



DECISION OF THE COURT

14 February 2017*

(Composition of the Court – Independence of the Judges)

In Case E-21/16,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal of the Principality of Liechtenstein (*Fürstliches Obergericht*), in the case between

Pascal Nobile

and

DAS Rechtsschutz-Versicherungs AG

concerning the interpretation of the Agreement on the European Economic Area, in particular Article 3 thereof, and Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), in particular Article 201(1)(a) thereof,

THE COURT,

composed of: Páll Hreinsson, Acting President (Judge-Rapporteur), Martin Ospelt and Siri Teigum, ad-hoc Judges,

Registrar: Gunnar Selvik,

gives the following

Decision

I Introduction

- 1 By a letter of 20 December 2016, registered at the Court on the same day, the Princely Court of Appeal of the Principality of Liechtenstein made a request for an Advisory

* Language of the request: German

Opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”).

- 2 The Princely Court of Appeal has referred three questions. The first two questions relate to the interpretation of Article 201(1)(a) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), while the third question reads as follows:

In the event that questions 1 and 2 are answered after 16 January 2017:

a) Does the principle of loyalty laid down in Article 3 of the EEA Agreement preclude national courts, in all circumstances, from calling the validity of decisions of the EFTA Court into question?

b) In the event that question 3a is answered in the negative: Which circumstances would allow national courts to question the validity of decisions of the EFTA Court, without thereby being in breach of the principle of loyalty laid down in Article 3 of the EEA Agreement?

- 3 The referring court states that the grounds for raising this question are, inter alia, as follows:

... the judge of the EFTA Court, Mr Per Christiansen, has been reappointed with effect from 17 January 2017, but only for a three-year term of office. However, Article 30(1) of the Surveillance and Court Agreement (SCA) provides that the Judges of the EFTA Court are appointed by common accord of the Governments of the EFTA States for a term of six years.

...

This raises the question, if, in the event the EFTA Court only issues its advisory opinion with respect to questions 1 and 2 after 16 January 2017, any such advisory opinion, issued according to Article 34 SCA, and constituting a decision of the EFTA Court, would even be valid for the purposes of Article 29 SCA.

- 4 In essence, the third question referred raises the issue whether, from 17 January 2017, the Court is lawfully composed in a manner that ensures its independence and impartiality. The Court has therefore decided, of its own motion, that a decision assessing the lawfulness of the Court’s composition must be taken before the referring court’s first two questions are addressed.

II Legal background, facts and procedure

- 5 The first, second and fourth paragraphs of Article 30 SCA read:

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.

...

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.

6 Article 2 of the Statute of the Court reads:

Before taking up his duties each Judge shall, in open court, take an oath to perform his duties impartially and conscientiously ...

7 Article 15 of the Statute of the Court reads:

No Judge may take part in the disposal of a case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.

If, for some special reason, any Judge considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President of the Court. If, for some reason, the President considers that any Judge should not sit in a particular case, he shall notify him accordingly.

Any difficulty arising as to the application of this Article shall be settled according to the fourth paragraph of Article 30 of this Agreement.

If according to this Article a Judge shall not take part in a particular case, a person to replace him shall be chosen in accordance with Article 30, fourth paragraph, of the Agreement, among those persons on the list who have been nominated by the Government which has nominated the regular Judge who is to be replaced.

A party may not apply for a change in the composition of the Court on the grounds of either nationality of a Judge or the absence from the Court of a Judge of the nationality of that party.

8 Article 3(1) of the Court's Rules of Procedure ("RoP") reads:

1. Before taking up his duties, a Judge shall, in accordance with Article 2 of the Statute, at the first public sitting of the Court which he attends after his appointment, take the following oath:

"I swear that I will perform my duties impartially and conscientiously; I swear that I will preserve the secrecy of the deliberations of the EFTA Court."

9 In its request, the referring court refers to ESA/Court Committee Decision 2016 No 5 of 1 December 2016 on the re-appointment of a Judge to the EFTA Court. The decision includes, inter alia, the following recitals:

... WHEREAS Judge Christiansen has been chosen, in accordance with Article 30, 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 recognised competence,

WHEREAS the Government of Norway has decided to re-nominate Judge Christiansen for a non-renewable term of three years, until he reaches the age of 70, which is the statutory retirement age for Norwegian Supreme Court Judges,

WHEREAS said decision is without prejudice to the term of office of any judge who may be reappointed in the future,

WHEREAS the ESA/Court Agreement should be applied in objective manner safeguarding the independence and stature of the EFTA Court.

10 Article 1 of ESA/Court Committee Decision of 1 December 2016 states that the EFTA States have decided:

To reappoint Mr Per Christiansen as Judge of the EFTA Court under the terms of the ESA/Court Agreement, for a period of three years with effect from 17 January 2017.

11 On 11 January 2017, President Carl Baudenbacher and Judge Per Christiansen were recused for the part of the case which relates to the third question referred. Accordingly, they were replaced by ad-hoc Judges Martin Ospelt and Siri Teigum respectively, pursuant to the fourth paragraph of Article 30 SCA, in the assessment of the third question.

12 On 13 January 2017, the Court sent a letter to the EFTA States inviting them to provide information and reasoning to shed further light on ESA/Court Committee Decision 2016 No 5 of 1 December 2016. In particular, the EFTA States were invited to address the issue whether the Court is lawfully composed in a manner that ensures its independence and neutrality.

- 13 Later that same day, the Court received ESA/Court Committee Decision 2017 No 1 of 13 January 2017 on the re-appointment of a Judge to the EFTA Court and repealing Decision 2016 No 5 of 1 December 2016. Article 1 of the new decision states that the EFTA States have decided:

To re-appoint Mr Per Christiansen as Judge of the EFTA Court, under the terms of the [SCA], for a period of six years with effect from 17 January 2017.

- 14 Article 7 of the decision reads:

Decision of the ESA/Court Committee 2016 No 5 of 1 December 2016 is hereby repealed.

- 15 In light of this development, the Court sent a letter on 17 January 2017 to the EFTA States informing them that the Court had concluded that it would decide on the lawfulness of its composition without it being necessary to receive information and reasoning from the EFTA States concerning the decision that had been repealed.

III Findings of the Court

- 16 Any assessment of the lawfulness of the Court's composition, particularly concerning its independence and impartiality, requires that due account is taken of several important factors. First, the principle of judicial independence is one of the fundamental values of the administration of justice. This principle is reflected, inter alia, in Articles 2 and 15 of the Statute of the Court and Article 3 RoP. Second, it is vital not only that judges are independent and fair, they must also appear to be so. Third, maintaining judicial independence requires that the relevant rules for judicial appointments, as set out in Article 30 SCA, must be strictly observed. Any other approach could lead to the erosion of public confidence in the Court and thereby undermine its appearance of independence and impartiality.
- 17 The ESA/Court Committee decided on 1 December 2016 to re-appoint Judge Per Christiansen for a non-renewable period of three years with effect from 17 January 2017. It was this event that led the referring court to raise the third question, since the first paragraph of Article 30 SCA provides that Judges shall be appointed for a term of six years.
- 18 The preamble to ESA/Court Committee Decision of 1 December 2016 does not explain why a reference is made in the recitals to the statutory retirement age for Norwegian Supreme Court Judges. The SCA and the Statute of the Court do not contain a corresponding provision.
- 19 The statement in the recitals of the ESA/Court Committee Decision of 1 December 2016 that the decision "is without prejudice to the term of office of any judge who may be reappointed in the future" raises questions whether the original decision to re-appoint Judge Christiansen was made on an objective basis.
- 20 Most importantly, the ESA/Court Committee Decision of 1 December 2016 did not address the grounds on which a term of three years could be reconciled with Article

30 SCA, which expressly provides for a term of six years, both for the appointment and the re-appointment of a Judge. This term aims at protecting the independence of the Judges.

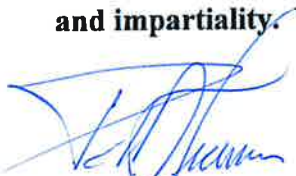
- 21 Irrespective of those considerations, the Court must take account of ESA/Court Committee Decision 2017 No 1 of 13 January 2017, which repealed the ESA/Court Committee Decision of 1 December 2016 and re-appointed Judge Per Christiansen for a term of six years. The new decision is unambiguous and provides for a term that is in accordance with Article 30 SCA. Consequently, there can be no doubt as to the lawfulness of the Court's composition from 17 January 2017.
- 22 It follows that, after this decision has been rendered, the substantive part of the present proceedings, namely the first two questions referred, may be addressed by the Court's three regular Judges.
- 23 The Court therefore concludes that, from 17 January 2017, it is lawfully composed in a manner that ensures its independence and impartiality.

On those grounds,

THE COURT

in response to the third question referred by the Princely Court of Appeal, hereby gives the following decision:

The Court is lawfully composed in a manner that ensures its independence and impartiality.



Páll Hreinsson



Siri Teigum




Martin Ospelt

Luxembourg, 14 February 2017.



Gunnar Selvik
Registrar



Páll Hreinsson
Acting President