



The EFTA Court

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Overview

This presentation covers:

1. Legal framework of the EFTA Court
2. Milestones in the EFTA Court's case-law
3. Interpretation of EEA law, relationship EFTA Court – ECJ



The nature of the EEA Agreement

- The same rules should apply in both pillars – **Homogeneity**
- The EEA Agreement is an Agreement of Public international law with a “twist”, cf. E-9/97 *Sveinbjörnsdóttir*
- The EFTA States did not transfer sovereignty to the EEA institutions – legislative powers and supra-national decision making. An exception from that principle is found mainly in competition law
- No direct effect and primacy *as* found in EU 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: Statute
- Rules of Procedure: New rules as of 1 August
- **Jurisdiction**: To rule on the interpretation of the EEA Agreement, includes Acts ref. in Annexes and Protocols (secondary legislation)



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: 20
- Working language – English, advisory opinions translated to the language of referring court
- Average duration of proceedings: 8-12 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, no provision corresponding to Article 260 TFEU – no possibility to impose fines
- Many cases brought under Article 31 SCA – mostly failure to implement regulations and directives
- 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.*



Milestones

- E-9/97 *Sveinbjörnsdóttir* – established state liability under EEA law, confirmed in E-4/01 *Karlsson*
- *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.*



Milestones

- The conclusion in *Sveinbjörnsdóttir* paved the way for the Court of Justice concluding that the EEA constituted an extension of the internal market
- *Ospelt*: “one of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States”



Milestones

- Case E-16/11 *Icesave* – the highest stakes infringement case, result of the Icelandic banking crisis
- Iceland was not obliged to ensure payment of minimum deposit guarantee
 - Directive only obliged the State to establish a deposit guarantee scheme – not guarantee payment in all cases
 - Directive meant to cater for collapse of individual institutions not an entire banking system
 - Recitals suggested that the burden on the State should not be too onerous
 - Legislative history interpreted as indicative of the State not being liable
- Ruling was not challenged by the EU – importance of credible EFTA pillar



Interpretation of EEA law

- Art. 6 EEA and Art. 3 SCA: EEA Agreement to be interpreted in conformity with the relevant case law of the ECJ – *Homogeneity*
- Rebuttable presumption – EEA law interpreted in line with corresponding provisions in EU law
- Differences in scope and purposes – different interpretation in specific circumstances, rare: E-4/04 *Pedicel*, E-28/15 *Jabbi* and E-4/19 *Campbell*



Interpretation of EEA law

- *E-3/98 Rainford-Towning: there are differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty, and it cannot be ruled out that such differences may, under specific circumstances, lead to differences in the interpretation [...]. But where parallel provisions are to be interpreted **without any such specific circumstances being present, homogeneity should prevail.***



Interpretation of EEA law

- Endorsed by the the Court of Justice
- C-471/04 *Keller Holding*: *both the Court and the EFTA Court have recognised the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly*



Relationship EFTA Court - ECJ

- EFTA Court deals 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 - ECJ

- *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 approach in L'Oreal does not weaken the standing of the EFTA Court – the fundamental objective is uniform interpretation of common EU/EEA rules throughout the EEA – homogeneity
- The EFTA Court does not align its case law if compelling grounds of EEA law are present, E-4/19 *Campbell*



Relationship EFTA Court - ECJ

- *The Court's judgment in Jabbi is based on the specific legal context of the EEA Agreement ... the Court's interpretation of the Directive must take into account the context ...in EEA law and the manner in which this context differs from the EU pillar.*
- *Recent case law of the ECJ ... has upheld relevant findings of the judgment in O. and B. However, none of these judgments concern the interpretation of the Directive in the context of the EEA Agreement. The Court finds that the EEA legal context remains unaltered since Jabbi.*



Relationship EFTA Court - ECJ

- The EFTA Court frequently cited by the EU Courts and in particular its Advocates Generals
- AG Trstenjak in C-300/12 „*unique judicial dialogue*“
- Observations made in connection with the case law on damages under the Motor Vehicle Directives
- E-8/07 *Nguyen* recognised the right to non-pecuniary damages cited e.g. in C-22/12, C-277/12



Relationship EFTA Court - ECJ

- E-3/00 *ESA v Norway* (precautionary principle); cited in C-192/01, C-41/02
- E-4/09 *Inconsult* (is website a durable medium?); cited in C-49/11, C-375/15
- E-3/16 *Ski Taxi* (restriction of competition by object); cited in AG opinion C-228/18