

The EFTA Court¹

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Introduction

In the relationship between the European Union and the EFTA States nearly all attention has recently been drawn to the enlargement negotiations of Norway, Sweden, Finland and Austria, which were recently successfully concluded.

However, it should not be forgotten that the accession of the abovementioned EFTA States still depends on the outcome of their respective referenda relating to the enlargement issue. The agreement establishing the European Economic Area (EEA), which entered into force on 1 January 1994, is at present the zenith of cooperation between the European Union and the EFTA States and the EEA Agreement could remain of importance if the outcome of the referenda in one or more of the EFTA States is negative. It should be mentioned that, besides Norway, Sweden, Finland and Austria, Iceland is also among the EFTA States which are party to the EEA Agreement. Liechtenstein has postponed its ratification due to its close relations with Switzerland which was unable to ratify following its referendum in 1992.

The EEA Agreement deserves further attention due to the possibility that it may serve as a model for the European Union in later negotiations with other countries, especially with Eastern European countries which most likely will not be able to accede as full members for some years to come but may like to be associated with the Community within a multilateral and institutionalized framework.

The purpose of this article is to present the EFTA Court and to give an introduction² to the organization, composition and competences of the Court and the relationship to the Court of Justice of the European Communities (abbreviated to CJEC in the following).

The Legal Basis for the Creation of the EFTA Court

The EEA Agreement does not create any institution or organ for its judicial review, enforcement or surveillance. However, according to Articles 108 and 109 of the EEA Agreement, the EFTA States are under an obligation to create such institutions, i.e. the EFTA Court and the EFTA Surveillance Authority, by means of a separate agreement amongst themselves. The provisions to fulfil this undertaking can be found in the 'ESA/EFTA Court Agreement' (Agreement on the Establishment of a Surveillance Authority and a Court of Justice signed in Oporto on 2 May 1992). To a large extent, the ESA/EFTA Court Agreement contains provisions which reproduce or closely follow corresponding provisions in the EC Treaty.

Part IV of the Agreement deals with the EFTA Court and the main provisions in this respect can be found in Articles 27 to 41. These provisions correspond to a great extent with Articles 165, 167, 169-178, 185 and 186 of the EC Treaty. In addition, Part V, General and Final Provisions, contains various provisions of relevance to the functioning of the Court in Articles 42-46 and 48. The Statute of the EFTA Court is contained in Protocol 5 to the ESA/EFTA Court Agreement.

Organization and Composition of the EFTA Court

The seat of the Court is Geneva, Switzerland, which was decided by common accord by the governments of the EFTA States involved, and the EFTA Court is a permanent court, as is the CJEC.

The EFTA Court is to consist of independent judges to be appointed by common accord of the governments of the EFTA States for a term of six years, although every three years there should be a partial replacement of the judges. No nationality requirement is stipulated in the ESA/EFTA Court Agreement but there is in fact one judge from each of the 5 EFTA States which are party to the EEA. The appointed judges are: Kurt Herndl (Austria), Leif Sevòn (Finland), Thór Vilhjálmsson (Iceland), Bjørn Haug (Norway) and Sven Norberg (Sweden).

The judges elect the President of the EFTA Court from among their number for a term of three years, but he may be re-elected. Leif Sevòn, former judge at the Supreme Court of Finland, has been elected President.

The EFTA Court will only sit in plenary session, which is one of the aspects in which the rules differ from those governing the CJEC. This was decided to be the best starting point until experience is gained from the Court's operations. At the request of the Court, the governments of the EFTA States may, by common accord, allow it to establish chambers. The EFTA Court has no advocates-general, contrary to the composition of the CJEC.

A very important aspect regarding the organization of the Court has been the decision to choose English as the working language of the Court. The EFTA States have used English as EFTA's only working language for all the years it has existed and throughout the EEA negotiations. The main exception to this choice relates to questions for interpretative opinions, the advisory opinions', which may be put forward and answered in the language of the national court. The working language of the CJEC is French. English is not the mother tongue of any of the present EFTA States and the choice of English as working language attributes a higher degree of equality in this respect than within the European Union. It will be interesting to see whether the accession of these EFTA States to the European Union will lead to any changes in the number of working languages at the CJEC.

As to the remaining rules relating to the organization of the Court, it can be said that the similarities between the EFTA Court and the CJEC clearly outweigh the differences.

The Competences of the EFTA Court

These competences correspond to a large extent with the competences of the CJEC, the most important difference probably being the replacement of the preliminary rulings procedure by the procedure for advisory opinions.

The EFTA Court is competent for five main types of cases:

1. infringement proceedings initiated by the EFTA Surveillance Authority against an EFTA State;
2. settlement of disputes between EFTA States relating to the EEA;
3. actions to annul a decision of the EFTA Surveillance Authority;
4. actions against the EFTA Surveillance Authority for failure to act;
5. advisory opinions to the national courts of the EFTA States.

The infringement procedure has its legal basis in Article 31 of the ESA/EFTA Court Agreement which, with a minor difference, is a reproduction of Article 169 of the EC Treaty. Under Article 33 of the ESA/EFTA Court Agreement, the State is obliged to take the necessary measures to comply with the judgment.

The settlement of disputes is regulated by Article 32 of the ESA/EFTA Court Agreement, which differs from the corresponding provision in Article 170 of the EC Treaty in that the EFTA States have no obligation to bring the matter before the EFTA Surveillance Authority before it is brought to the EFTA Court. The dispute can relate to the interpretation of the EEA Agreement, the Agreement on the Standing Committee of the EFTA States or the ESA/EFTA Court Agreement.

The EEA Agreement does not deal with conflicts between Member States of the European Union. If a conflict concerning the interpretation and application of EEA rules arose between these Member States, it would be settled through internal Community procedures and, in the last instance, by the CJEC pursuant to Article 170 of the EC Treaty.

Article 36 of the ESA/EFTA Court Agreement concerning the action to annul decisions of the EFTA Surveillance Authority has Articles 173 and 174(1) of the EC Treaty as its models. However, Article 36 limits the review to decisions of the EFTA Surveillance Authority whereas Article 173 of the EC Treaty also covers legislative acts such as regulations and directives.

In this context, it is important to bear in mind that the EEA Agreement is a public international law agreement and that the EEA Agreement, according to Protocol 35³ of the EEA Agreement, implies no transfer of legislative power from the Contracting Parties to any institution or organ in EFTA, the European Union or the EEA.

Before describing the advisory opinions, it should be mentioned that Article 107 of the EEA Agreement provides the possibility for an EFTA State to allow a court or tribunal to ask the CJEC to decide upon the interpretation of an EEA rule. Protocol 34 of the EEA Agreement contains further details on this matter. Each EFTA State is entirely free to decide whether to avail itself of this possibility. None of the EFTA States has made use of the option. It would cause political and constitutional difficulties to allow a court (CJEC) of a territorial entity to which none of the EFTA States belong to give binding interpretations.

The EFTA States have instead chosen to entrust the EFTA Court with a corresponding competence to give advisory opinions in light of the need for and importance of the existence of a procedure similar to the preliminary rulings. It was not possible to go further than to give the EFTA Court the competence to deliver advisory (non-binding) opinions. The function of the CJEC as conceived in the EC Treaty is that of a court whose decisions are binding.

The legal basis for the advisory opinions can be found in Article 34 of the ESA/EFTA Court Agreement and provides for the possibility of national courts and tribunals of the EFTA States requesting advisory opinions on the interpretation of the EEA Agreement. The EFTA States can in their internal legislation limit the right to make such a request to courts and tribunals against whose decisions there is no judicial remedy under national law. Such a limitation does not exist under the preliminary rulings procedure in the European Union. Only Austria has made a limitation in the right to make a request.

The procedure also differs from the preliminary rulings under the EC Treaty in other respects. There is no obligation to seek an advisory opinion, whereas the national courts and tribunals in the European Union against whose decisions there is no judicial remedy under national law must bring the matter before the CJEC according to Article 177 (3) of the EC Treaty. An advisory opinion may only be sought on the interpretation of the EEA Agreement and not on the validity of the decisions of the bodies established on the basis of the EEA Agreement.

Taking into account the complexity of the EEA legal system and the experiences in the European Union there is no doubt that this procedure will be of utmost importance for the

Contracting Parties' ambition to ensure a uniform interpretation and application of the EEA Agreement. The governments of the EFTA States expect that their national courts will make use of the possibility very early on to ask the EFTA Court to give advisory opinions.

The Relationship Between the EFTA Court and the CJEC

It must be emphasized that there is no mechanism for direct cooperation between the CJEC and the EFTA Court regarding the assessment of individual cases brought before one of these courts. The two Courts are independent of each other. Such a mechanism would have been incompatible with Community law according to the CJEC in Opinion 1/91.⁴ Instead there is a considerable number of rules and mechanisms which aim at ensuring a homogenous development of the jurisprudence of the EEA.

In Article 6 of the EEA Agreement, the Contracting Parties have declared that all provisions of the Agreement, in so far as they are identical in substance to corresponding EC rules, are in their implementation and application to be interpreted in conformity with the relevant rulings of the CJEC given prior to the date on which the Agreement was signed.

Article 3 (2) of the ESA/EFTA Court Agreement is relevant for the case-law of the CJEC after the signing of the EEA Agreement and obliges the EFTA Court to give due consideration to the principles laid down by the rulings of the CJEC made after the Agreement was signed, and which concern the interpretation of the EEA Agreement or such rules of Community law which are identical in substance to the EEA Agreement, the provisions of Protocol 1 to 4 to the ESA/EFTA Court Agreement and the provisions of the acts corresponding to those listed in Annexes I and II of the ESA/EFTA Court Agreement.

The fifteenth consideration of the Preamble to the EEA Agreement clearly stresses the intention of the Contracting Parties to arrive at and maintain a uniform application and interpretation of the Agreement.

Article 106 of the EEA Agreement provides that a system of exchange of information concerning judgments by the EFTA Court, the CJEC and its first instance (Court of First Instance of the European Communities) and the courts of last instance of the EFTA States is to be established.

Furthermore, the EEA Joint Committee is obliged, according to Article 105 of the EEA Agreement, to keep the development of the case-law of the CJEC and the EFTA Court under constant review and is to act to preserve the homogenous interpretation of the Agreement. Protocol 48 to the EEA Agreement provides that the decisions taken by the EEA Joint Committee under Articles 105 and 111 may not affect the case-law of the CJEC. This provision was originally an agreed minute but was transferred to the Protocol to avoid any doubt.

According to Article 111 of the EEA Agreement, the Contracting Parties can agree to request the CJEC for a ruling on a dispute concerning rules which are identical in substance to Community law.

Conclusion

There are far-reaching similarities in the organization and competences of the CJEC and the EFTA Court. The EFTA Court has as far as possible been given the same competences as the CJEC, in order to secure the homogenous application of the EEA Agreement. The success or failure of the EEA cooperation will to a large extent depend on the effective functioning of the EFTA Court and smooth cooperation between the EFTA Court and the CJEC. n

1. All views expressed are strictly personal. Special thanks are due to Martin Johansson, Legal Secretary at the EFTA Court, for his comments.

2. For a thorough and clear description of the EFTA Court, the following publication can be recommended: Norberg, Sven, 'The European Economic Area: Institutional Solutions for Ensuring a Dynamic and Homogenous EEA' in Vassili Christianos and Steen Treumer (eds.) *Competition Law of the EEA* (to be published by the European Institute of Public Administration, Maastricht, 1994). Judge Sven Norberg was Director of Legal Affairs, EFTA Secretariat, from 1982 until the entry into force of the EEA Agreement.

3. Mr Advocate-General Walter van Gerven, CJEC, doubts whether the legal assessment in Protocol 35 of the EEA Agreement is entirely correct. For further details on this issue and for van Gerven's highly interesting point of view on primacy and direct effect of EEA law, see Walter van Gerven, 'The Genesis of EEA Law and the Principles of Primacy and Direct Effect' in *Fordham International Law Journal* (Vol 16, 1992-93, 955).

4. Opinion 1/91 [1991] *ECR* I-6079.