the EFTA Court) to elaborate an understanding of what contributes a tribunal, given that, figuratively, tribunals tend to be less judicial in nature than courts.

In general, confusion arises in some national context about what constitutes a referring body for referring to the European Courts because there are national bodies that do not easily fit into the simplistic form of dividing bodies between 'administrative' and 'judicial'. It is common in various areas of the public sphere to have appeals against administrative bodies, even that are specialised, that are in lieu of a first instance judicial body. But there is a sharp distinction between administrative function and judicial adjudication. Given that the Nordic states are highly sophisticated administrative states, there is potential room for the blurring between administrative function and judicial function of certain bodies. Occasionally, courts and their members undertake tasks in the public sector, which raises a whole set of partiality issues.[34] It is evident, however, that the legal provisions providing for referrals to the European Courts are designed for an appeal system of a Member State, and not a first-instance decision-maker as part of an administrative process.

The threshold for a referring body to meet a standard of being sufficiently judicial to make a referral is getting higher in recent times.[35] For *courts* in most

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[32] On the rule of law in the Nordic states, which is a consideration that should be self-reflected upon, see, Graham Butler, 'The European Rule of Law Standard, the Nordic States, and EU Law' in Antonina Bakardjieva Engelbrekt, Andreas Moberg and Joakim Nergelius (eds), *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Hart Publishing 2021).

[33] E.g., *Domstolen* (Danish), *Tuomioistuin* (Finnish), *domstol* (Swedish). This point was made more broadly in, Opinion of Advocate General Fennelly, Case C-134/97, *Victoria Film A/S*, ECLI:EU:C:1998:309, para. 19, and footnote therein.

[34] For example, quite problematically, judges in Denmark regularly take on public sector tasks like board memberships of public institutions (such as universities), examination grading, membership of assessment committees for academic positions, and even sit as arbitrators in private proceedings. Such tasks are incompatible with their judicial role, and threaten the independence of their role.

[35] See, Morten Broberg and Niels Fenger, 'The European Court of Justice's Transformation of Its Approach towards Preliminary References from Member State Administrative Bodies' (2022) 24 Cambridge Yearbook of European Legal Studies; Graham Butler, 'Independence

Member States, this is not an issue. For *tribunals* in all Member States however, this raises tricky questions, especially in the Nordic states, owing to their prevalence. Many bodies in the Nordic states operate in a murky territory between being bodies that are merely executive authorities, administrative decision-makers on the one hand; and judicial bodies on the other. Within these areas, when referrals to the European Courts are made, it is not always evident whether a body that is engaging in adjudication is *sufficiently* judicial. After all, tribunals are usually far less independent than courts, given that many tribunals are not composed of judges, but rather, other actors like lawyers, academics, and other non-judicial individuals.

One way of deciphering where a referring body is sufficiently judicial is to examine the independence of a referring body once a referral is made. The starting point for assessing whether a referring body is sufficiently judicial typically hinges on the independence of the body. It is the case that independence is presumed, but if it is absent, it is the prerogative of parties to the case or approved intervenors to question it, or the CJEU (or the EFTA Court) to raise an issue of their own motion.

Independence is inherent in the task of adjudication and judicial decision-making. Being independent obviously means adjudicating between two parties that are independent of the adjudicator. Independence is a central criterion, and not an ancillary one, which cannot be disregarded or ignored when convenient. There has to be clear, legal safeguards to preserve the independence of tribunals if they are to be able to make referrals. The internal criteria of independence of referring bodies deals with rules on composition, appointment procedures, terms of service, irremovability, impartiality; whilst external criteria include the lack of outside pressures, and the imposition of no hierarchical constraints. Whilst internal and external criteria of independence are admittedly difficult to distinguish, the sufficiently judicial test is readily evident, despite the obvious inexactness of what constitutes independence.[36]

The case-law of the CJEU was historically very receptive and liberal to providing answers to referring bodies in EU Member States, regardless of whether the referring bodies were courts, tribunals, or merely bodies exercising administrative function. In other words, being sufficiently judicial or not was not an overriding concern of the CJEU. If a tribunal of some kind referred a case to the CJEU, the CJEU usually had few qualms in going about adjudicating,[37] as it ordinarily would when a court referred. For example, independence was not considered an important criterion in the early days of the CJEU's case-law. Just

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of Non-Judicial Bodies and Orders for a Preliminary Reference to the Court of Justice' (2020) 45 European Law Review 870.

[36] In the case-law, Advocate General Hogan noted that the referring body in the case before him did not enjoy a 'sufficient degree' of independence. Opinion of Advocate General Hogan, Case C-274/14, *Proceedings brought by Banco de Santander SA*, ECLI:EU:C:2019:802.

[37] There are many examples. For one however, see, Joined Cases C-110/98 to C-147/98, *Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT)*, ECLI:EU:C:2000:145.

by way of the *Vaassen-Göbbels* judgment,[38] it was apparent the following criteria mattered: the referring body had to be established by law, the referring body had to be permanent, the referring body's jurisdiction had to be compulsory, the referring body heard cases between parties, and the referring body applied rules of law. In other words, the necessity of the independence of the referring body was not required. It was perhaps assumed to be implicit.[39]

Much later thereafter however in *Pretore di Salò*, the CJEU stated that it will, 'reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its of judging, *independently*[,] and in accordance with the law'.[40] This approach received implicit support in *Corbiau*.[41]

But independence alone has not been the issue, but broader structural issues about the place and role of referring bodies within national legal orders. One Advocate General even once observed that the admissibility criteria from certain bodies, particularly those that were not sufficiently judicial, was 'too flexible and not sufficiently consistent',[42] and that the case-law of the CJEU on this point was 'casuistic, very elastic[,] and not very scientific'.[43] The CJEU has in the past decade, as will become apparent, placed greater focus on the independence of referring bodies, and particularly tribunals.[44]

What is a court or tribunal of an EU Member State is a detailed body of case-law. But it is far from being conclusive as regards all the types of bodies in EU Member States that come, or do not come within it. Thus, case-by-case examinations have always been necessary.

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[38] Case 61/65, *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf*, ECLI:EU:C:1966:39.

[39] See, compared to the CJEU, the Opinion of the Advocate General, who believed independence was a necessity for the referring body to refer. Opinion of Advocate General Gand, Case 61/65, *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf*, ECLI:EU:C:1966:25, p. 281.

[40] Case 14/86, *Pretore di Salò v Persons unknown*, ECLI:EU:C:1987:275, para. 7 (emphasis added).

[41] Case C-24/92, *Pierre Corbiau v Administration des contributions*, ECLI:EU:C:1993:118, para. 15.

[42] Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-17/00, *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort*, ECLI:EU:C:2001:366, para. 14.

[43] Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-17/00, *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort*, ECLI:EU:C:2001:366, para. 14.

[44] See, Butler, 'Independence of Non-Judicial Bodies and Orders for a Preliminary Reference to the Court of Justice' (n 35).

3 Tribunals in Nordic-EU Member States and Referrals to the CJEU

3.1 The Age of Openness

Between 1973 and 1988, it was only *courts* in Denmark that had made references for a preliminary ruling under what is now Article 267 TFEU (then Article 177 EC).[45] In 1988 however, the Industrial Arbitration Board of Denmark (*Faglige Voldgiftsret*) in the *Danfoss* case made a reference for a preliminary ruling,[46] which had sought an interpretative of Equal Pay Directive.[47] It is apparent that despite the Industrial Arbitration Board in Denmark not being formally part of the national judiciary, no party to the proceeding raised the issue about whether the tribunal was able to make the reference for a preliminary ruling or not.

The CJEU had to tackle the issue on whether it was constituted in accordance with the purpose of the preliminary reference procedure. Under a heading in the judgment called the 'judicial nature' of the referring body, the CJEU put emphasis on the fact that the referring body was established by national law, heard cases at final instance, parties could not object to the body hearing the case, and that the body's jurisdiction was compulsory,[48] as well as the national law governing the composition of the referring body. The CJEU therefore concluded the case was admissible. A tribunal in Denmark, that was not quite judicial, could nonetheless engage with CJEU on interpretative questions of European law.[49]

Questions can immediately be raised about whether the CJEU had gotten this judgment – on this admissibility point – correct or not. After all, the Industrial Arbitration Board of Denmark only met on an ad hoc basis for specific disputes, and there were no fixed members of the referring body. Be that as it may, the Industrial Arbitration Board of Denmark subsequently referred another case to the CJEU in *Royal Copenhagen*,[50] in which the CJEU accepted the case from the referring body without further consideration of the admissibility issues.[51]

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[45] The first reference was from the Maritime and Commercial Court (*Sø- og Handelsretten*). Case 86/75, *EMI Records Limited v CBS Grammofon A/S*, ECLI:EU:C:1976:86. It is erroneously referred to in the judgment of the CJEU as the Admiralty and Commercial Court.

[46] Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, ECLI:EU:C:1989:383.

[47] At the time, 'L 45/19. Council Directive of 10 February 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women (75/117/EEC). Official Journal of the European Communities. 19 February 1975'.

[48] Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, ECLI:EU:C:1989:383, para. 7.

[49] Coming to the same conclusion as the CJEU was the Advocate General. See, Opinion of Advocate General Lenz, Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, ECLI:EU:C:1989:228.

[50] Case C-400/93, *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*, ECLI:EU:C:1995:155.

[51] Note, however, that the Advocate General did, though coming to the conclusion that the case was admissible, though admitting that the case coming from the referring body 'may be open to question' whether it was a tribunal or not. See, Opinion of Advocate General Léger, Case

In Finland, not long after that state's accession to the EU, there was the *Jokela and Pitkäranta* case, which concerned a referral to the CJEU from the Rural Business Appeal Board of Finland (*Maaseutuelinkeinojen Valituslautakunta*). The CJEU seems to have raised a question of its own motion as to whether the Rural Business Appeal Board of Finland – a tribunal – was an independent tribunal for the purposes of the reference for a preliminary ruling procedure or not. In rather superficial analysis, the CJEU stated that, 'it appears', that the members of the tribunal 'enjoy the same guarantees as judges against removal from office'.[52]

In its judgment, the CJEU did not set out what these guarantees were or provide any reasoning at all for what makes the Rural Business Appeals Board of Finland, a tribunal, analogous to the manner in which the Finnish courts were established. Thus, the *Jokela and Pitkäranta* judgment was of its day, in that the independence criterion was relevant, but not absolutely determinative of whether a referred case was to be answered or not. Thus, the case was admitted from the referring body.[53]

Not long after the accession of Sweden to the EU in 1995, the Revenue Board of Sweden (*Skatterättsnämnden*)[54] referred a case to the CJEU, *Victoria Film*,[55] for an interpretation on the Act of Accession,[56] as well as the Sixth VAT Directive.[57] Intervening in the case, the Commission took the view that the referring body was not a court or tribunal; with Sweden, on the other hand, having taken the view that it was a body to be captured by the meaning of Article 267 TFEU as a tribunal.

C-400/93, *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*, ECLI:EU:C:1995:48, paras. 9-13.

52 Joined Cases C-9/97 and C-118/97, *Raija-Liisa Jokela and Laura Pitkäranta*, ECLI:EU:C:1998:497, para. 20.

53 A similar conclusion was reached by the Advocate General. See, Opinion of Advocate General Mischo, Joined Cases C-9/97 and C-118/97, *Raija-Liisa Jokela and Laura Pitkäranta*, ECLI:EU:C:1998:129, paras. 15-20.

54 The translation of the *Skatterättsnämnden* differs across various texts. It has been called the Revenue Board, but also the 'Council for Advance Tax Rulings', or the 'Revenue Law Commission'. For simplicity, the Revenue Board term will be utilised in this article.

55 Case C-134/97, *Victoria Film A/S*, ECLI:EU:C:1998:535.

56 'C 241/07. Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on Which the European Union Is Founded. Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, Die Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Kingdom of Norway, the Republic of Austria, the Republic of Finland the Kingdom of Sweden, Concerning the Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union. Official Journal of the European Communities. 29 August 1994.'

57 'L 145/1. Sixth Council Directive of 17 May 1977 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes - Common System of Value Added Tax: Uniform Basis of Assessment (77/388/EEC). Official Journal of the European Communities. 13 June 1977.'

The CJEU sided with the Commission. For the first time therefore, it said a tribunal in a Nordic state was not a tribunal for the purposes of the preliminary reference procedure. It took the position in its judgment that there were 'factors…[that]…lead to the conclusion that it performs an essentially administrative function'.[58] The CJEU took this view because, at the time that a case appeared before the referring body in a national setting, the administrative authority – the National Tax Board of Sweden (*Riksskatteverket*)[59] – had not actually made a decision yet. Accordingly, the Revenue Board of Sweden, the referring body, was merely just a cog in the administrative wheel of the state. It was only providing for a preliminary decision on issues of taxation. In other words, it was not resolving a dispute after an administrative decision had been taken. Thus, the tribunal was not to be considered a tribunal within the meaning of the reference for a preliminary ruling procedure, and the case was deemed inadmissible.[60] Intriguingly, the Advocate General had come to the opposite view, in that for him, the case from the referring body should have been deemed admissible.[61]

This was not a sign of a general turn in the case-law however. Further referrals demonstrated the CJEU's approach was indeed still open. Post-*Victoria Film*, there was a referral to the CJEU from the Universities' Appeal Board of Sweden (*Överklagandenämnden för Högskolan*).[62] The *Abrahamsson and Anderson v Fogelqvist* case presented the CJEU with another tribunal in a Nordic state trying to seek an interpretation of European law.[63] Here, the referring body sought an interpretation of another one of the equal treatment directives,[64] given the disputed appointment of a professor at the University of Gothenburg (*Göteborgs universitet*). The referring body had its basis in law, was chaired by a judge, but had ordinary members also. Though the referring body was not a court, the CJEU equated it to one, noting that the body provided decisions 'without receiving any instructions and in total impartiality',[65] and moreover, that its decisions were not

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58 Case C-134/97, *Victoria Film A/S*, ECLI:EU:C:1998:535, para. 15.

59 This is now the Tax Agency (*Skatteverket*).

60 The judgment of the CJEU stated it had 'no jurisdiction', but this was surely an error. The CJEU has been inconsistent with its own terminology, given that in some instances in this case-law, it has used the language of admissibility/inadmissible, whereas in other instances, it has used the language of jurisdiction/lack of jurisdiction. There appears to be no valid reason for this other than just a case of mere incongruous drafting, given that admissibility and jurisdiction are fundamentally different legal concepts.

61 Opinion of Advocate General Fennelly, Case C-134/97, *Victoria Film A/S*, ECLI:EU:C:1998:309, paras. 10-32.

62 It has been also been called the Board of Appeals for Higher Education.

63 Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, ECLI:EU:C:2000:367.

64 'L 39/40. Council Directive of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions (76/207/EC). Official Journal of the European Communities. 14 February 1976.'

65 Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, ECLI:EU:C:2000:367, para. 36.

subject to appeal.[66] The CJEU thus stated that the case from the Universities' Appeal Board of Sweden was admissible.

On the basis of the CJEU's judgment in *Abrahamsson and Anderson v Fogelqvist*, it was the first time that there was divergence between the referring possibilities between two tribunals in the same EU Member State. On the one hand, the Revenue Board of Sweden was unable to make references for a preliminary ruling on foot of *Victoria Film*, but the Universities' Appeal Board of Sweden was able to make references for a preliminary ruling on foot of *Abrahamsson and Anderson v Fogelqvist*. Whilst neither were judicial bodies, their status under European law differed.

This inconsistency was not going unnoticed. Advocate General Saggio in *Abrahamsson and Anderson v Fogelqvist* had delivered a sharp Opinion prior to the CJEU's judgment. In his view, the Universities' Appeal Board of Sweden was an 'administrative body',[67] and that the CJEU must proceed prudently. As he put it, it would be, 'essential to proceed with the greatest care in assessing whether national rules meet the requirement of independence appropriate to a body regarded — albeit in a specific context and for certain purposes — as a court or tribunal'.[68] The independence of the members, the issue of the lack of security of tenure of the membership of the referring body was particularly troublesome, especially in terms of absence of clear rules. He thus advised the CJEU find that the case as inadmissible. Advocate General Saggio had form in this regard, as he was previously warned against accepting references for a preliminary ruling from bodies which lacked sufficient judicial character, including issues regarding the independence of them, as seen in *Gabalfrisa*.[69]

Many years after *Abrahamsson and Anderson v Fogelqvist*, the CJEU received another referral from the Universities' Appeal Board of Sweden in *Lyyski*,[70] on the refusal of Umeå University (*Umeå universitet*) to register the applicant on a training course. The CJEU in its judgment, nor the Opinion of the Advocate General,[71] did not deal with any issue regarding the status of the referring body, despite the obviously questionable status and characteristics of the tribunal for the purposes of the preliminary reference procedure.

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66 Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, ECLI:EU:C:2000:367, para. 34. It is unclear here whether the CJEU meant it was subject to appeal to another tribunal, or instead, to the courts of Sweden.

67 Opinion of Advocate General Saggio, Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, ECLI:EU:C:1999:556, para. 14.

68 Opinion of Advocate General Saggio, Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, ECLI:EU:C:1999:556, para. 19.

69 Opinion of Advocate General Saggio, Joined Cases C-110/98 to C-147/98, *Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT)*, ECLI:EU:C:1999:489, paras. 9-21. As it turns out, the CJEU came around to the view of Advocate General Saggio some twenty-plus years after his Opinion in *Gabalfrisa*, with its remarkable judgment in, Case C-274/14, *Proceedings brought by Banco de Santander SA*, ECLI:EU:C:2020:17.

70 Case C-40/05, *Kaj Lyyski v Umeå universitet*, ECLI:EU:C:2007:10.

71 Opinion of Advocate General Stix-Hackl, Case C-40/05, *Kaj Lyyski v Umeå universitet*, ECLI:EU:C:2006:571.

A further issue with Swedish tribunals arose in *Jia*,[72] a referral to the CJEU from the Immigration Appeals Board of Sweden (*Utlänningsnämnden*).[73] The referring body, which was a not a court, but a tribunal, heard appeals against administrative decisions. Remarkably, the CJEU took no issue, at all, with the admissibility of the case as to whether the referring body was a tribunal or not within the meaning of the reference for a preliminary ruling procedure. This was after the Opinion of the Advocate General had highlighted a number of issues, including the fact that the referring body 'has the possibility of referring certain cases to the Government'.[74] Despite this, he stated that the case should be admitted, since the Immigration Appeals Board of Sweden in *Jia* was 'comparable'[75] to the Universities' Appeal Board in *Abrahamsson and Anderson v Fogelqvist*.

This very open approach to Nordic tribunals,[76] did not mean, however, that every referral would be accepted. In fact, a body that was most certainly not a tribunal was the Environmental and Health Committee (*Miljö- och hälsoskyddsnämnden*) of the Municipality of Mora in Sweden (*Mora kommune*). It made a reference for a preliminary ruling in *Bengtsson*.[77] The CJEU did not even proceed to a judgment, but merely ruled by an order. Whilst the referring body claimed that it was an administrative body, but exercising a judicial function, the other parties to the proceedings were of the view that the referring body was merely supervisory, and thus, purely administrative. The Commission, in particular, pointed out that the members of a referring body were political, and thus, not independent. The CJEU easily found that the referring body was not a tribunal.

The age of openness was still underway however, despite the *Victoria Film* and *Bengtsson* judgments. In Denmark, post entry into force of the Treaty of Lisbon, a case arose before the Appeals Tribunal of the Students' Grants and Loans Scheme of Denmark (*Ankenævnet for Statens Uddannelsesstøtte*) called *LN*.[78] The referring body was seized of a case between a student, who was also a worker, against the Agency for Higher Education and Educational Support (*Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*). The referring body, a tribunal, was not part of the judicial system of Denmark, had sought an interpretation of the Free Movement Directive,[79] given the national scheme in

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[72] Case C-1/05, *Yunying Jia v Migrationsverket*, ECLI:EU:C:2007:1.

[73] It is referred to as the 'Aliens Appeals Board' in the judgment.

[74] Opinion of Advocate General Geelhoed, Case C-1/05, *Yunying Jia v Migrationsverket*, ECLI:EU:C:2006:258, para. 16.

[75] Opinion of Advocate General Geelhoed, Case C-1/05, *Yunying Jia v Migrationsverket*, ECLI:EU:C:2006:258, para. 25. Regrettably, Advocate General Geelhoed did not engaged with the Opinion of Advocate General Saggio in *Abrahamsson and Anderson v Fogelqvist*.

[76] Except, the Revenue Board of Sweden, as per the *Victoria Film* case.

[77] Case C-344/09, *Dan Bengtsson*, ECLI:EU:C:2011:174.

[78] Case C-46/12, *L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, ECLI:EU:C:2013:97.

[79] 'L 158/77. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States'.

place for student financing, and as executed by the national authority, was not in line with the principle of equal treatment for students seeking to be in receipts of student grants and loans.

The referring body was essentially an administrative appeals board. The CJEU did not address the status of the referring body at all, and nor was an Opinion of an Advocate General delivered in the case. Questions can rightly be raised as to why the CJEU accepted the reference for a preliminary ruling and answered the questions of the referring body. One enlightening reason, that can only be speculated upon, was the facts of the case. This was not a 'hard' case from the point of view of EU law. The practice of Denmark, when it came to providing student grants for study in higher education institutions, was indirectly discriminatory, and very difficult to justify on the basis of any potential grounds of exception that might have applied. Denmark lost the case outright, and the way in which decisions were made vis-à-vis the provision for state educational support grants (*statens uddannelsesstøtte*, or *SU*) had to accommodate a way to provide such grants in a non-discriminatory manor, on an equal treatment basis.

3.2 The Age of Independence

This liberal approach of the CJEU pre-Lisbon, but also post-Lisbon in *LN*, however, appears to have seen a significant turn in two subsequent cases involving referring tribunals in Denmark in the *TDC I* and *MT Højgaard A/S and Züblin* cases.

First in *TDC I*,[80] the CJEU received a reference for a preliminary ruling from the Telecommunications Complaints Board of Denmark (*Teleklagenævnet*) concerning the universal service directive,[81] as amended. The Commission, intervening, took issue with the status of the referring body in national law, arguing that the independence of its members was not protected, and that accordingly, it was subject to influence that judicial actors would not be subjected to. By contrast, Denmark stated that the referring body should be considered as a tribunal for the purposes of the preliminary reference procedure, owing to the fact that it had many features of a judicial body.

Taking the issue of the independence of the referring body seriously, the CJEU drew on two aspects of independence, external and internal.[82] The lack of specific rules against members removal from the referring body, however, was the determining factor,[83] where the CJEU placed the most weight. Indeed, as the Advocate General in the case had noted, there were, 'serious doubts…about whether the judgment of the members of the body making the reference is

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[80] Case C-222/13, *TDC A/S v Erhvervsstyrelsen*, ECLI:EU:C:2014:2265 (*TDC I*).

[81] 'L 108/51. Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services (Universal Service Directive). Official Journal of the European Communities. 24 April 2002.'

[82] Case C-222/13, *TDC A/S v Erhvervsstyrelsen*, ECLI:EU:C:2014:2265 (*TDC I*), paras. 29-32.

[83] Case C-222/13, *TDC A/S v Erhvervsstyrelsen*, ECLI:EU:C:2014:2265 (*TDC I*), paras. 33-36.

independent',[84] which was 'imperviousness to external factors'.[85] Given there were no specific guarantees in law to protect the independence of the referring body, the CJEU found that the Telecommunications Complaints Board of Denmark was not a tribunal for the purposes of the reference for a preliminary ruling procedure.[86] The case eventually came before the CJEU in *TDC II*,[87] once the case was appealed upwards into the national judicial system, which in turn made a referral.

Second in *MT Højgaard and Züblin*,[88] the Public Procurement Complaints Board of Denmark (*Klagenævnet for Udbud*)[89] made a reference for a preliminary ruling concerning a specific public procurement directive.[90] The referring body was not part of the national judiciary, but many years earlier, earlier in *Unitron Scandinavia and 3-S*,[91] the CJEU accepted that the referring body was a tribunal that could make references.

Back in *Unitron Scandinavia and 3-S*, Advocate General Alber stated that the rulings of the referring body both talked and walked like a court, and therefore, was indeed a body able to reference cases for a preliminary ruling, without necessarily being drawn on whether it was either a court or a tribunal.[92] The CJEU in *Unitron Scandinavia and 3-S* did little more than endorse the findings of the Advocate General explicitly.[93]

In *MT Højgaard and Züblin* however, it is apparent that the *Unitron Scandinavia and 3-S* reasoning was insufficient, and furthermore, Denmark had asked the CJEU to clarify, in light of its judgment in *TDC I* regarding the Telecommunications Complaints Board of Denmark, whether the referring

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[84] Opinion of Advocate General Bot, Case C-222/13, *TDC A/S v Erhvervsstyrelsen*, ECLI:EU:C:2014:1979, para. 9.

[85] Opinion of Advocate General Bot, Case C-222/13, *TDC A/S v Erhvervsstyrelsen*, ECLI:EU:C:2014:1979, para. 46.

[86] The fact that no member of the referring body had ever been removed by the Minister was not enough to convince the Advocate General or the CJEU. The fact that no rules existed was itself problematic. Nor were the Advocate General or the CJEU willing to analogise protections against removal held by judicial office holders to them.

[87] Case C-327/15, *TDC A/S v Teleklagenævnet and Erhvervs- og Vækstministeriet*, ECLI:EU:C:2016:974 (*TDC II*).

[88] Case C-396/14, *MT Højgaard A/S and Züblin A/S v Banedanmark*, ECLI:EU:C:2016:347.

[89] Other names that it has been called include the Procurement Review Board.

[90] 'L 134/1. Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors. Official Journal of the European Union. 30 April 2004.'

[91] Case C-275/98, *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri*, ECLI:EU:C:1999:567.

[92] Opinion of Advocate General Alber, Case C-275/98, *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri*, ECLI:EU:C:1999:384, paras. 15-18.

[93] Case C-275/98, *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri*, ECLI:EU:C:1999:567, paras. 15-20.

Public Procurement Complaints Board of Denmark was indeed a tribunal or not for the purposes of the reference for a preliminary ruling procedure.[94]

The Advocate General in *MT Højgaard and Züblin* stated that 'a more detailed examination [wa]s needed', in light of the information provided to the CJEU.[95] The CJEU, in Grand Chamber, began by distinguishing the *TDC I* case, noting that that referring body in that did not have independence, but by contrast, the Public Procurement Complaints Board of Denmark in the case at hand in *MT Højgaard and Züblin* did, and was enshrined in the specific law regarding the referring body.[96]

Whilst the Opinion of the Advocate General was much more compelling and detailed in distinguishing the differences between the Telecommunications Complaints Board of Denmark in *TDC I* and the Public Procurements Complaints Board of Denmark in *MT Højgaard and Züblin*,[97] both the Opinion of the Advocate General and the judgment of the CJEU put it that the referring body was a tribunal for the purposes of the preliminary reference procedure, still. The most recent judgment of the CJEU in *Simonsen & Weel* has confirmed that the *Unitron Scandinavia and 3-S* and *MT Højgaard and Züblin* judgments remain sound,[98] and that the Public Procurement Complaints Board of Denmark, as constituted, remains a tribunal that can make references for a preliminary ruling.

4 Tribunals in Nordic-EFTA-EEA States and Referrals to the EFTA Court

Even though the EFTA Court only covers a small number of states, there is an abundance of case-law in which the EFTA Court has received requests for advisory opinions from tribunals in EFTA-EEA states under Article 34 SCA. After all, it was long predicted with the EEA Agreement, and the subsequent SCA, that 'certain organs', tribunals of kind, could come within the notion of a tribunal for the advisory opinion procedure.[99] For example, Norway has many tribunal-like bodies that could potentially request advisory opinions, with the state having many 'quasi-judicial administrative bodies…[that]…perform judicial functions in the material sense'.[100] Furthermore, it has been estimated that in Iceland alone,

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94 Case C-396/14, *MT Højgaard A/S and Züblin A/S v Banedanmark*, ECLI:EU:C:2016:347, para. 22.

95 Opinion of Advocate General Mengozzi, *MT Højgaard A/S and Züblin A/S v Banedanmark*, ECLI:EU:C:2015:774, para. 31.

96 Case C-396/14, *MT Højgaard A/S and Züblin A/S v Banedanmark*, ECLI:EU:C:2016:347, paras. 27-33.

97 See, Opinion of Advocate General Mengozzi, *MT Højgaard A/S and Züblin A/S v Banedanmark*, ECLI:EU:C:2015:774, paras. 29-46.

98 Case C-23/20, *Simonsen & Weel A/S v Region Nordjylland og Region Syddanmark*, ECLI:EU:C:2021:490.

99 Sven Norberg and others (eds), *The European Economic Area: EEA Law: A Commentary on the EEA Agreement* (Fritzes 1993). p. 714.

100 Thomas Christian Poulsen, 'Norwegian Courts' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016). p. 259.

there are up to fifty bodies that might come within the scope of a tribunal for the purposes of the advisory opinion procedure.[101] As evidenced, the EFTA Court has retained a very open approach to referrals to it from tribunals in the EFTA-EEA states.

4.1 A Different View

The very first case that the EFTA Court received from a referring body through the request for an advisory opinion procedure was from the Appeals Committee at the Board of Customs of Finland (*Tullilautakunta* or *Tullnämnden*)[102] in an appeal against the decision of the Helsinki District Customs House (*Helsingin piiritullikamari*). The case, *Restamark*, has legendary status in the EFTA pillar of the EEA, for the founding judgment upon which EEA law has been built out from. This was just after Finland acceded to the EEA Agreement and it coming into effect, with Finland being an EFTA-EEA state; but prior to Finland being an EU Member State.

The EFTA Court began on a different path than the CJEU, without citing extensive CJEU authority. Instead, the EFTA Court in *Restamark* stated that, for EEA law, what a court or tribunal is, 'must be given its own interpretation'.[103] Given the way in which the national law of Finland had designated the referring body in the case at hand, it was most certainly part of the administration of the state, and not a judicial actor. The Board of Customs was staffed by civil servants, and the chair of the referring body was a Director General of the public body against whose decisions were being challenged.

This was admitted by the EFTA Court, when it put that the referring body 'appears to be closely linked to the central customs administration'.[104] However, in the next breath, it stated that, 'on balance',[105] the referring body had 'the elements characteristic of judicial procedures'.[106] These remarkable statements lead the EFTA Court to conclude the tribunal was fitting to receive an advisory opinion from the EFTA Court.[107] That was despite two EFTA-EEA states and the EFTA Surveillance Authority (ESA) pleading in the case that it should be ruled as inadmissible.[108] A view has been offered, not long thereafter, that the

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[101] Skúli Magnússon, 'Icelandic Courts' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016). p. 279.

[102] Also called the Customs Board.

[103] Case E-1/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark*, 19 December 1994, para. 24.

[104] Case E-1/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark*, 19 December 1994, para. 29.

[105] Case E-1/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark*, 19 December 1994, para. 29.

[106] Case E-1/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark*, 19 December 1994, para. 29.

[107] Note, as an interesting sidenote, that after Finland acceded to the EU on 1 January 1995, the same referring body made a reference for a preliminary ruling to the CJEU in Case C-115/96, *Outokumpu Oy*. However, regrettably, the case was withdrawn early in the proceeding. It would have been fascinating to see whether the CJEU had the same view of the EFTA Court on the referring body.

[108] For critique here, see, Graham Butler, 'Mind the (Homogeneity) Gap: Independence of Referring Bodies Requesting Advisory Opinions from the EFTA Court' (2020) 44 Fordham International Law Journal 307. pp. 326-328.

referring body in *Restamark* was not really fitting to be an acceptable tribunal for the purposes of the procedure.[109]

Thereafter in *Mattel*,[110] the EFTA Court dug in its heels into this peculiar approach. Here, it had received a request for an advisory opinion from the Market Council of Norway (*Markedsrådet*). Notwithstanding that the EFTA Court stated that, '[i]t would seem that under Norwegian law the Markedsrådet is considered or treated as an administrative body rather than as a [c]ourt',[111] it nonetheless found the referral to the admissible, relying in particular on the fact that the parties to the case did not contest the admissibility before it. The EFTA Court subsequently reinforced its view on the Market Council in its *Pedicel* judgment.[112]

A further Norwegian referral appears to have motivated the EFTA Court to offer more reasoning for its liberal approach to accepting referrals from tribunals, despite them obviously lacking sufficient judicial character. In *Dr. A*,[113] the EFTA Court received a request for an advisory opinion from the Appeal Board for Health Personnel of Norway (*Statens helsepersonellnemnd*). The body was unquestionably part of the administrative process, given that it was a respondent in judicial proceedings in the Member State. The EFTA Court, however, stated that Article 34 SCA was open, and that, it did 'not require a strict interpretation of the term[] tribunal'.[114] It furthermore was of the view that the referring body acted in a capacity resembling 'semi-judicial function'.[115] In other words, for the EFTA Court, it was a tribunal that was sufficiently judicial for the purposes of the advisory opinion procedure.

In *Fred. Olsen and Others*,[116] the EFTA Court received a request for an advisory opinion from the Tax Appeals Board for the Central Tax Office for Large Enterprises of Norway (*Skatteklagenemnda ved Sentralskattekontoret for storbedrifter*). This time, the Commission, whilst regularly intervening at the EFTA Court, began to take up the lack of independence of referring bodies. It was evident that, in light of the facts presented, that the referring body constituted a first instance administrative appeal, and was not a judicial body. Nonetheless, true-to-form, the EFTA Court found the case admissible despite the lack of clear safeguards to protect the independence of the referring body. In

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[109] Carl Baudenbacher, 'Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area' (1997) 3 Columbia Journal of European Law 169. p. 215.

[110] Case E-8/94 and E-9/94, *Forbrukerombudet v Mattel Scandinavia A/S and Lego Norge A/S*, 16 June 1995.

[111] Case E-8/94 and E-9/94, *Forbrukerombudet v Mattel Scandinavia A/S and Lego Norge A/S*, 16 June 1995, para. 13.

[112] Case E-4/04, *Pedicel AS v Sosial- og helsedirektoratet*, 25 February 2005, paras. 20-21.

[113] Case E-1/11, *Norwegian Appeal Board for Health Personnel – appeal from A*, 15 December 2011.

[114] Case E-1/11, *Norwegian Appeal Board for Health Personnel – appeal from A*, 15 December 2011, para. 34.

[115] Case E-1/11, *Norwegian Appeal Board for Health Personnel – appeal from A*, 15 December 2011, para. 42.

[116] Case E-3/13 and E-20/13, *Fred. Olsen and Others v the Norwegian State*, 9 July 2014.

other words, the EFTA Court would find any first instance administrative appeal body constituted a sufficiently judicial tribunal for the purposes of the advisory opinion procedure.

4.2 A Consistent View

Further cases continued to be referred. In *Municipality of Oslo*,[117] the EFTA Court received a request for an advisory opinion from the Board of Appeal for Industrial Property Rights of Norway (*Klagenemnda for industrielle rettigheter*). Around the same time, the CJEU was beginning to tighten its case-law,[118] and it was an open question whether the EFTA Court would do the same. But it would not. Instead, the EFTA Court continued on its existing path. Despite acknowledging deficiencies that would not pass muster at the CJEU, the EFTA Court stated that despite the deficiencies not guaranteeing the independence of the referring body, such issue is 'just one part of the overall examination',[119] as to whether the referring body can receive an advisory opinion of the EFTA Court.

With the gap widening between the case-law of the European Courts across the Nordic states, the next opportunity would have been the EFTA Court finding stronger reasoning for its open approach to tribunals and their referrals to the EFTA Court. That arose in *Scanteam*,[120] in which the EFTA Court received a request for an advisory opinion from the Complaints Board for Public Procurement of Norway (*Klagenemnda for offentlige anskaffelser*). At the time of deliberations, the CJEU had delivered its strongest statement yet in *Banco de Santander* that tribunals of EU Member States that are not sufficiently judicial, with necessary safeguards to protect their internal and external aspects of independence, would be deemed inadmissible.[121]

No specific rules concerned the removal of members of the body requesting an advisory opinion in *Scanteam*. The EFTA Court was nonetheless satisfied the case was to be deemed admissible. It stated that,

> The interpretation of the notion of…tribunal under Article 34 SCA must pay due regard to the constitutional and legal traditions of the EFTA States. Accordingly, that interpretation must take account of the important role played by administrative appeal boards in the EFTA[-EEA] [s]tates.[122]

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[117] Case E-5/16, *Norwegian Board of Appeal for Industrial Property Rights – appeal from the municipality of Oslo*, 6 April 2017.

[118] For example, as regards referring bodies in the Nordic states, the aforementioned cases of *TDC I* and *MT Højgaard and Züblin*.

[119] Case E-5/16, *Norwegian Board of Appeal for Industrial Property Rights – appeal from the municipality of Oslo*, 6 April 2017, para. 39.

[120] Case E-8/19, *Scanteam AS v The Norwegian Government*, 16 July 2020.

[121] Case C-274/14, *Proceedings brought by Banco de Santander SA*, ECLI:EU:C:2020:17. See, Butler, 'Independence of Non-Judicial Bodies and Orders for a Preliminary Reference to the Court of Justice' (n 35).

[122] Case E-8/19, *Scanteam AS v The Norwegian Government*, 16 July 2020, para. 46.

This was the first frank admissions of the EFTA Court that tribunals in the Nordic states are somehow different, which is an assertion that has never been entertained by the CJEU.[123]

On the same day as the EFTA Court delivered its judgment in *Scanteam*, it also delivered a judgment in *Tak*,[124] a referral for an advisory opinion from the Public Procurement Complaints Commission of Iceland (*Kærunefnd útboðsmála*).[125] There, the EFTA Court was satisfied that that procedures were sufficiently judicial to determine that the tribunal's referral was admissible.[126] The same referring body equally received a substantive answer to its referred questions in *Hraðbraut* thereafter.[127]

For the sake of completeness, it should also be noted that the one state of the EFTA-EEA states that is not a Nordic state – Liechtenstein – has also had its share of bodies admitted as tribunals for the purposes of the advisory opinion procedure at the EFTA Court.[128]

5 Analysis

Over time, the CJEU and EFTA Court have received references and requests – referrals – from a range of bodies in their respective pillars of the EEA. Whilst many tribunals in the Nordic states have had their referrals deemed admissible, some have not, and it is apparent the CJEU has taken a stricter approach in more recent times. Initially, the CJEU was a liberal decision-maker on the admissibility of cases from tribunals. A gradual turn in the case-law has now come about, with referring bodies being subject to a more evident threshold of being sufficiently judicial. By contrast, the EFTA Court has consistently taken a very liberal approach.

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123 For critique of the judgment in *Scanteam*, see, Butler, 'Mind the (Homogeneity) Gap: Independence of Referring Bodies Requesting Advisory Opinions from the EFTA Court' (n 108). pp. 334-336.

124 Case E-7/19, *Tak – Malbik ehf. v the Icelandic Road and Coastal Administration and Þróttur ehf.*, 16 July 2020.

125 Also called the Public Procurement Complaints Commission, the Public Procurements Complaints Committee, and the Complaint Committee for Public Procurement.

126 Case E-7/19, *Tak – Malbik ehf. v the Icelandic Road and Coastal Administration and Þróttur ehf.*, 16 July 2020, paras. 39-43.

127 Case E-13/19, *Hraðbraut ehf. v mennta- og menningarmálaráðuneytið, Verzlunarskóli Íslands ses., Tækniskólinn ehf., and Menntaskóli Borgarfjarðar ehf.*, 10 December 2020.

128 See, e.g., Case E-4/09, *Inconsult Anstalt v Finanzmarktaufsicht*, 27 January 2010, referred by the Complaints Commission of the Financial Market Authority of Liechtenstein (*Beschwerdekommission der Finanzmarktaufsicht*); Joined Cases E-26/15 and E-27/15, *Criminal Proceedings against B and B v Finanzmarktaufsicht (FMA)*, 3 August 2016, in which the same body was called the 'Appeals Board' on this occasion; Case E-6/20, *Pintail AG v Finanzmarktaufsicht*, 16 July 2020, in which the same was called a third name, the 'Board of Appeal'. Furthermore, Case E-10/20, *ADCADA Immobilien AG PCC in Konkurs v Finanzmarktaufsicht*, 18 June 2021. Furthermore, Joined Cases E-11/19 and E-12/19, Adpublisher AG v J & K, 10 December 2020, referred by the Board of Appeal for Administrative Matters of Liechtenstein (*Beschwerdekommission für Verwaltungsangelegenheiten*). For more, see, Wilhelm Ungerank, 'Liechtenstein Courts' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016).

5.1 The Approach of the CJEU

The CJEU's greater emphasis on the independence of tribunals, as demonstrated most recently in the *TDC* and *MT Højgaard and Züblin* cases in a Nordic context, harkens back to the issues previously raised. Those two cases both fell and rose respectively on the grounds of independence. Long before them, Advocate General Stix-Hackl had argued that referring bodies, be they courts or tribunals, need to have their independence defined in law 'clearly and precisely'.[129] Thus, it is unlikely if such a referring body like that of was the case for *Danfoss* and many of the referring bodies subsequent cases made a reference for a preliminary ruling today, that the CJEU would so readily deem the case admissible. The CJEU would likely demand more information from the referring body, hear the parties' views on the matter, and decide the admissibility with additional reading, one way or another.

There has been no exact time of turning of the CJEU's case-law. The Treaty of Lisbon itself was not a catalyst, as demonstrated by the CJEU's very open approach to admissibility in *LN*. But the turn has been for tighter criteria since then, and in no place is this better seen than in *Banco de Santander*.[130] But the tightening of the CJEU's standard of independence should not be seen as a matter of mere docket control. Instead, all that is happening is merely case-by-case assessments being made, as they arise, to determine whether a referring body meets the newly adopted standard of independence, which is an affirmative rule of law issue.

As it turned out, the judgment of the CJEU in *TDC I* proved to be a major development on the issue of tribunals making references for a preliminary ruling.[131] Essentially, the judgment in CJEU has meant that if there were no national rules in Member States governing the irremovability of members of referring body, then national law cannot be considered to provide a sufficient guarantee of independence for members of referring bodies. The new mantra of the CJEU was evidently that, as put, 'it would seem that the [CJEU] needs to hear very good arguments to be persuaded of the judicial nature of a body'.[132]

Ever since *TDC I*, the CJEU has been more careful about whom it entertains requests for a preliminary ruling from, and this contemporary approach means that the point of department for tribunals will be that independence is not necessarily assumed, and can be probed for further examination at the admissibility stage of the CJEU's proceedings, before the substantive questions referred will be considered.

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[129] Opinion of Advocate General Stix-Hackl, Case C-506/04, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, ECLI:EU:C:2006:311, para. 50.

[130] Case C-274/14, *Proceedings brought by Banco de Santander SA*, ECLI:EU:C:2020:17. See, Butler, 'Independence of Non-Judicial Bodies and Orders for a Preliminary Reference to the Court of Justice' (n 35).

[131] Case C-222/13, *TDC A/S v Erhvervsstyrelsen*, ECLI:EU:C:2014:2265 (*TDC I*).

[132] Nils Wahl and Luca Prete, 'The Gatekeepers of Article 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings' (2018) 55 Common Market Law Review 511. p. 524.

5.2 The Approach of the EFTA Court

Given that tribunals in Denmark, Finland, and Sweden, if they want to make a reference for a preliminary ruling to the CJEU, are now subject to more stringent requirements than they have ever been; it is indeed curious that tribunals in Iceland and Norway, if they want to make a request for an advisory opinion, are to be subjected to a different standard by the EFTA Court. This puts it against the normative assumption that the CJEU and EFTA Court rule on equivalent issues in a similar way.

In *Hellenic Capital Market Commission*, the EFTA Court suggested that referring bodies that are only of an administrative nature do not come within the scope of a tribunal for the purposes of the advisory opinion procedure,[133] which is a close adaptation of the CJEU's more recent case-law. But that remark of the EFTA Court in *Hellenic Capital Market Commission* does not seem to have prevented the EFTA Court in answering the questions put to it in all cases referred to it under the advisory opinion procedure, no matter their composition. Some of the EFTA Court's latter reasoning such as in *Dr. A* and *Scanteam* demonstrate that it is self-acknowledging the deficiencies in its approach. That said, it similarly demonstrates no sign of changing its case-law.

From the point of view of the EEA Agreement and SCA, there is to be substantive and procedural homogeneity of the EEA legal order with the EU legal order. It is not apparent that there is any overriding circumstance for the EFTA Court's liberal approach to accepting cases from tribunals whose credentials are not sufficiently judicial. Whilst it can be rightly stated that, for example, in Iceland, that there are, 'a number of appellate committees…have the potential to satisfy the conditions for being classified as a court or tribunal',[134] that does not mean, however, that the EFTA Court has to accept them.

Article 3(2) EEA demands that the EFTA Court must take account of new case-law of the CJEU, but the EFTA Court does not seem to be doing so.[135] With *Banco de Santander* from the CJEU, this will inevitably mean the EFTA Court must now too adopt a stricter stance on its admissibility criteria, if homogeneity is to be retained between EU law and EEA law on what constitutes as a referable body.[136] The EFTA Court should be paying attention to some of its own case-

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[133] Case E-23/13, *Hellenic Capital Market Commission (HCMC)*, 9 May 2014, para. 32: 'a national body may be classified as a court or tribunal within the meaning of Article 34 SCA when it is performing judicial functions, whereas, when it is exercising other functions, for example of an administrative nature, it may not be so classified'.

[134] Ólafur Ísberg Hannesson, 'Advisory Opinions in the EEA: The Icelandic Supreme Court and the EFTA Court' (2018) 43 European Law Review 858. p. 862.

[135] As put, 'the EFTA Court's case law has been firstly, dishonest about the material independence of referring bodies (*Restamark*), before trying to pass off as if it was giving effect to the principle of procedural homogeneity (*Dr A*, and *Fred, Olsen and Others*), later merely casting independence aside by looking at the way referring bodies act as a whole (*Municipality of Oslo*), and later again, post-*Banco de Santander*, even daring to suggest that "constitutional and legal traditions" are relevant for ignoring the independence of referring bodies, as it did in *Scanteam*'. Butler, 'Mind the (Homogeneity) Gap: Independence of Referring Bodies Requesting Advisory Opinions from the EFTA Court' (n 108). p. 336.

[136] For this full argument, from the perspective of ensuring procedural homogeneity between the EU pillar and the EFTA pillar of the EEA, see, ibid.

law. As it stated itself in *Posten Norge v ESA*, there is, '[a] need to apply the principle of procedural homogeneity…to ensure equal access to justice for individuals and economic operators throughout the EEA'.[137]

5.3 Tribunals' Decisions not Appealable to National Courts

The current approach of the CJEU (but not the EFTA Court) to reduce the availability of the preliminary reference procedure to tribunals that are not sufficiently judicial has ramifications. It might be claimed that tribunals being unable to make referrals to the European Courts would deny the effectiveness of EU/EEA law. This can be immediately rebutted. After all, even if bodies who try make a referral are explicitly told they are not able to do so; or if bodies in Member States are unsure whether they are able to make references for a preliminary ruling or not; such bodies both still have obligations under EU/EEA law.

However, all bodies of states across the two pillars of the EEA – administrative or judicial – they are all responsible for ensuring EU/EEA law is applied where necessary. And if a body is evidently administrative, it has long been the case that administrative authorities also have obligations under EU/EEA law.[138] Furthermore, as evidenced by the *TDC* cases, where the referring body in *TDC I* had the case deemed inadmissible,[139] the same issue arose once that case reached the actual courts of the Nordic state in *TDC II*.[140]

The problem arises however where there could be a referral to one of the European Courts from a body – a tribunal – whose decisions are not appealable to the courts of that state. At one time, the CJEU handled this issue by accepting the admissibility of cases of such bodies that were tribunals. In *Broekmeulen*, the CJEU ruled that if a national body,

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[137] Case E-15/10, *Posten Norge AS v EFTA Surveillance Authority*, 18 April 2012, para. 110. See also, Case E-14/11, *DB Schenker v EFTA Surveillance Authority*, 21 December 2012, para. 77: 'The [EFTA] Court has recognised the procedural branch of the principle of homogeneity'. For the EFTA Court, the principle of homogeneity can only be breached when there are 'specific circumstances'. Case E-3/98, *Herbert Rainford-Towning*, 10 December 1998, para. 21; or on the basis, read more strictly, of 'compelling grounds'. Joined Cases E-9/07 and E-10/07, *L'Oréal Norge AS v Aarskog Per AS and Others and Smart Club Norge*, 8 July 2008, para. 31.

[138] E.g., The obligations on national administrative bodies, such as Case 103/88, *Fratelli Costanzo SpA v Comune di Milano*, ECLI:EU:C:1989:256; including when involving national constitutional issues, such as Case C-378/17, *The Minister for Justice and Equality and The Commissioner of An Garda Síochána v Workplace Relations Commission*, ECLI:EU:C:2018:979. See further, Maartje Verhoeven, *The Costanzo Obligation: The Obligations of National Administrative Authorities in the Cases of Incompatibility between National Law and European Law* (Intersentia 2011).

[139] Case C-222/13, *TDC A/S v Erhvervsstyrelsen*, ECLI:EU:C:2014:2265 (*TDC I*).

[140] Case C-327/15, *TDC A/S v Teleklagenævnet and Erhvervs- og Vækstministeriet*, ECLI:EU:C:2016:974 (*TDC II*).

> delivers decisions which are in fact recognised as final, [they] must, in a matter involving the application of [EU] law, be considered as a court or tribunal of a Member State within the meaning of Article [267 TFEU].[141]

However, *Brockmeulen* cannot be considered good law in the modern age. The CJEU would – on balance – no longer accept such references from such tribunals that would be not sufficiently judicial. The ramifications of this would be that such tribunals in states, must have their decisions be appealable to courts in the respective states. Otherwise, it would result in a potential area of national law that is then, problematically, walled-off from EU law.

In such a circumstance, this would necessitate change at national level, as decisions of administrative authorities, against whose decisions there is no appeal, is a violation of EU law. Member States are thus under an obligation to amend their national law. How change would look like, would be up to the state concerned,[142] within certain parameters set by EU/EEA law. That said however, if decisions of a tribunal are appealable to a national court, there is no lapse of judicial protection. This view is support by the CJEU's recent case-law such as in *TDC I*, which suggests it still places emphasis on decisions of the body having its referral being deemed inadmissible as being resolved by its decisions eventually having the possibility to be decided by a court in that state.[143]

In is incumbent for the Nordic states to carefully examine the structures of their states to ensure there are no areas of their respective national legal orders that become absent of EU/EEA law, without opportunity for judicial redress, and the possibility for the referral procedures to come into play.

6 Conclusion

The rule of law is alive and well,[144] and living in the current case-law, at least as regarding the case-law of the CJEU. Whilst the CJEU has wavered over time in its commitment to the necessity of independence of tribunals in the past, it has since tightened up, ensuring that tribunals making referrals are sufficiently judicial. This brings forth several considerations for the legal orders of the Nordic states, who, whilst theoretically have a strong rule of law ethos about the design of the states are, nonetheless, not impenetrable as regards rule of law issues.[145]

EU law is not static. On the contrary, it evolves with the wider EU legal environment around it. This naturally changes the wider contours in which

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[141] Case 246/80, *C. Broekmeulen v Huisarts Registratie Commissie*, ECLI:EU:C:1981:218, para. 17.

[142] Member States have discretion about how to give effect to remedies under EU law, which is an obligation they must provide. Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, paras. 17-18.

[143] Case C-222/13, *TDC A/S v Erhvervsstyrelsen*, ECLI:EU:C:2014:2265 (*TDC I*), para. 37.

[144] It was the *Les Verts* judgment of the CJEU that proclaimed that the EU was based on the rule of law. Case C-294/83, *Parti écologiste "Les Verts" v. European Parliament*, ECLI:EU:C:1986:166, para. 23.

[145] On the rule of law standards in Scandinavia, see, Butler, 'The European Rule of Law Standard, the Nordic States, and EU Law' (n 32).

adjudication occurs at the CJEU. A shift in the judicial approach of the CJEU to the issue at hand – referrals to it by tribunals in the Nordic states – as evidenced, has moved with the times, in light of the wider concerns of rule of law backsliding in some Member States. What the CJEU is concerned with in the modern age is safeguards. Such safeguards were not ordinarily apparent in its earlier rulings.

The *TDC I* and *MT Højgaard and Züblin* cases appear to have been the turning points with regard to tribunals and referrals to the CJEU with regard to tribunals in Denmark, Finland, and Sweden. By contrast, for tribunals in Iceland and Norway, the EFTA Court has an extremely welcoming approach to requests for advisory opinions from tribunals in those jurisdictions. The fact that tribunals in the Nordic states are split across two different pillars of the EEA – the EU pillar and the EFTA pillar – and the recently divergent case-law means there is an anomaly in the present age. Tribunals in Iceland and Norway that are administrative in nature may refer cases to the EFTA Court, but similarly constituted tribunals in Denmark, Finland, and Sweden may not refer cases to the CJEU. This divergent approach is problematic,[146] and the tightening of admissibility criteria at the CJEU is going to put the EFTA Court under pressure. For the EFTA Court has never, ever, refused to hear a case from a referring body, no matter whom that body was, including administrative appeals bodies. The most it has ever done was in *Wilhelmsen*,[147] to say that certain questions sent by a referring body were inadmissible.

The necessary demand of the independence of courts has crossed-over to also mean the independence of tribunals in European states. Many tribunals in the Nordic states are not independent, but merely administrative bodies that are no way considered part of the judicial system. There will naturally be consequences for Nordic tribunals as a result of this.[148] It is relatively straightforward for tribunals in the Nordic states to be accommodated in the understanding of Article 267 TFEU and Article 34 SCA to have cases before them admissible before the CJEU and EFTA Court. To ensure that they are sufficiently judicial, legal safeguards to further enhance the independence of such bodies is an obvious step that could be taken. It is thus now up to the Nordic states to respond to these developments that have occurred at the European Courts.

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[146] As highlighted in, Butler, 'Mind the (Homogeneity) Gap: Independence of Referring Bodies Requesting Advisory Opinions from the EFTA Court' (n 108).

[147] Case E-6/96, *Tore Wilhelmsen AS v Oslo kommune*, 27 June 1997, para. 40.

[148] Interestingly, Sweden never reformed the Revenue Board (*Skatterättsnämnden*) after the *Victoria Film* judgment, so that body, centrally important in Sweden as regards tax law, is still not able to make references for a preliminary ruling. The author is grateful to Professor Mattias Dahlberg for this point.

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