**The EFTA Court Fifteen Years On**

by Prof. Dr. Carl Baudenbacher, President of the EFTA Court

1. The EEA Agreement is based on a **two pillar structure**, the EC forming one pillar and EEA/EFTA the other. EEA law originates in EC law. The EFTA States have no co-decision rights in drafting new EC legislation, but they enjoy participation rights in the decision-shaping phase and they may veto the adoption of new EC legislation into the EEA/EFTA pillar. At any rate, the law in both pillars is largely identical in substance. In order to create a level playing field for individuals and economic operators, i.e. to avoid a race to the bottom and forum shopping, the drafters of the EEA Agreement formulated **homogeneity rules** which essentially bind the EFTA Court to follow relevant ECJ case law. On the other hand, there is no written provision which would oblige the ECJ to take into account relevant EFTA Court case law. This is remarkable since in the vast majority of its cases, the EFTA Court has to tackle **fresh legal questions**. To link the EFTA States to the supranational EC by means of international law was an ambitious task. After fifteen years one can safely say that the experiment has succeeded and that the EFTA Courts has played an important role in this.

2. Originally, the fathers and mothers of the EEA Agreement had planned to establish an **EEA Court** which would have consisted of judges from the ECJ and from the EFTA States. In Opinion 1/91, the ECJ declared this judicial system incompatible with Community law. With hindsight, one must concede that as far as the result is concerned, the ECJ did the right thing. The EEA Court would have been a mixed breed which could have led to confusion. However, the ECJ overshot the mark. It argued that the EEA Agreement was but a simple treaty under public international law binding essentially the Contracting Parties, that its provisions lacked direct effect and primacy and that they were to be interpreted according to the conservative rules of the Vienna Convention on the Law of Treaties. To the ECJ's credit one must say that its approach may have been motivated by the refusal of the EFTA States and their courts to give any effect to the provisions of the 1972/1973 bilateral Free Trade Agreements, a practice that in view of the ECJ's 1982 *Kupferberg* judgment led to a **judicial restraint** of trade.

3. In reality, the ECJ's considerations were more some sort of a prognosis than statements carved in stone. This became clear when the EFTA Court in its very first judgment in *Restamark* held that the main focus of the EEA Agreement was not on alleged differences between EC and EEA law, but on **homogeneity**. The Court also found in this case that quasi-direct effect, i.e. the capacity of EEA rules

that had been implemented into the national legal orders of the EFTA States of being **invoked in national courts**, followed from EEA law. Both Community courts honoured this by opening a dialogue with the EFTA Court at the first opportunity, the CFI in its 1997 *Opel Austria* judgment and the ECJ in the same year in Joined cases *De Agostini* and *TV Shop i Sverige*. In 2002, in *Einarsson*, the EFTA Court applied the approach used in Restamark also to the issue of primacy.

Most importantly, the EFTA Court found in its 1998 *Sveinbjörnsdóttir* landmark judgment (against the advice of the Governments of Iceland, Norway and Sweden as well as, a bit surprisingly, of the European Commission) **state liability** to be part of EEA law. With this, the ECJ's prognosis in Opinion 1/91 concerning fundamental differences between EC and EEA law was to a large extent falsified. Six months later the ECJ echoed the EFTA Court's *Sveinbjörnsdóttir* judgment in *Rechberger*. The Supreme Courts of Iceland, Norway and Sweden accepted EEA state liability. In later rulings the EFTA Court further held that national courts of the EEA/EFTA states are bound to interpret national law as far as possible in conformity with EEA law.

4. As far as the **legal nature** of the EEA Agreement is concerned, the EFTA Court stated in *Sveinbjörnsdóttir* that the EEA Agreement is an international treaty *sui generis* which has created a distinct legal order of its own. Its depth of integration is less far-reaching than under the EC Treaty, but the scope and objective go beyond what is usual for an agreement under public international law. In its 2003 *Ásgeirsson* judgment, the EFTA Court, referring to the case law of the CFI and of the ECJ, held that the legal order established by the EEA Agreement was characterized by the creation of an internal market, the protection of individual rights and an institutional framework providing for effective surveillance and judicial review. With this, the EFTA Court has acknowledged that the EEA constitutes a **tertium** between the supranational EC law and classical public international law. The goal of the EEA Agreement to protect individuals and economic operators became also manifest with the recognition of EEA fundamental rights in cases *TV 1000*, *Bellona* and *Ásgeirsson* and of other general principles of EEA law such as non-discrimination, proportionality, good administration, legal certainty and the protection of legitimate expectations. Most importantly, the EFTA Court does not follow the interpretation rules of the Vienna Convention on the Law of Treaties, but the same maxims as the ECJ. This may include dynamic interpretation not only in cases in which the EC Treaty has been amended since 1994 and the EFTA Court is bound by homogeneity to follow the ECJ's case law, but also in **going first** cases. On balance, the EEA Agreement is closer to supranational EC law than to public international law.

5. The EFTA Court has dealt with a little more than 100 cases in the first 15 years of its existence. That probably corresponds to what was expected in 1995, after the Court was downsized from five to three judges. Still, there are cases in which national tribunals refrain from making a preliminary reference although parties have asked for it. The widespread assumption that courts of last resort in the EEA/EFTA states have an unlimited discretion to seize or not to seize the EFTA Court is questionable. Experience shows that EFTA individuals and economic operators enjoy broad access to the ECJ. National courts of the EEA/EFTA states should take that into account and **refer every case** to the EFTA Court in which the interpretation of EEA law is at stake. The EFTA Surveillance Authority, for its part, appears to be more reluctant to bring direct actions against governments than the Commission in the EC pillar.

In substance, the EFTA Court has in particular dealt with cases concerning the four fundamental freedoms, State monopolies in the fields of alcohol, tobacco and gambling, EEA state liability, competition and state aid law, labour law, equal treatment, trademark law, insurance law, food law and social security law.

6. The EFTA Court has established itself as an independent European court of law in the first 15 years of its existence. This is no obvious accomplishment given the fact that the Court has since 6 September 1995 consisted of only three judges (which means, *inter alia*, that the judge from the country concerned must also sit in politically sensitive cases) and that appointment and reappointment of the judges lay in the hands of the governments. The Court has from the beginning developed a system of precedent. Its autonomy is strengthened by the fact that the president is elected by the judges and not the governments. The Court's rulings are followed by the national courts and by the governments of the EEA/EFTA states. But they also have an impact on **Community case law**. The EFTA Court has probably tackled fresh legal questions in some 60 cases. This has led to an at least equal number of references by the ECJ, its Advocates-General, the CFI and Supreme and Appeals Courts in certain EC Member States. When interpreting EC law, the Community Courts found support in the jurisprudence of the EFTA Court in cases concerning the scope and the limits of the transmitting State principle under the Directive on Television Without Frontiers, the assessment of the succession of contracts under the Directive on Transfer of Undertakings, the definition and the limits of the precautionary principle in cases involving the sale of foodstuffs fortified with vitamins and minerals, the sale of animal feedingstuffs fortified with antibiotics, the release of genetically modified organisms, and the fight against BSE, the assessment under State aid law of national tax measures whose selectivity flows from a criterion relating to

geographic location, the assessment under the rules on free movement of goods of a State import monopoly for alcohol, the relationship between the freedom to provide services and the free movement of capital, and the question whether the condition that packaging be necessary is also directed at the manner or style in which a pharmaceutical protected by a trademark has been repackaged. As to the interpretation of EEA law, the Community Courts reverted to judgments of the EFTA Court in cases regarding the legal nature of the EEA Agreement, the principle of State liability in EEA law, the definition and the limits of the precautionary principle in the context of the fight against BSE, the free movement of workers, the freedom of establishment, the freedom to provide services, and the free movement of capital. Advocates General of the ECJ have in their opinions made reference to EFTA Court judgments in cases concerning the scope and the limits of the transmitting State principle under the Directive on Television without Frontiers, the compatibility of State alcohol monopolies with the rules on free movement of goods, the exhaustion of trade mark rights, the definition and the limits of the precautionary principle in cases involving the sale of foodstuffs fortified with vitamins and minerals and the release of genetically fortified organisms, the question of whether the provisions of EEA law and EC law on free movement of capital are identical in substance after the Maastricht amendments of the EC Treaty, the question of whether financial compensation granted by a Member State to an undertaking providing a public service should be regarded as State aid, equal treatment of men and women, the interpretation of the Motor Vehicle Insurance Directives, the assessment of the transfer of ownership of assets under the Transfer of Undertakings Directive, the modalities of repackaging of pharmaceuticals, the taxation of dividends, the assessment under the rules on free movement of goods of a State import monopoly for alcohol, the compatibility of national legislation prohibiting the affixing of tinted film to the windows of passenger and goods vehicles with the free movement of goods rules of the EC Treaty and the EEA Agreement, the justification of a licensing system which limits the total number of operators in the territory of a Member State in the light of considerations of public interest, the limited antitrust immunity of collective agreements on working conditions, the interpretation of the directive on transparency of the measures regulating the prices of pharmaceuticals, the compatibility of a State betting monopoly with the fundamental freedoms, and the assessment of exclusive purchasing agreements. High courts in EC Member States have referred to the jurisprudence of the EFTA Court, including the Austrian Supreme Court, the German Supreme Court, the German Supreme Financial Court, the Swedish Supreme Court, the Court of Appeal (England and Wales), and the Gerechtshof Amsterdam. EFTA Court case law has been referred to before the House of Lords.

Overall, it is fair to say that the EFTA Court is, with its limited case load and its limited means, making a significant contribution to the development of the case law in the whole of the EEA."