



Luxembourg, 27 January 2012

A NOTE BY THE EFTA COURT ON THE NORWEGIAN OFFICIAL REPORTS NOU 2012: 2 "OUTSIDE AND INSIDE, NORWAY'S AGREEMENTS WITH THE EUROPEAN UNION"

The EFTA Court welcomes that the Report's main thrust is a positive assessment of the EEA/EFTA institutions and the way in which they have worked and fulfilled their tasks over the past 18 years (see, e.g., p. 226 second column). In the Report, the EFTA Court is considered to be a central element of the EEA structure and constituting a pre-condition in ensuring homogeneity and dynamism in the application of EEA law. It is also acknowledged by the Report that in its practical functioning, the Court undoubtedly makes its contribution to the rule of law in the EEA context (see, e.g., p. 225).

The Report considers that a main challenge for the EFTA Court is its limited number of cases (see, e.g., p. 225). However, the case load has increased noticeably with 18 incoming cases in 2010 and 19 cases in 2011. This rise in case load is not well reflected in the Report.

According to the Report, the main explanation of the lower case load in previous years is the size of the EFTA pillar. In fact, this may reflect the smaller EFTA markets. Considering the total population of the EU internal market (500 mn) and of the EEA/EFTA markets (5 mn), it may nevertheless be said that the EFTA Court, in relative terms, has more cases than the Court of Justice of the European Union (ECJ). In 2010, for example, the ECJ registered 631 new cases, which constitutes 1,26 cases per million inhabitants. In the same year, the EFTA Court registered 18 new cases, which equates to 3,6 cases per million inhabitants. Furthermore, the ECJ has a wider jurisdiction. Indeed, a similar widening of the jurisdiction of the EFTA Court could provide an institutional strengthening in the EEA.

A limited case load has of itself no detrimental effect on the judgments of the Court, contrary to what seems to be implied in the Report (see p. 225). Indeed, other international courts, e.g., the International Court of Justice, have a limited number of cases. If anything, the effect may be an advantage in enabling the Court to invest greater care in its deliberations. In the judicial dialogue between the two courts of the EEA, the ECJ and its Advocates General make reference to EFTA Court judgments. Statements by independent lawyers and in European academic literature further reflect an overall positive view of the EFTA Court and its judgments.

The Report alleges that the EFTA Court has been unable to establish the confidence and the authority needed for broader co-operation with national judges (see, e.g., p. 212, first column). According to the Report (see p. 225) an indirect reason why Norwegian judges may be reluctant to address the EFTA Court more frequently is its limited case load. This assessment does not seem to be in conformity with other points made, in particular, that the Norwegian Supreme Court emphasised in its first *Finanger* judgment of 2000 that the EFTA Court's Advisory Opinions shall have a considerable weight as a legal source in Norway (see p. 210, first column) and that Norwegian judges are loyal to the EEA system (*ibid*). To the Court's knowledge there are no examples of a national court deviating from rulings, including "non-binding" advisory opinions, of the Court. Furthermore, the case law of the EFTA Court is considered a source of EEA law by the national courts of the EFTA States, as well as by several national courts of the EU, as demonstrated by the multitude of references made to the Court's case law.

It may be added that two Judges of the EFTA Court have recently been appointed Justices of their respective national Supreme Courts and two of the present EFTA Court Judges have served as Judges at a national Supreme Court prior to their appointment to the EFTA Court.

The function of the preliminary reference procedure is to ensure homogeneous interpretation and thereby to prevent fragmentation of EEA law. Moreover, the EFTA Court receives much more relevant EEA law input than a national court. In addition to the parties, the EFTA Surveillance Authority, the European Commission as well as EEA/EFTA and EU Member States participate in the proceedings. The EFTA Court must be employed for these very purposes as well as the promotion of the EEA Agreement. This view also seems to be in-line with the thrust of the Report (see, e.g., p. 225, first column).

The Report states that three judges are not necessarily sufficient to guarantee credible judgments in important cases (see, e.g., p. 225, second column). The EFTA Court notes in this regard that the WTO Appellate Body gives its rulings in a three-member panel and so do the United States Courts of Appeals in most cases. Chambers of three judges render a large part of the judgments of the ECJ and the General Court. However, since the EFTA Court is a court of first and last instance, the Court believes that in important cases it ought to sit with five judges instead of three. The Court has therefore proposed a system whereby two ad-hoc judges could be called in such cases. This would require an amendment only of the EFTA Agreement on the Establishment of a Court of Justice and a Surveillance Authority.

The Report states that on the whole, the EFTA Court has managed to establish case law consistent with that of the ECJ (see, e.g., p. 221, first column and p. 225, second column). According to the Report, there may be examples of judgments in which the EFTA Court has been stricter on Norway than the ECJ theoretically may have been (see, e.g., pp. 225-226). This contention seems to be based on a single source. Further, to the Court's knowledge, similar contentions have never been made in the two other EEA/EFTA States. Regardless of views on the Court's case law in academic publications, a difference in the case law between the EFTA Court and the ECJ has never been established on a formal level (Article 105 EEA). Such a claim as asserted in the Report can hardly be verified by research. It lies in the nature of things that an unsuccessful party may be disappointed by the judgment of any court.

It is also stated in the Report that the Court, occasionally, has been underutilised. There were in fact years in the past when the Court had a limited number of cases. This was no different in the early years of the Court of Justice of the European Union. However, the case load at present is absorbing the capacity of the Court. Further increases would impact on the present handling time and on the way the Court has to operate. At present, the EFTA Court has a handling time well below that of the ECJ. This must be regarded as an asset. As for a remark on the lack of a permanent courtroom until recently (see p. 222, first column), the Ministry of Foreign Affairs will know that the Court argued in 2003, and later, for having the financial means to establish one.

The Report does not appear to include any data or analysis that would indicate that the EFTA Court has not been effective in carrying out its functions since its establishment in 1994. It is nevertheless appropriate to note that certain elements in the Court's organisation may be improved. In this context, the Court would like to refer again to its proposals of 14 October 2011 to the EFTA States concerning the possibility of having an "Extended EFTA Court" in cases of particular importance, the possibility of being assisted by an Advocate-General and the establishment of an appointment evaluation mechanism for Judges and the Advocate General.