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# **The Enforcement System of the EEA Agreement**

Visit of the Federal Supreme Court of Switzerland  
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## A. The EEA Agreement

### 1. Goals and effect

The EEA Agreement aims at extending the EU single market to the EEA/EFTA States. “Homogeneous and dynamic EEA”.

It is based on a two pillar model with an EU pillar and an EFTA pillar.

The law is essentially identical in substance in both pillars.

Surveillance and judicial control in the EFTA pillar: ESA and Court.

Quasi-direct effect of EEA law in the legal orders of the EEA/EFTA States, quasi-primacy, State liability. All these principles follow from EEA law.

In the Nordic Member States, the principle of EEA law friendly interpretation follows from domestic law.

In Liechtenstein direct effect and primacy follow from domestic law.

## A. The EEA Agreement

### 2. History of the EFTA judicial mechanism

1991: EEA Court planned for the EFTA pillar with 5 judges from the ECJ and 3 judges from the EFTA countries; thrown out by ECJ Opinion 1/91.

Opinion 1/91 (confirmed in Opinion 1/00 and Opinion 1/09):

- The autonomy of the EU legal order must be preserved.
- A one pillar system including third countries is compatible with EU law.
- The ECJ is prepared to give preliminary rulings also to national courts outside the EU provided they are legally binding.

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## A. The EEA Agreement

### 2. History of the EFTA judicial mechanism

1992: EFTA Court planned with 7 judges from the EFTA countries. No Advocate General.

#### Opinion 1/92:

The EEA two pillar system is compatible with EU law.

1994: EFTA Court takes up its functions with 5 judges from the participating EFTA countries AT, FIN, IS, NO, SE. No AG.

Mid-1995: Judges from AT, FIN, SE resign. Judge from LI joins the bench.

Since then: 3 regular judges and 6 ad hoc judges.

2011: EFTA Court submits proposal to EEA/EFTA States: Extended Court of 5 and Advocate General in important cases.

## B. The EFTA Court



### 1. Judicial protection in the EFTA pillar

Recital 4 of the Preamble to the EEA Agreement:

“CONSIDERING the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties”

How is this goal to be achieved?

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## B. The EFTA Court

### 2. Structure of the EFTA Court

Legal person under international law; headquarters agreement with the Grand Duchy of Luxembourg (original seat: Geneva).

3 cabinets consisting of 1 judge, 1 legal secretary and 1 personal assistant.

Since 1 January 2012 2 additional temporary legal officers (increasing case load).

Cabinet system as opposed to a pool system.

Registry; translation to a large part outsourced.

Working language of the Court: English.

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## B. The EFTA Court

### 3. Main types of procedure

(1) Infringement action (ESA v EEA/EFTA State);

(2) Preliminary reference procedure (all national courts are also EEA courts);

(3) Action for nullity (EEA/EFTA State v ESA; private operator v ESA); State aid cases, competition law cases.

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## B. The EFTA Court

### 4. Cases

45 cases in the last 3 years.

Examples: Bid price rules in the Takeover Directive (E-1/10 *Periscopus*); the first case worldwide involving a display ban for tobacco products at the point of sale (E-16/10 *Philip Morris*); the first case in the whole EEA concerning the legal nature of a website (E-4/09 *Inconsult*); the first cases in the whole EEA on the legal consequences of the 2008 financial crisis, E-16/11 *Icesave*; E-3/11 *Sigmarsson*; E-18/11 *Irish Bank Resolution Corporation*; E-17/11 *Aresbank S.A.*, E-15/10 *Norway Post v ESA*, a case on alleged abuse of a dominant position in which a fine of approximately 13 million Euro was imposed, upon which the Court will render judgment shortly.

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### C. How can a citizen or economic operator defend his rights against an EEA/EFTA State?

#### 1. Lodging a complaint with ESA

Cost free.

ESA's discretion in bringing an infringement case.

ESA's negotiating policy.

#### 2. Bringing a law suit before the competent national court followed by a request to the national judge to make a reference

Communicating vessels, complementing each other.

ESA and national judges should be aware of that.

#### 3. Combining the two options.

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## D. The infringement procedure

Article 31 SCA:

“If the EFTA Surveillance Authority considers that an EFTA State has failed to fulfill an obligation under the EEA Agreement or of this Agreement, it shall, unless otherwise provided for in this Agreement, deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the EFTA Surveillance Authority, the latter may bring the matter before the EFTA Court.”

Article 33 SCA:

“The EFTA States concerned shall take the necessary measures to comply with the judgments of the EFTA Court.”

Cf. E-18/10 *ESA v Norway*.

## E. The preliminary reference procedure

### 1. Legal basis

Article 34 SCA:

“The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.

Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.”

Article 267 TFEU was the role model, but there are three differences.

## E. The preliminary reference procedure

### 2. "Non-binding" character of preliminary rulings

In reality they are hardly weaker than ECJ preliminary rulings.

Validity ["Rechtskraft"] (Case E-6/01 *CIBA*).

ESA's role.

Factual *erga omnes* effect ("precedent") (Ex.: EEA State liability: Norwegian Supreme Court *Finanger II*, Liechtenstein Supreme Court *Dr Tschannett III*).

Numerous references by Union courts and AG's to EFTA Court case law.

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## E. The preliminary reference procedure

### 3. Situation of courts of last resort of the EEA/EFTA States

Interpretation of Article 34 SCA (text, scheme and purpose; Art. 3 EEA, Recital 4 of the preamble to the EEA Agreement; recent literature).

Self-understanding of the courts of last resort: They seem to feel free.

Norwegian Supreme Court: 4 references.

Liechtenstein Supreme Court, Supreme Administrative Court, State Court: 6 references.

Icelandic Supreme Court: 3 direct references and 9 confirmations of reference decisions made by a district court.

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## E. The preliminary reference procedure

### 3. Situation of courts of last resort of the EEA/EFTA States

In the absence of empirical data, one may assume that the low number of references from Norway is due to the following reasons:

- The dualist tradition.
- A certain resistance in academic literature, in particular by authors who have difficulties to accept the 1994 “no” to EU membership.
- The policy of the State Attorney to systematically oppose references.

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## E. The preliminary reference procedure

### 4. The Icelandic EEA Implementation Act

Appeal system.

Systematic appeals by the State Attorney since 2002 (confirmation of State liability in *Karlsson*).

Old case law of the Supreme Court.

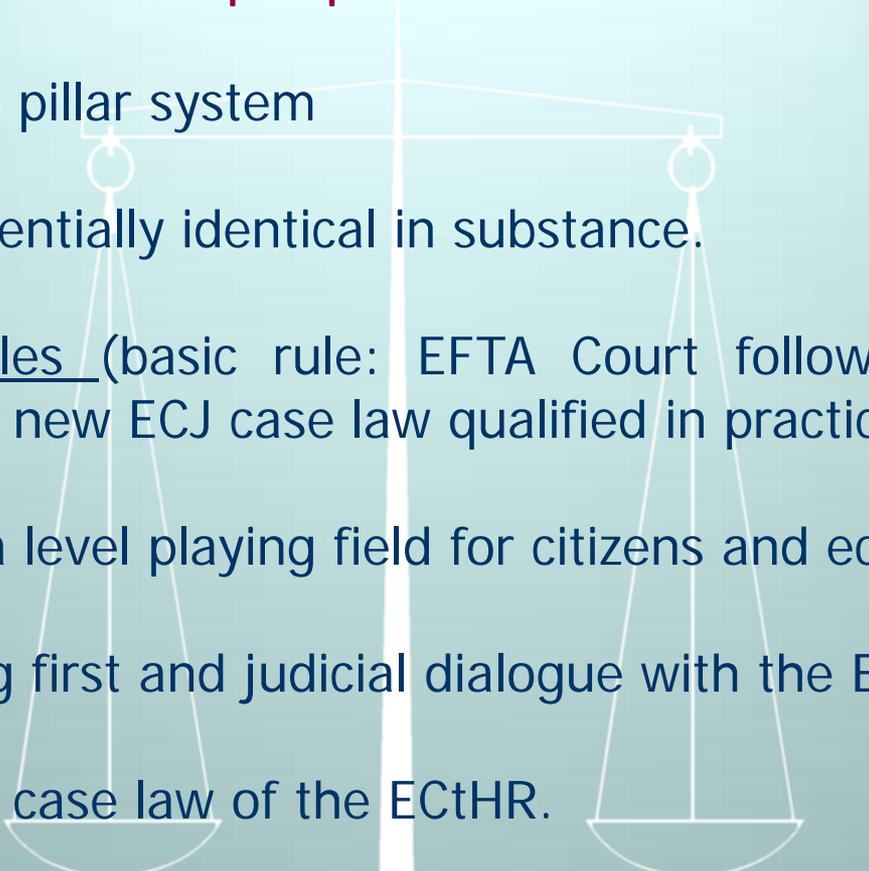
ECJ *Cartesio*.

New practice of the State Attorney.

New case law of the Supreme Court.

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## F. The European pillar architecture



### 1. The EEA two pillar system

Law which is essentially identical in substance.

Homogeneity rules (basic rule: EFTA Court follows ECJ; distinction between old and new ECJ case law qualified in practice).

Goal: To create a level playing field for citizens and economic operators.

EFTA Court going first and judicial dialogue with the ECJ and its AG's.

Relevance of the case law of the ECtHR.

### 2. The Brussels/Lugano system

Law which is essentially identical in substance.

Homogeneity rules with the ECJ as the center of gravity, but no common court of the EFTA States.

## F. The European pillar architecture

### 3. The “Swiss pillar”

#### (1) Free Movement of Persons Agreement

Article 16 FMPA: Homogeneity rules with a distinction between old and new ECJ case law .

Excursus: Cases may arise in three different legal contexts although the law is identical in substance: EU law, EEA law, public international law.

Example: Regulation 1408/71: C-160/96 *Molenaar*; C-215/99 *Jauch*; C-286/03 *Hosse*; Liechtenstein Administrative Court of 12 February 2003; E-5/06 *ESA v Liechtenstein*; ATF 132 V 423.

EFTA Court E-9/97 *Sveinbjörnsdóttir*. The EEA Agreement is closer to supranational EU law than to public international law. The Court uses the same methods of interpretation as the CJEU rather than the conservative rules of the Vienna Convention on the Law of Treaties.

## F. The European pillar architecture

### 3. The “Swiss pillar”

#### (2) Autonomous implementation of EU law in Switzerland

ATF 129 III 335, Consideration 6, and ATF 130 III 182 Consideration 5.5.1:

Autonomously implemented EU law must “in case of doubt” be interpreted in conformity with European law.

ATF 129 III 335: The Swiss judge must also “update” autonomously implemented European law in view of new ECJ case law.

Professor *Ernst A. Kramer*: If there is no relevant case law of the ECJ, the case law of the neighboring EU countries should be looked to.

Could the EFTA Court be a source of inspiration?

Cross-fertilization in competition law? (*Norway Post/ PubliGroupe SA* – ECtHR *Menarini*.)