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The role of the EFTA Court

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Overview

A. History

B. Structure

C. Case law

D. Accomplishments

E. Challenges

I. Pre-history

The 1972 Free Trade Agreements are directly effective in the EC (ECJ Case Rs. 104/81 *Kupferberg*), but not in the EFTA States.

There is thus no reciprocity with regard to access to justice.

Administration of 1972 FTA's by diplomatic dispute settlement mechanisms (Joint Committees meeting behind closed doors and deciding by consensus; sanctions: retaliation).

Prof. *Olivier Jacot-Guillarmod*: Judicial restraint of trade.

II. EEA Court

Protocol 35 to the EEA Agreement: Quasi-direct effect (and implicitly quasi-primacy).

5 ECJ judges and 3 EFTA judges (guarantee of homogeneity).

* Deciding on conflicts between the Contracting Parties;

* Deciding on the EFTA surveillance mechanism;

* But no competence to give preliminary rulings.

Rejected by the ECJ on 14 December 1991 in Opinion 1/91.

III. EFTA Court

Protocol 35 to the EEA Agreement largely unchanged.

No structural links with the ECJ.

From 7 to 5 to 3 judges from the EFTA States.

* Deciding on the EFTA surveillance mechanism (actions of ESA against EEA/EFTA States; actions for nullity by States and individuals);

* Competence to render preliminary rulings.

Approved by the ECJ on 10 April 1992 in Opinion 1/92.

I. Composition and working methods

3 judges and 6 ad hoc judges.

Cabinet system (as opposed to a pool system).

Registry.

No Advocate General.

No research department.

Modern language regime (English in direct actions; English plus the language of the referring court in preliminary ruling cases).

II. Appointment of judges

One judge per State, no nationality requirement, 6 years term.

Judges are chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence.

The selection procedure is governed by national law.

Appointment is by common accord of the governments. In essence, EEA/EFTA States pick their own judge.

Who becomes a judge in reality?

III. Re-appointment of judges

Re-appointment is possible and occurs.

Re-appointment is by common accord of the governments.

Consent of other governments is normally a formality.

The procedure is governed by national law.

A means to protect judges from their own government (and, as the case may be, from other governments) is the prohibition of minority judges presenting a dissenting opinion.

IV. Election of the Court's president

Unlike in ESA, where the president is appointed by common accord of the governments of the EEA/EFTA States, the president of the EFTA Court is elected by the judges.

The following persons have served as presidents:

Leif Sevón from Finland (1994-1995);

Bjørn Haug from Norway (1995-1999);

Thór Vilhjálmsson from Iceland (2000-2002);

C. B. from Liechtenstein (2003-).

V. The EFTA Court as part of the governance structure of the EFTA pillar

The EFTA pillar resembles a pond with one big fish und two small fishes.

To preserve the independence of the EFTA Court is of crucial importance for the functioning of the EEA.

The same governments whose compliance with EEA law is being judged upon by the EFTA Court decide about the re-appointment of judges.

The independence of judges may be jeopardized due to the size of the EFTA Court. The judge from the country concerned must also sit in politically sensitive cases.

C. Case law

I. Types of procedure

1. Infringement action ESA ./. Member State

a. Legal basis

Art. 108 (2)(a) EEA, Art. 31 SCA.

b. ESA's policy in bringing cases

Compliance bargaining comes first.

ESA aims at convincing the States to comply by negotiations.

The function of EFTA Court precedent.

C. Case law

I. Types of procedure

1. Infringement action ESA ./. Member State

c. Why would governments prefer to be taken to the EFTA Court?

d. The role of the European Commission and of other EU and EEA/EFTA States

C. Case law

I. Types of procedure

2. Reference for a preliminary ruling by a national court of a Member State

a. Legal basis (Art. 34 SCA)

Decisions of the EFTA Court are called judgments in the rubrum and advisory opinions in the operative part.

Unlike Art. 267 TFEU, Art. 34 SCA does not oblige courts of last resort to make a reference. The SCA must, however, be interpreted in light of the principles of loyalty and of reciprocity which are laid down in the EEA Agreement.

C. Case law

I. Types of procedure

2. Reference for a preliminary ruling by a national court of a Member State

b. Practice

Courts of last resort seem to assume that they are free to refer or not to refer a case.

Judgments in the form of an advisory opinion are not weaker than preliminary rulings of the ECJ.

In Iceland, decisions of a first instance court to make a reference are systematically being appealed to the Supreme Court. The latter has thrown out cases and questions.

C. Case law

I. Types of procedure

2. Reference for a preliminary ruling by a national court of a Member State

c. The role of ESA and of the European Commission and of EU and EEA/EFTA States.

C. Case law

I. Types of procedure

3. Action for nullity against a decision of ESA in competition and State aid law cases

Art. 36 SCA.

Action of EEA/EFTA States or of individuals/economic operators against a decision of ESA in competition or State aid law.

E-15/10 Posten Norge ./. ESA (pending).

Joined Cases E-4/10, 6/10, 7/10 Liechtenstein, REASSUR and Swisscom ./. ESA (pending).

II. Some landmark cases

1. Effect, primacy, State liability and conform interpretation

E-1/94 Restamark; E- 1/01 Einarsson; E-9/97; Sveinbjörns-dóttir; E-4/01 Karlsson; E-1/07 Criminal proceedings against A; E-8/07 Nguyen; E-2/10 Kolbeinsson.

2. Fundamental rights

E-8/97 TV 1000; E-2/02 Bellona; E-2/03 Ásgeirsson.

3. Other general principles

Duty to loyally cooperate; non-discrimination; proportionality; good administration; legal certainty; legitimate expectations.

C. Case law

II. Someandmark cases

4. State monopolies for alcohol, tobacco and gambling

E-1/94 Restamark; E-6/96 Wilhelmsen; E-9/00 ESA ./. Norway (alcopops); E-4/04 Pedicel; E-4/05 HOB vín I; E-6/07 HOB vín II; E-16/10 - Philip Morris (pending).

5. Precautionary principle

E-3/00 ESA ./. Norway; E-4/04 Pedicel.

6. Ownership of natural resources

E-2/06 Norwegian Waterfalls.

C. Case law

II. Landmark cases

7. Climate, geography and culture

E-3/05 ESA ./. Norway (Finnmark); E-1/03 ESA ./. Iceland (Flight taxes); E-1/01 Einarsson).

8. Affirmative action

E-1/02 ESA ./. Norway (Oslo University).

9. State aid and competition law

E-4/97 Norwegian Bankers' Association ./. ESA; E-9/00 LO.

II. Landmark cases

10. Labour law

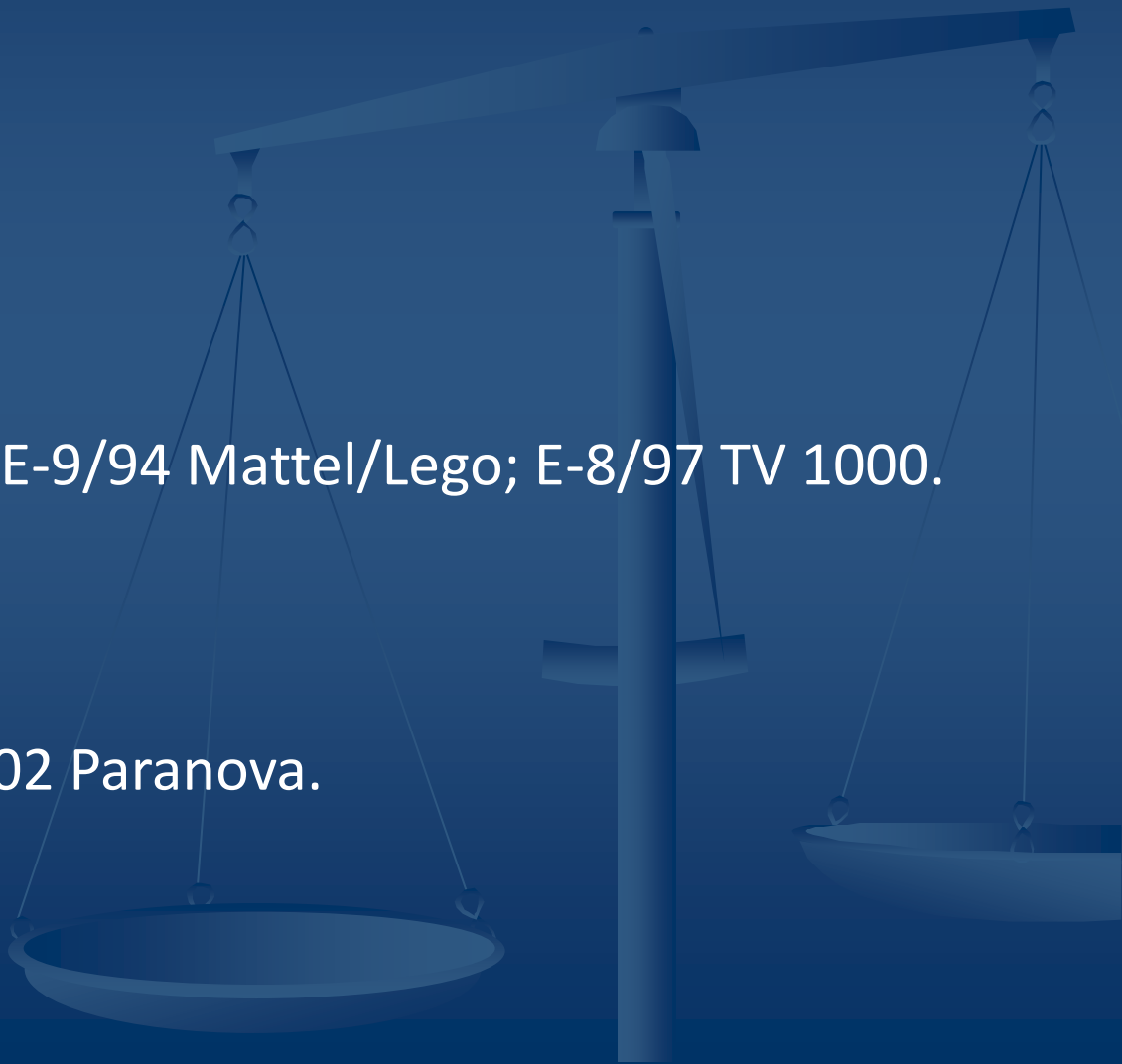
E-2/96 Ulstein.

11. TV without frontiers

Joined Cases E-8/94 and E-9/94 Mattel/Lego; E-8/97 TV 1000.

12. IP law

E-1/98 Astra Norge; E-3/02 Paranova.



III. “Sagas”

1. The Finanger saga

E-9/1997 Sveinbjörnsdóttir; Icelandic Supreme Court Sveinbjörnsdóttir 1999; E-1/99 Finanger; Norwegian Supreme Court Finanger I 2000; ECJ C-537/03 Candolin (30/5/2005) Norwegian Supreme Court Finanger II (28/10/2005).

2. The Dr Tschannett saga

Reasoned opinion of ESA; E-6/00 Dr Juergen Tschannett; 3 rulings of the Supreme Court of Liechtenstein without a reference to the EFTA Court; 2 rulings of the FL State Court.

On 7 May 2010, the Supreme Court found in favour of the Plaintiff; on 30 November 2010, the case was settled.

I. Maintenance of homogeneity

1. EEA/EFTA States pleading alleged differences between EU law and EEA law.

In E-6/96 Wilhelmsen , the Government of Norway un-successfully urged the Court to find that beer is excluded from the scope of the EEA Agreement.

In E-3/98 Rainford-Towning the FL Government unsuccessfully argued that the case law of the ECJ on freedom of establishment is not directly relevant to the interpretation of Article 31 EEA.

In E-2/06 Norwegian Waterfalls, the Norwegian Government, supported by the Icelandic government, pleaded that rules concerning ownership of natural resources fall outside the scope of the EEA Agreement. The EFTA Court disagreed.

I. Maintenance of homogeneity

2. EEA/EFTA States inviting the Court to deviate from the case law of the ECJ

In E-1/02 University of Oslo, the Norwegian government asked the Court to adopt an alternative to the interpretation of the Equal Rights Directive developed by the ECJ. The Court did not follow that invitation.

3. EEA/EFTA States arguing that the constitutional principles of EU law are not part of EEA law

Cf. the Court's case law concerning effect, primacy, State liability and conforming interpretation, supra.

II. Creative homogeneity

Sometimes the EFTA Court basically follows the ECJ with regard to the outcome of a case, but uses different reasons, and maybe the outcome might be slightly different.

Example: The Court's case law concerning the written justification grounds in Article 13 EEA which is the equivalent of Article 36 TFEU, and the mandatory requirements which have been acknowledged by the ECJ in the *Cassis de Dijon* case under what is now Article 34 TFEU (ex Article 28 EC). The Court treats the written justification grounds in Article 13 EEA in the same way as the unwritten mandatory requirements.

See Christiaan Timmermans, Liber Amicorum Norberg, 2006.

III. Giving input to the EU judiciary

1. The EFTA Court is frequently faced with fresh legal questions (so-called going first-constellation) .

2. ECJ and GC refer to EFTA Court judgments if they agree with them. Most important area: Recognition of the precautionary principle and of its limits. AG's routinely refer to EFTA Court case law.

   Altogether over 70 cases.

3. Certain national high courts of EU Member States follow EFTA Court case law. Latest example: German Supreme Court Case I ZR 66/08 of 29/4/2010 following EFTA Court E-4/09 Inconsult.

E. Challenges

I. Lack of an Advocate General

II. Deficiencies of the preliminary ruling procedure

The situation of courts of last resort (cf., e.g., the ruling of the Liechtenstein Supreme Court in the Dr Tschannett II; supra).

The Icelandic situation (cf. most recently E-2/10 Kolbeinsson). See ECJ C-210/06 Cartesio: Lower courts must essentially be free to decide on whether to make a reference.

Preliminary rulings instead of advisory opinions?

III. The appointment procedure for judges

See Art. 255 TFEU.