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The EFTA Judicial System Reaches the Age of Majority – Accomplishments and Problems

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Introduction

Ladies and gentlemen,

I am glad to be here and to speak to you on the on the occasion of the EFTA Court reaching its majority; on what the Court has accomplished, and where it has caused or faces problems. In view of certain statements which have been made in recent days, let me start by saying that in the last three years the Court has seen a sharp **increase in incoming cases**. During this time, we have registered 45 cases, most of them posing novel legal questions which have not been decided by the Court of Justice of the European Union (CJEU) under EU or EEA law. Among them were, just to give some examples, cases concerning the 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 on the legal consequences of the 2008 financial crisis in the whole of the EEA, in particular (but not only) E-16/11 *Icesave* (also E-3/11 *Sigmarsson*; E-18/11 *Irish Bank Resolution Corporation*; E-17/11 *Aresbank S.A.*) and 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 in February of this year.

In view of the size of the EFTA pillar, the size of our cabinets and the fact that we don't have an Advocate General or a research department, one has to say that we have more cases than the CJEU. The recently published Norwegian EEA Review Report concludes that the Court has contributed to the strengthening of the EEA Agreement, its robustness and the European Union's confidence in it.

1. Difficult birth and troubled youth

As many of you know, the Court had a difficult birth and a troubled youth. There was from the beginning the idea that the EEA should comprise of two pillars: an EU pillar with the then 12 EU Member States and an EFTA pillar with the then 7 EFTA States. However, the CJEU turned out to be a rude midwife. In its Opinion 1/91 of 14 December 1991, it threw out the idea of a combined EEA Court for the EFTA pillar which would have consisted of judges from the CJEU and from the EFTA States. This step is understandable from the perspective of autonomy of EU law. However, in its reasoning, the CJEU overshot the mark with regard to the effect, primacy and legal nature of the EEA Agreement claiming that the agreement would be governed by classic public international law and that it lacked direct effect and primacy.

In subsequent negotiations, the Contracting Parties agreed to establish an EFTA Court which would only consists of judges nominated by the EFTA States. The second version of the EEA Agreement was approved by the CJEU in its Second EEA Opinion 1/92 of 10 April 1992.

In 1992, the 7 EFTA States signed the EEA Agreement in Oporto. The plan was, to set up the EFTA Court with **7 judges**. Due to a negative referendum, Switzerland had to pull out and Liechtenstein decided to postpone the ratification of the Agreement, despite a positive referendum, in order to re-negotiate its Customs Union Treaty with Switzerland.

On 1 January 1994, the EEA Agreement entered into force for the 5 EFTA States Austria, Finland, Iceland, Norway and Sweden and the EFTA Court took up its functions with **5 judges** nominated by these countries and appointed by common accord amongst them.

In 1995, Austria, Finland and Sweden joined the European Union and Liechtenstein became an EEA Member State on the EFTA side. Since mid-1995 the EFTA Court has consisted of **3 regular judges** and 6 ad-hoc judges. Since then, the EFTA pillar has resembled a small pond with one big fish and two small fish.

2. The battle for judicial homogeneity

The homogeneity principle

General

The EEA Agreement is based on the principle of homogeneity. The law in both pillars is essentially identical in substance and must be interpreted essentially in the same way. The goal is to create a level playing field for citizens and economic operators. The main protagonists of the EEA Agreement are not governments, not civil servants, not diplomats and not judges. The main protagonists are those who create wealth: i.e. manufacturers, workers, traders, consumers, investors. The EEA Agreement confers rights upon them and ensures that these rights are protected, also on the **judicial level**. Homogeneity must be secured both on the legislative and the judicial level. My field is judicial homogeneity. Let me say already at this point that homogeneity is not a one-way street. I will come back to that.

There are three aspects to homogeneity.

Substantive homogeneity

The first is homogeneous interpretation of the substantial rules of EEA law. We have heard many times from government agents that due to alleged differences in goal and context, the EEA Agreement must be interpreted in a less integrationist, and therefore more government-friendly way, than the EU Treaties. All claims to that effect have been rejected by the Court. In Case E-2/06 *Norwegian Waterfalls* the Court held that there is a **presumption** that identically worded provisions in EEA law are to be interpreted in the same way as in EU law.

Homogeneity with regard to effect

As far as effects-related homogeneity is concerned, there is, according to common understanding, only an *obligation de résultat.* The Nordic governments have claimed from the beginning that there cannot be direct effect, supremacy, or State liability. These are the so-called constitutional principles of EU law. The Court was faced with the respective questions early on. It held in its very first case, E-1/94 *Restamark*, that the provisions of the EEA Agreement have quasi-direct effect, that means that once they've been **implemented** into the legal orders of the EFTA States they may be

invoked by citizens and economic operators before the national courts (and the EFTA Court). This effect follows from EEA law, not from the national legal orders of the EFTA States. In E-1/01 *Einarsson*, the Court found that the same applied with regard to primacy, so that commentators have spoken of quasi-primacy. The Court has, moreover, acknowledged the principle of interpretation in conformity with EEA law (E-4/01 *Karlsson*; E-1/07 *Criminal proceedings against A*).

Most importantly, the Court held in E-9/97 *Sveinbjörnsdóttir* that full **state liability** applies in EEA law. Iceland, Norway and Sweden as well as, a little surprisingly, the European Commission had urged the Court to reject such an assertion. The EFTA Surveillance Authority (ESA) was the only participant in the case arguing in favour of state liability. With *Sveinbjörnsdóttir*, Opinion 1/91 of the CJEU was to a large extent falsified. It is clear that this case-law dissatisfied the governments of the Nordic EFTA States. But the Court could not see how homogeneity could be preserved and how the rights of citizens and economic operators could be protected without state liability.

Procedural homogeneity

The third aspect is procedural homogeneity. The Court held early on that although it is not required to follow the reasoning of the CJEU when interpreting the main part of the ESA/Court Agreement, the reasoning which led the CJEU to its interpretations of expressions in Union law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court (see, e.g., E-2/02 *Bellona*). In several cases and orders of the president the Court formally acknowledged, in 2011, the principle of procedural homogeneity (see, in particular, Case E-18/10 *ESA v Norway*). This case law may have consequences in particular when it comes to **access to justice.**

General principles of EEA law

In line with the CJEU, the Court has also acknowledged general principles of EEA law, such as proportionality, legal certainty, legitimate expectations, good faith etc. To give an example, in E-3/11 *Sigmarsson*, the Court held that the restrictions on free movement of capital enacted by the Icelandic government after the 2008 financial crisis were justified. But they could only be upheld as long as they were necessary to stabilise the Icelandic currency.

The Court has also recognised **fundamental rights**. In E-2/03 *Ásgeirsson*, it held that provisions of EEA law and of the ESA/Court Agreement must be interpreted in the light of fundamental rights and that the European Convention on Human Rights and the case-law of the European Court of Human Rights are important sources when construing provisions of EEA law. In fact, in the *Norway Post* case, the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights have been invoked many times.

As far as the legal basis for the recognition of general principles is concerned, I may point to the fact that Art. 46(2) SCA mirrors Art. 340(2) TFEU. Admittedly we have not made a comparative analysis but neither does the CJEU in most cases. The decisive reason for the Court having acknowledged fundamental principles is homogeneity.

Legal nature of EEA Law and methods of interpretation

With regard to legal nature, the Court held in *Sveinbjörnsdóttir* that the EEA Agreement is an international law agreement *sui generis* with a distinct legal order of its own. The Agreement is, in other words, a *tertium* between public international law and supranational law. This qualification is based on a **functionalist approach** which is difficult to accept for positivists.

Consequently, the Court uses essentially the same methods of interpretation as the CJEU rather than the conservative methods of interpretation codified in the Vienna Convention on the Law of Treaties. As Opinion 1/91 had considered the EEA Agreement to be a classical public international law agreement essentially binding governments, it is also flawed in this respect.

By way of an example of the Court's approach with regard to interpretation, I may mention Case E-6/96 *Wilhelmsen* where the Norwegian Government argued that beer was not covered by the EEA Agreement. In fact, there were reasons for making that contention, but there were also other factors. If there was a gap in EEA law, the Court filled it by holding that beer fell within the scope of application of the EEA rules on the free movement of goods. In Case E-4/04 *Pedicel*, the Court held that EEA law may be dynamically interpreted if this is necessary in order to achieve judicial homogeneity. In Cases E-4/11 *Clauder*; E-3/11 *Sigmarsson* and E-2/11 *Norway Offshore*, the Court also explicitly acknowledged the principle of effectiveness (*effet utile*). However the Court may also take a dynamic view in cases in which it has to tackle fresh legal questions such as Case E-3/00

Kellogg's, where it found that the precautionary principle was part of EEA law. The Norwegian government lost this case before the Court, but on balance, it won in reality because it was able to maintain its restrictions concerning the free movement of food stuffs fortified with certain vitamins and iron.

That the Court is in certain cases prepared to dynamically interpret EEA law, does not mean that it would necessarily take a pro-integrationist approach. In E-10/04 *Piazza*, it held that national rules restricting the free movement of capital in the EEA may, as in Community law, be justified on grounds such as those stipulated in Article 58 EC (now Article 65 TFEU) or on considerations of overriding public interest. The Court thereby filled a gap in the EEA Agreement.

3. EFTA Court going first

General

In the majority of cases the Court is faced with novel legal questions. This fact is almost always (I think deliberately) **overlooked** in our capitals. Examples of the Court going first can be seen in our judgments on television without frontiers, transfer of undertakings, the precautionary principle, the repackaging of pharmaceutical products, the taxation of inbound dividends, the compatibility of state alcohol, tobacco, and gambling monopolies with the fundamental freedoms, experimental medical treatment abroad, the legal nature of a website, the compatibility of a national display ban on tobacco products at the point of sale with the rules on free movement of goods, the restriction of free movement of capital in financial crisis, and the posting of workers in other EEA States.

Judicial dialogue with the CJEU and the General Court

The Courts of the European Union have from the beginning made it clear that judicial homogeneity is not a one-way street. The judicial dialogue was opened by the General Court in Case T-115/94 *Opel Austria* and by the CJEU in Joined Cases C-34-36/95 *de Agostini*. CJEU President *Vassilios Skouris* stated at the EFTA Court's 10th Anniversary in 2004, that "ignoring EFTA Court precedence would simply be incompatible with the overriding objective of the EEA Agreement, which is homogeneity". I note that President Skouris invoked the notion of precedent and not just of ruling or judgment.

A special role is played in this dialogue by the CJEU's **Advocates General** who frequently act as an opening for the case-law of the Court into the case-law of the CJEU.

I may add that the EFTA Court's case law does not only have an influence on the Union Courts in Luxembourg, but also on some of the most influential **national courts** in the EU member states. So give some examples, the German Supreme Court referred to us when transposing the CJEU's *Überseering* jurisprudence to EEA law, *nota bene* without asking the CJEU for a preliminary ruling. It has also taken over our case-law on the legal nature of a website and our case-law on the repackaging of pharmaceutical products. The German Supreme Fiscal Court made reference to our jurisprudence concerning the taxation of inbound dividends. The Court of Appeal of England and Wales and other English courts actively engage in dialogue with us. High courts in EU Member States have occasionally taken a ruling of the EFTA Court to trigger a reference to the CJEU (see in particular Court of Appeal of England and Wales in Case C-348/04 *Boehringer Ingelheim II*).

4. Acceptance of case law

The EFTA Court has, in approximately 90 cases, tackled fresh legal questions which have led correspondingly to about 90 citations by the Union Courts.

National courts and governments in the EEA/EFTA states comply with our case-law. The Court's rulings have factual *erga omnes* effect, no matter from which country the case has originated. The *Sveinbjörnsdóttir* case was referred to the Court by an Iceland court, and the Icelandic courts subsequently acknowledged EEA state liability. But also the Supreme Court of Norway followed our *Sveinbjörnsdóttir* ruling (see Norwegian Supreme Court's judgment in *Finanger II* and the Liechtenstein Supreme Court's judgment in *Dr Tschannett III*, both acknowledging EEA State liability). I say this because national governments sometimes oppose references to the EFTA Court hoping that a national court will be more understanding of their desires. This policy is not only questionable from the perspective of access to justice. It will also not prevent the EFTA Court from ruling on the matter concerned upon a reference from a national court of another EEA/EFTA State or upon a direct action by the EFTA Surveillance Authority.

Academic literature in the European Union is overwhelmingly positive of the Court, in EFTA there are many positive voices, but some are critical, in particular in Norway. Let me give you three quotations:

Max Planck Encyclopedia of Public International Law (2011):

> "Following an unequivocal understanding in legal scholarship, the jurisprudence of the EFTA Court has made an important contribution to the smooth development of the EEA and for ensuring its homogeneity."

CJEU Advocate General Eleanor Sharpston (2012):

> "The EFTA Court has a deservedly good reputation for holding hearings that are well-focussed interactions between the Bench and the Bar and that manage to avoid wasting time without constraining advocates' freedom to plead."

John Temple Lang (2006):

> "The judgments of the EFTA Court are in general shorter, clearer, and more concise than the judgments of the Court of Justice. They are more practical, and for many lawyers easier to read, than the judgments of the Court of Justice used to be, when they were shorter but more abstract. The EFTA Court judgments are straightforward, clear and authoritative."

5. Problems

Access to the Court

The Court has received important cases by way of reference from national courts from all three EEA/EFTA States including from courts of last resort. Although the Court has now a full docket, in certain years it had only few incoming cases. According to Article 34 SCA there is, unlike under Article 267 TFEU, no written obligation on the courts of last resort in the EFTA States to make a reference. In fact, the Norwegian Supreme Court has not made a reference since 2002. If this happens occasionally, it is not a problem. If it is, however, done systematically, an old dialectic principle applies, namely that quantity is transformed into quality. I may quote *Hegel* and *Marx* here. Who knows, perhaps one day the EFTA Surveillance Authority will look into the matter.

The 2011 *Fredriksen* Report on EEA law in Norwegian courts found that Norwegian courts are generally holding back from making references. Dr Fredriksen stated that in a number of cases, applications for a reference were rejected without adequate reasons being given. We have looked into academic literature in certain EFTA States and we have found that essentially ten arguments are being put forward which allegedly speak against making a reference to the EFTA Court, in particular in the case of the Norwegian Supreme Court. One could call them the **"Ten Commandments" against making a reference**.

These Ten Commandments are: (1) The EFTA Court is small and has only a limited docket. (2) Supreme courts are free to refer (wording of Article 34 SCA). (3) Since the EFTA Court's rulings are "only" advisory, there is little to be gained from them. (4) Only the CJEU is entitled to make certain decisions. (5) A national supreme court is in a better position to decide certain sensitive cases. (6) The EFTA Court is a judicial activist. (7) The EFTA Court is more catholic than the Pope. (8) Even in going first cases, the Supreme Court has little to gain from a reference since the answer of the EFTA Court will only be provisional because if the ECJ does not follow, the EFTA Court will have to change its case-law. (9) In case of a conflict between EFTA Court and CJEU case-law, the CJEU's ruling may or should be followed without a reference to the EFTA Court. (10) Delay and costs speak against referring cases.

All the "Ten Commandments" are unfounded. Let me just address some of them. The contention that the EFTA Court is **small** and has **few cases** has also been reiterated in the Norwegian EEA Committee's Report. In the chapter on the EFTA Court, the report alleges that the Court is too small and that it has too few cases to function properly. It is interesting that outside of Norwegian academic and government circles this is seen in a different way. We have never heard similar allegations from a Norwegian judge and never in Iceland and in Liechtenstein. The fact that many EU Member States intervene in our cases and that we have this intense judicial dialogue with the judges and advocates general of the CJEU speaks for itself. Finally, the report does not take into account that in the last three years the Court has registered 15 incoming cases on average.

The report also claims a number of times, and even in the introductory chapter, that the EFTA Court is "more catholic than the Pope", meaning that we are tougher on Norway than the CJEU is on the EU States. This language is somewhat surprising in an official report commissioned by a Member State Government and such a claim is **unsubstantiated**. You cannot merely

pick a few cases out of 160 and argue that you would have got a better deal before the CJEU. We noticed, by the way, that ESA is explicitly exempt from the accusation of being more catholic than the Pope, although in the past this slur has also been used with regard to the Authority. I am not sure whether I should congratulate ESA on this "accomplishment".

The report finally alleges that it is our own fault that Norwegian courts have not referred more cases since we have failed to establish sufficient trust and authority with the Norwegian judiciary. I notice, however, that Icelandic and Liechtenstein courts perform significantly better when it comes to making references. Still, this argument has been made in an official report commissioned by the Norwegian government and that in itself makes it an interesting argument. I had always thought that we got fewer cases from Norway because the Norwegian **Government Attorney** systematically opposes any references to the EFTA Court and because many academics tend to overemphasise that the courts are free to decide whether to refer or not. I remind you of the Ten Commandments. But now we have this statement by the Committee. I cannot imagine that this statement is only based on value judgment. There must be some empirical research. The Court would be interested in seeing the survey the Committee must have made in order to come to that conclusion, the survey on the motives of the national judges.

Recent literature emphasises that Art. 34 SCA cannot be interpreted in an isolated manner, but that it must be seen in light of the general **duty of loyalty** laid down in Art. 3 EEA which also applies to national courts. The question has furthermore been posed whether Art. 34 SCA should be amended. I will not go into these questions, but limit myself to stating that at the very least decisions refusing a reference must be adequately reasoned.

In Iceland we see a new, much more EEA friendly, referral policy of the Supreme Court and we have received a record number of cases per capita from Liechtenstein.

Reform proposals

In view of 18 years of experience, the Court has, on 14 October 2011, made three reform proposals to the EFTA State governments.

(1)Extended court in important cases (5 judges);

(2) Advocate General in important cases;

(3) Panel to scrutinise candidates (cf. Article 255 TFEU).

It is not that a three members' court does not function properly. I reject the respective insinuations in the EFTA Court chapter of the Norwegian EEA Review Committee's report. There is, however, a risk that the governments may one day appoint a judge or two who do not cut the mustard. It happens in all walks of life that people may be given positions without having the requisite knowledge and skills or character. If you are only three, there is a risk that after such a decision your institution will not function properly.

Ladies and Gentlemen, I thank you for your attention.