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An Extended EFTA Court? The EFTA Court proposes amendments to the SCA

The EFTA Court has recently proposed to the EFTA States amendments to the Agreement of the EFTA States on the Establishment of Surveillance Authority and a Court of Justice (SCA). The proposal contains three elements:

- (1) The possibility of calling ad hoc Judges to the bench for an Extended Court;
- (2) The establishment of an Evaluation Panel for Candidate Judges and the Advocate General in line with Article 255 TFEU;
- (3) The creation of the post of an Advocate General.

The proposals aim at reinforcing the professional competence and the standing of the Court and, thus, to enhance the Court's credibility as a European Court whose function it is to interpret the EEA Agreement alongside the Court of Justice of the European Union (CJEU). Furthermore, it is considered that the legal framework of the EFTA Court ought to be brought more in line with that of the CJEU. The proposed amendments are restricted to the composition of the Court and its formation. The legal functions of the EFTA Court and its relations with the courts of the EFTA States are not affected.

The proposals were introduced to the EFTA States in sessions of the ESA/Court Committee on 14 October and 1 December 2011 where the Court's initiative was welcomed. The proposals are currently under a review by the EFTA States' Administrations with the aim of discussing them at the next ESA/Court Committee meeting.

Amendments to Specific Articles

Article 28 SCA

Present text

The EFTA Court shall consist of three judges.

Proposed Amendment

The EFTA Court shall consist of one Judge from each EFTA State and nine ad hoc Judges, three from each EFTA State. The Statute of the EFTA Court may provide for the EFTA Court being assisted by an Advocate General.

The rules applicable to Judges shall apply *mutatis mutandis* to ad hoc Judges and, as the case may be, the Advocate General. In any case, Article 4, second paragraph, and Article 13, of Protocol 5 shall not apply to ad hoc Judges and to the Advocate General.

Comment

The wording of the provision does not fix the number of EFTA Court Judges at three although that is the present number of the EEA/EFTA States. The second paragraph is essentially taken from Article 30(4) SCA with regard to substance. The wording "from each EFTA State" implies a nomination by each EEA/EFTA State but does not entail any requirement regarding the nationality of the candidate Judges. The list of ad hoc Judges would be expanded to nine. Ad hoc Judges from the list will serve as a replacement for a Judge who for some reason cannot sit, as the case is at present, and as additional Judges in the Extended Court, which is a supplementary function following from the proposal.

The amendment makes it possible to provide for an Advocate General by amending the Statute of the EFTA Court. However, there is no obligation in this respect and the exact definition of the working terms of an Advocate General (e.g. whether he would be full-time or ad hoc, whether he would participate in all cases or only in exceptionally important ones) is left open.

Article 29 SCA

Present text

Decisions of the Court shall be valid only when all its members have participated in the deliberations.

Proposed Amendments

The Court shall sit either as the Court, consisting of three Judges, or as an Extended Court, consisting of five Judges, including ad hoc Judges. Decisions of the Court shall only be valid when three Judges are sitting in the deliberations. Decisions of the Extended Court shall only be valid when five Judges are sitting in the deliberations.

The Court shall sit as an Extended Court where it considers a case to involve particular interest. For all other matters the Court shall sit in a formation of three Judges with a permanent appointment.

If one of the Judges, in the opinion of the other Judges taking part in the disposal of a case, is disqualified from acting in it, the other Judges shall agree on an ad hoc Judge to replace him. If they cannot agree, the President shall, by lot, choose among the ad hoc Judges nominated by the EFTA State which nominated the Judge who is prevented from taking part in the proceedings.

The Extended Court shall consist of the Judges and as many ad hoc Judges as necessary to constitute a formation of five. The President shall, by lot, call ad hoc Judges to the bench. However, two ad hoc Judges from the same EFTA State shall not take part in the disposal of a case if ad hoc Judges from other EFTA States are available.

Comment

The amendment provides for the possibility of an "Extended Court" of five Judges. The decision to submit a case to the Extended Court is to be taken by the Court based on its assessment of the importance of each case. Parties, States and others participating in the proceedings are able to request the Court to submit a case to an Extended Court. However, the Court must have the final say on this.

The rules in paragraph three pertaining to the selection of ad hoc Judges in the case of a Judge being unable to sit in a case remain unchanged in substance (cf. now Article 30, paragraph 4, SCA). According to paragraph 4, the Extended EFTA Court is to be created by choosing ad hoc Judges randomly from the pool of nine ad hoc Judges. If Judges from other EFTA States are available, this random selection must, however, not result in two ad hoc Judges from the same EFTA State being called to the bench in the case. Hence, if a selection by lot renders two ad hoc Judges from the same EFTA State, a new selection would have to take place with regard to the second Judge as long as ad hoc Judges from other EFTA States are available. A situation where two ad hoc Judges from the same EFTA State would be called to the bench (i.e. where all other seven ad-hoc Judges would be unable to participate) can be virtually excluded in practice.

Article 30 SCA

Present text

The Judges shall be 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. They shall be appointed by common accord of the Governments of the EFTA States for a term of six years.

Retiring Judges shall be eligible for reappointment.

The Judges shall elect the President of the EFTA Court from among their number for a term of three years. He may be re-elected.

In case one of the Judges, in the opinion of the two other Judges, is disqualified from acting in a particular case, the two other Judges shall agree on a person to replace him chosen from a list established by common accord by the Governments of the EFTA States. If they cannot agree that person shall be chosen from the list by lot by the President. With regard to a Judge chosen in this way the rules applicable to regular Judges shall apply *mutatis mutandis*. In any case Article 4, second paragraph, and Article 13, of Protocol 5, shall not apply.

Amendment

Judges, ad hoc Judges and, as the case may be, the Advocate General shall be 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. They shall be appointed by common accord of the Governments of the EFTA States for a term of six years, after consultation of the panel provided for in Article 30 a.

Retiring Judges, ad hoc Judges and, as the case may be, the Advocate General shall be eligible for reappointment.

The Judges shall elect the President of the EFTA Court from among their number for a term of three years. He may be re-elected.

The Court shall appoint its Registrar and lay down the rules governing his service.

Comment

The amended paragraph 1 includes the ad hoc Judges, as well as a possible Advocate General, and contains a reference to the evaluation panel set up by Article 30a. Paragraph 4 adds a reference to the Court's Registrar following the model of Article 253(5) TFEU.

New Article 30a SCA

A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of a Judge, ad hoc Judge or Advocate General of the Court before the EFTA States make the appointments referred to in Article 30.

The panel shall comprise of five persons: one chosen from among former members of the Court who shall also be Chairman, and one from among the former members of the Court of Justice of the European Union. The other members of the panel, each coming from a separate EFTA State, shall be chosen from among present or former members of the highest judicial offices of the EFTA States or be lawyers of recognised competence. The EFTA States shall adopt a decision establishing the panel's operating rules and a decision appointing its members as well as their remuneration. It shall act on the initiative of the President of the Court.

Comment

The Article is modelled upon Article 255 TFEU with the following exception: Firstly, it is foreseen that the evaluation panel is composed of only five members. Secondly, the Article foresees a former member of the CJEU to be a member of the panel. This is considered appropriate to enhance the credibility of the EFTA Court vis-à-vis the CJEU. This member could, for instance, be chosen from those former members of the CJEU who have been appointed to the panel established according to Article 255 TFEU. Hence, the panel would be composed of one former Judge of the EFTA Court, one former Judge of the CJEU, and three members coming from separate EFTA States and being either (present or former) Supreme Court Judges or jurisconsults of recognised competence, i.e. University Professors of Law.

A Transitory Provision

The provisions of Article 30a shall be without prejudice to the appointment of present Judges and ad hoc Judges. The ad-hoc Judges referred to in Article 28, as amended, shall be appointed for the first time on 1 July 2013. The provisions of Article 30a shall be applicable in the case of a Judge or an ad hoc Judge being reappointed.

The decisions referred to in Article 30a establishing the evaluation panel's operating rules, appointing its members and their remuneration, shall be taken by the EFTA States no later than 1 July 2012.

Comment

The provision clarifies that present Judges and ad hoc Judges are not subjected to any evaluation of the panel to be set up in accordance to Article 30a. It follows from the second sentence that the new ad hoc Judges would be appointed only when the appointment period of present ad hoc Judges expires, i.e. 1 July 2013. Thus, until that date, the Court would be served by the present six ad hoc Judges. However, it is stipulated that the provisions of Article 30a will be applicable in the case of any of the present Judges or ad-hoc Judges is proposed for reappointment. Paragraph 2 aims to ensure that decisions regarding the evaluation panel have been taken in good time before the panel evaluates the nominations for ad hoc Judges to be appointed on 1 July 2013.