

Carl Baudenbacher
President of the EFTA Court

Some Reflections on the EFTA Court

Visit of H.E. Erna Solberg, Prime Minister of the Kingdom of Norway, 2 July 2015

EEA: Two pillar system

EU pillar (Commission + ECJ) and EFTA pillar (ESA + EFTA Court)

Homogeneity and reciprocity

Legislative homogeneity

- EEA Joint Committee competent to incorporate new EU law.
- EFTA States take part in decision shaping, but not in decision making.
- Opting out is possible; could lead to suspension of affected part of the EEA Agreement.

Judicial homogeneity (substantive, effect-related, procedural).

Statistics

240 cases

105 preliminary references (AOs)

40 actions for nullity in competition and state aid cases

5 cases for failure to act

1 damage case

The rest are mostly infringement cases (ESA v an EEA/EFTA State).

Structure of the Court (I)

Composition:

- Five Members Court (1994-1995)
- Three Members Court (since 1995); six ad hoc-judges
- No Advocate-General
- No appeal system (no General Court)

Nomination, appointment and re-appointment of judges like in the EU

But no Article 255 TFEU panel

Secrecy of the vote (no dissenting opinions)

Structure of the Court (II)

Cabinet system

Registry (HR, finances, procedure)

Manning table and efficiency

- 18 persons (3 Judges and 5 lawyers dealing with the cases)
- 2014: Budget of 4 million Euros
- Recent years: 25 - 30 new cases registered per year
- Handling time in preliminary reference cases:
On average 8 months

Substantive homogeneity

Basic rule: EFTA Court follows ECJ, as far as case law is available.

However, law is not an exact science.

(1) For instance, if relevant ECJ case law is 20 years old, but there are new circumstances or new scientific evidence, the Court may not follow it (E-3/00 *ESA v. Norway* [*Kellogg's*]).

(2) There may be relevant case law from the European Court of Human Rights (E-15/10 *Posten Norge*).

(3) The Court may opt for 'creative homogeneity'.

E-5/10 *Dr. Kottke*: Provision of security may not be required in civil litigation in a manner disproportionately affecting the interests of a non-resident plaintiff in being able to commence legal proceedings.

Effect-related homogeneity

'Obligation de résultat'

State liability is part of EEA law (E-9/97 *Sveinbjörnsdóttir*)

No direct effect, but quasi-direct effect (problem: implementation backlog)

No primacy, but quasi-primacy (problem: implementation backlog)

Conform interpretation

Procedural homogeneity

No provision to that effect

Heuristic principle

Examples:

- Binding nature of judgments in infringement proceedings.
- Intervention right of the Commission (Order of the President in E-16/11 *Icesave*)
- Notion of court or tribunal entitled to make a reference
- Right of audience of in-house counsel (E-8/13 *Abelia*)

Going first (I)

In most cases there is no ECJ case law (“first-mover advantage”).

Examples: E-1/10 *Periscopus* (bid price rules in the Takeover Directive), E-16/10 *Philip Morris* (first case worldwide on a display ban for tobacco products at the point of sale), E-4/09 *Inconsult* (legal nature of a website), E-4/11 *Clauder* (right to family reunification), cases concerning the 2008 financial crisis (E-3/11 *Sigmarsson*, E-18/11 *Irish Bank Resolution Corporation*, E-17/11 *Aresbank S.A.*, E-16/11 *ESA v. Iceland (Icesave)*, E-10/12 *Hardarson*; more cases pending); E-7/13 *Creditinfo* (interpretation of Directive 2003/98/EC on the re-use of public sector information); E-18/14 *Wow Air* (allocation of time slots at airports).

No written obligation for the ECJ to take the Court’s case law into account.

But some 100 cases in which the Union courts and AG’s made some 150 references to the Court’s case law.

Going first (II)

“[A] national court applying EU law may need to look at the case-law of four European Courts: the Court of Human Rights, the Court of Justice, the EU General Court, and the EFTA Court. All four courts now cite the others’ judgments [...] As a result of the accidents of European history, we have more judicial dialogue in Europe than exists anywhere else in the world. But it is more than a dialogue: it is a symbiosis, and co-evolution.”

(John Temple Lang, 2014)

Going first (III)

ECJ President *Vassilios Skouris*:

“The long-lasting dialogue between the EFTA Court and the CJEU has allowed the flow of information in both directions. Ignoring EFTA Court precedents would simply be incompatible with the overriding objective of the EEA Agreement, which is homogeneity. [...] The symbiotic nature of the relationship has contributed to the successful development of the EEA Single Market. Both courts stand as examples for each other thus depicting mutual respect, strengthening the rules of homogeneity and representing a high level of appreciation. Cooperation between the two was built on strong foundations which have stood the test of time.” (In: EFTA Court, Ed., *The EEA and the EFTA Court. Decentred Integration*, 2014, 1, 12, emphases added.)

Homogeneity cannot be achieved in every case; process-oriented approach; no snapshot in time!

Judicial style

Differs from the one of the ECJ; more comprehensive reasoning.

- No French tradition
- No Advocate-General
- A small court is to a lesser degree able to decree what the law is than a big court.
- Creating acceptance

Relying on own case law (some sort of precedent system).

References to case law of supreme courts of the EEA States and to academic literature.

Approach to economic issues (I)

EEA single market law is economic law. It turns around the relationship between economic freedom and regulation.

Notions of cartel agreement and abuse of a dominant position are legal notions to be examined in the light of economic considerations (settled case law).

E-15/10 Posten Norge:

ESA cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway flowing the system of legality review.

But E-3/11 Sigmarsson:

Wide margin of discretion of EFTA States in complex assessment of macroeconomic factors in a systemic crisis.

Approach to economic issues (II)

E-16/11 *Icesave*:

Rec. 16 in the Preamble to Directive 94/14 points to the concept of moral hazard.

Citation of Nobel Laureate *Joseph E. Stiglitz* who described the lesson of moral hazard in the following way: ‘[T]he more and better insurance that is provided against some contingency, the less incentive individuals have to avoid the insured event, because the less they bear the full consequences of their actions’. (Para. 167.)

On this basis, the Court emphasised that “moral hazard would also occur in the case of State funding, serving to immunise a deposit-guarantee scheme from the costs which have, in principle, to be borne by its members.” (Para. 168.)

Taken over by AG *Mengozzi* in C- 127/14 *Andrejs Surmačš* (Opinion of 17 March 2015).

Transparency policy

Every procedural step can be tracked on the Court's website.

Report for the Hearing summarises the written observations of parties and participants.

Researchers may be given access to the file of decided cases.

Confidential documents will, however, not be made available.

The Court's transparency policy has been commended by the Directorate-General for Internal Policies of the European Parliament.

Widening gap

The Treaties of the EU were amended several times, whereas the EEA Agreement remained unchanged.

Problems were, unsurprisingly, addressed on a case by case basis.

Regarding the EU Charter of Fundamental Rights, there may be the following constellations:

- (1) The Court may reference the Charter in dicta (E-4/11 *Clauder*).
- (2) The Court may conclude that it does not matter whether the Charter is taken into account or not because it does not add anything new to EEA law, as it stands (E-10/14 *Deveci*).
- (3) The Charter implies something which has not so far been part of EEA law. The ECJ has given a specific interpretation to a legal act which is also part of EEA law in light of the Charter.

Some landmark cases (I)

E-1/94 *Restamark* (Notion of court or tribunal, import alcohol monopoly, effect)

E-4/97 *Husbanken II* (State guarantee for a publicly owned bank, standard of judicial review, complex economic assessment)

E-9/97 *Sveinbjörnsdóttir* (State liability)

E-1/99 *Finanger* (Taking a ride with an intoxicated driver)

E-3/00 *Kellogg's* (Nutritional need argument and precautionary principle in food law)

E-2/03 *Ásgeirsson* (Rules of origin, fundamental rights)

E-3/06 *Norwegian Waterfalls* (“Hjemfall”)

Some landmark cases (II)

E-4/09 *Inconsult* (Is a website a durable medium? Can the consumer be expected to become active?)

E-15/10 *Posten Norge* (Abuse of a dominant position, standard of judicial review, complex economic assessment)

E-16/10 *Philipp Morris* (display ban for tobacco products at point of sale)

E-14/11 *DB Schenker I* (public access to documents)

E-16/11 *Icesave* (Liability of the State if deposit guarantee scheme is unable to pay in a systemic crisis?)

E-8/13 *Abelia* (Right of audience of in-house counsel)

E-18/14 Order of the President and Judgment *Wow Air* (Accelerated preliminary reference procedure, slot allocation at airports)