The EFTA Court

Ólafur Jóhannes Einarsson
Registrar EFTA Court

www.eftacourt.int
olafur.einarsson@eftacourt.int

Brussels, 14 February 2019
Overview

- This presentation covers:
  1. Legal framework
  2. Relationship EFTA Court – EU Courts
  3. Notable case-law
Legal framework

- **EEA Agreement Article 108(2):** states that the EFTA States shall establish a court of justice (EFTA Court)

- **Surveillance and Court Agreement (SCA):** Article 27 provides for the establishment of the EFTA Court

- **Protocol 5 SCA:** Statutes

- **Rules of Procedure:** under review
Organisation

- 3 judges → Each EFTA State nominates one judge

- One cabinet per judge, with legal secretaries and assistants

- Registry handles procedural questions and the administration of the Court

- Total staff: around 20

- Working language – English

- Average duration of proceedings: 8 months
Types of cases - I

DIRECT ACTIONS (DA)

- **Infringement actions vs. EFTA States:**
  - Initiated by ESA (Art. 31 SCA)
  - Initiated by another EFTA State (Art. 32 SCA)

- **Challenges against ESA:**
  - Validity of ESA’s decisions (Art. 36 SCA)
  - ESA’s failure to act (Art. 37 SCA)
  - Liability of ESA (Art. 39 SCA)

- **Parties:** ESA, EFTA States; private entities (Arts. 36, 37, 39)
Direct actions

- Article 31 SCA is modelled on Article 258 TFEU.
- However, under EEA law, there is no provision corresponding to Article 260 TFEU – no possibility to impose fines.
- Many cases brought under Article 31 SCA.
- Article 36 SCA corresponds to Article 263 TFEU – standing of private applicants.
- In practice, these cases are on the validity of ESA’s state aid decisions.
Types of cases - II

ADVISORY OPINIONS (AO)

- **Who can request?**
  - "..any court or tribunal in an EFTA State." (Art 34(2) SCA)

- **When to request?**
  - "Where... that court or tribunal considers it necessary to enable it to give judgment." (Art 34(2) SCA)

- **Effect?**
  - «Always» followed, but formally speaking not binding (≠ ECJ’s preliminary rulings)
Advisory opinions

- Article 34 SCA modelled on the preliminary ruling procedure in Article 267 TFEU;
- However: advisory opinions are not preliminary rulings.
- Does this matter in practice?
- See E-2/11 STX and E-16/16 Fosen-Linjen; E-7/18 Fosen-Linjen II
- No (explicit) duty on courts of last instance to refer questions to the EFTA Court – contrast with the situation under TFEU.
Duty to refer

- E-18/11 Irish Bank: According to the wording of Article 34 SCA, there is, in particular, no obligation on national courts against whose decisions there is no judicial remedy under national law to make a reference to the Court.

- At the same time, courts against whose decisions there is no judicial remedy under national law will take due account of the fact that they are bound to fulfil their duty of loyalty under Article 3 EEA.
Duty to refer

- E-3/12 Jonsson: It is equally important that such questions are referred to the Court (under Article 34 SCA) if the legal situation lacks clarity. Thereby unnecessary mistakes in the interpretation and application of EEA law are avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU are ensured.
2. Relationship
EFTA Court - EU Courts

- Art. 6 EEA and Art. 3 SCA: EEA Agreement to be interpreted in conformity with the relevant case law of the ECJ.
- Rebuttable presumption – EEA interpreted in line with corresponding provisions in EU law.
- Differences in scope and purposes – different interpretation in specific circumstances, very rare.
- EFTA Court rulings on EEA specific problems – E-12/10 Marine Harvest (competence of ESA under Protocol 9 EEA).
Relationship

EFTA Court - EU Courts

- EFTA Court often has to deal with questions unresolved by the ECJ
- What happens in the event of a divergence?
- E-9/07 L’Oréal: [neither] explicitly addresses the situation where the EFTA Court has ruled on an issue first and the ECJ has subsequently come to a different conclusion. However, the consequences for the internal market within the EEA are the same in that situation as in a situation where the ECJ has ruled on an issue first and the EFTA Court subsequently were to come to a different conclusion.
Relationship

EFTA Court - EU Courts

- This calls for an interpretation of EEA law in line with new case law of the ECJ regardless of whether the EFTA Court has previously ruled on the question.

- The EFTA Court frequently cited by the EU Courts and Advocates Generals, e.g.: E-3/00 ESA v Norway (precautionary principle); E-4/09 Inconsult (is website a durable medium?); E-15/10 Posten Norge (nature of competition law fines)
3. Notable case-law

- E-9/97 Sveinbjörnsdóttir – established state liability.

- The EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own. The EEA Agreement does not establish a customs union but an enhanced free trade area [...]. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.
Citizenship Directive in the EEA

- Citizenship as laid down in Articles 20 and 21 TFEU has no equivalent under the EEA Agreement.
- However, after protracted discussions between the EFTA States and the Commission, the Citizenship Directive (2004/38) was incorporated *without* substantive adaptations.
- Raises complex questions – E-26/13 *Gunnarsson* and E-28/15 *Jabbi*.
Citizenship Directive in the EEA

- Gunnarsson - an Icelandic pensioner who moved to Denmark with his wife in receipt of unemployment benefits; was not allowed to use his wife’s tax allowance.

- Similar case solved by the CJEU on the basis of Article 21 TFEU – C-520/04 Turpeinen.

- Could he rely on Article 7 of the Directive against Iceland, his home State?

- Yes, said the EFTA Court.
Citizenship Directive in the EEA

- In Case C-456/12 *O and B* decided before *Gunnarsson*, the CJEU reached the opposite conclusion regarding applicability of Article 7 vis-à-vis the home State.
- Quite an unusual situation.
- In *Jabbi* the EFTA Court was then again asked the question and came up with the same answer.
Citizenship Directive in the EEA

- The Court emphasised the importance of free movement of persons in the scheme of the EEA Agreement.
- Distinguished *O and B*, the Directive had to be interpreted in EEA legal context.
- Arrived at the same result as applied in EU law on the basis of sources available under EEA law.
Citizenship Directive in the EEA

- The EFTA Court has been accused of judicial activism – incorporating Treaty changes in via the backdoor.
- However, by incorporating the Directive without any substantive adaptations, the Contracting Parties effectively left the complex issues to the EFTA Court.
Import of meat

- Iceland has a licence system for the import of meat and other agricultural products.
- Are these products covered by the EEA Agreement?
- Yes and no!
- Agricultural products fall, in principle, outside the scope of the Agreement.
- However, voluminous legislation relating to food and feed in Annex I.
Import of meat

- E-17/15 *Ferskar kjötvörur* and E-2-3/17 *ESA v Iceland*

- The licensing system is a veterinary check for the purposes of Directive 89/662 and in breach of that Directive.

- The Court rejected all arguments to the effect that the legislation should be interpreted differently as a matter of EEA law.
A few interesting cases

- E-1/06 Gaming Machines
- E-2/06 Hjemfall
- E-10/11 Hurtigruten
- E-15/10 Posten Norge
- E-16/11 Icesave
- E-14/15 Holship
- E-3/16 Ski Taxi
- E-15/16 Yara