The EFTA Court 18 Years On - Accomplishments and Challenges

EFTA Court Spring Conference 2012
Outline

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C. Effect-related homogeneity
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A. Introduction

1. Difficult birth and troubled youth

Combined EEA Court rejected by the ECJ by Opinion 1/91

From 7 to 5 to 3 judges (and 6 ad hoc judges)

2 pillar system; docking to the EU single market with the exception of common policies

- Agriculture
- fisheries
- foreign trade
- currency

Legislative and judicial homogeneity
A. Introduction

II. Judicial homogeneity

Article 6 EEA

Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.

Article 3 II SCA

In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.
A. Introduction

III. Mission accomplished?

Max Planck Encyclopedia of International Law:

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.

*Sharpston/Clifton.*

[T]he judgments that the EFTA Court has delivered since its inception have been of consistent quality and perceptiveness; and it has earned its good reputation for judicial exposition. Its work deserves to be taken seriously by all who are engaged in studying and applying EU/EEA law.
A. Introduction

II. Mission accomplished?

*John Temple Lang.*

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.
B. Substantive homogeneity

I. ECJ Opinion 1/91

Alleged difference of goal and context between EC and EEA law.

II. EFTA Court

Invitations of EFTA and EU States Governments to recognize difference of goal and context rejected.

Invitations of EFTA State Governments to recognize special justification grounds in the area of the fundamental freedoms rejected.

Rainford Towning; Norwegian Waterfalls. Presumption that identically worded provisions must be construed in an identical way.
B. Substantive homogeneity

III. ECJ

*Ospelt*, paragraph 29:

[O]ne of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States. From that angle, several provisions of the abovementioned Agreement are intended to ensure as uniform an interpretation as possible thereof throughout the EEA (see Opinion 1/92 [1992] ECR I-2821). It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly within the Member States.
B. Substantive homogeneity

III. ECJ

*Bellio Fratelli*, paragraph 34:

[B]oth the Court and the EFTA Court have recognised the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly.

No application of *Polydor* to the EEA Agreement by the ECJ.

IV. EFTA Court referencing the ECHR and the ECtHR

*Norway Post*:

Since competition law proceedings which may entail substantial fines fall, as a matter of principle, within the criminal sphere for the purposes of Article 6 ECHR, that provision must apply with its full stringency.
C. Effect-related homogeneity

I. Written EEA law

Protocol 35 EEA

Whereas this Agreement aims at achieving a homogeneous European Economic Area, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the European Economic Area; and

Whereas this consequently will have to be achieved through national procedures;

Sole Article

For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.
C. Effect-related homogeneity

I. Written EEA law

Article 7 EEA

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.
C. Effect-related homogeneity

I. Written EEA law

Preamble EEA Agreement

(4) 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;

(8) CONVINCED of the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights;

(15) WHEREAS, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;

Articles 6 EEA/3 II SCA („relevant“)
C. Effect-related homogeneity

II. Academic literature

AG van Gerven and others:

Direct effect and primacy must be deemed to be part of EEA law because a legal system that would not encompass them would not at all be homogeneous with Community law.

Nordic authors:

Mostly opposed to the recognition of direct effect and primacy in EEA law.
C. Effect-related homogeneity

III. ECJ Opinion 1/91

No guarantee of EU style direct effect and primacy in EEA law

IV. EFTA pillar of the EEA

EFTA Court Restamark, Einarsson, Karlsson, Criminal proceedings against A:

Quasi-direct effect, quasi-primacy, conform interpretation

EFTA Court Sveinbjörnsdóttir, Kolbeinsson:

State liability
C. Effect-related homogeneity

V. EU pillar of the EEA

GC *Opel Austria* and ECJ *Rechberger*

Direct effect and State liability

Excursion Commission’s submussion in *Granville*

The ECJ’s approach “gives better protection in certain cases to nationals of the EFTA States than the EFTA jurisprudence gives to Union citizens”. The Commission suggests “that the EFTA Court might wish to take this on board, if it wishes to revisit its jurisprudence”.

**Comment:** Lack of EU style direct effect “as long as” effect-related homogeneity can be achieved by other means. This would underscore the EFTA States’ obligation to take all necessary measures to implement EEA rules timely and correctly in their respective legal orders.
D. Procedural homogeneity

I. EFTA Court case law

Restamark and following cases: Relevance of ECJ case law if identical wording.

Concept of procedural homogeneity recognized recently (E-18/10 ESA v Norway; E-15/10 Posten Norge v ESA; order of the Court E-13/10 Aleris Ungplan v ESA; order of the President E-14/10 Konkurrenten.no AS v ESA; order of the President E-15/10 Posten Norge v ESA).

Access to justice.

Full ambit of the concept is yet to be discovered.

Order of the President E-16/11 Icesave (Intervention of the Commission): No limitation to identically worded provisions.
D. Procedural homogeneity

II. Freedom of courts of last resort to refer?

1. 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.

....
D. Procedural homogeneity

11. Freedom of courts of last resort to refer?

2. Article 3 EEA

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.

3. Recital 4 of the Preamble to the EEA

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;
D. Procedural homogeneity

4. Academic literature

Old approach: Restriction to the text of Article 34 SCA

New approach: Interpretation of the SCA in light of the higher ranking EEA Agreement and of Article 6 ECHR

5. ECtHR *Ullens de Schooten and Rezabek v. Belgium*, applications nos. 3989/07 and 38353/07, of 20 September 2011

Duty on a national court of last resort to reason a refusal to make a reference.

6. Supreme Courts of Iceland, Liechtenstein, Norway assume that they are free
D. Procedural homogeneity

6. Practice

Supreme Courts of Iceland, Liechtenstein, Norway assume that they are free.

The Liechtenstein **Supreme Administrative Court** takes another view. Its President *Andreas Batliner* stated in a speech in Vaduz on 2 May 2012:

> Controversial legal questions must always be decided by the highest court. Otherwise there will be no legal certainty and no legal peace. The highest court in European law questions is according to the EEA Agreement not the Liechtenstein Administrative Court, but the EFTA Court.

In Case E-1/06 Gaming Machines, the Norwegian Supreme Court acknowledged that the EFTA Court is the final arbiter in the EFTA pillar which gives ‘the authoritative answer’ to questions of EEA law.
E. Dialogue national courts of the EFTA States – EFTA Court – ECJ – national courts of the EU States

Examples:

Taking a ride in a motor vehicle that is driven by an intoxicated driver:
Høyesterett *Finanger* - EFTA Court *Finanger* – AG Geelhoed *Candolin* - ECJ *Candolin*

Nutritional need argument and precautionary principle in food law:
ECJ *Sandoz* - EFTA Court *Kellogg’s* – CFI *Pfizer Animal Health and Alpharma* - ECJ *Commission v Denmark, Monsanto, Commission v Netherlands* – AG’s – EFTA Court *Pedicel*.

Repackager of pharmaceuticals adding its own design:
Høyesterett *Merck ./. Paranova* - EFTA Court *Merck ./. Paranova* - England and Wales Court of Appeal *Boehringer Ingelheim II* - AG Sharpston *Boehringer Ingelheim II* - ECJ *Boehringer Ingelheim II* - German Supreme Court *STILNOX* a.o.
E. Dialogue national courts of the EFTA States – EFTA Court – ECJ – national courts of the EU States

Examples:

Taxation of outbound dividends:

Notion of “durable medium” (legal nature of a webpage):
Liechtenstein Appeals Commission of the Financial Market Authority Inconsult - German Supreme Court Holzhocker AG Mengozzi – Content services.
E. Dialogue national courts of the EFTA States – EFTA Court – ECJ – national courts of the EU States

ECJ President Vassilios Skouris:
[1]Ignoring EFTA Court precedents would simply be incompatible with the overriding objective of the EEA agreement which is homogeneity.

ECJ Judge Allan Rosas
[2]or me the question as to whether judges should be open to the outside world and be aware of discussions taking place in other relevant jurisdictions, is not any longer a question of opinion, it is a question of whether you are competent or incompetent. If you close your eyes, you belong to the latter category.

EU Member State Governments are pleaders before the EFTA Court.

Role of the Commission in EFTA Court cases.
F. The EFTA Court’s reform proposals

I. Extended Court in important cases (3 + 2 ad hoc judges)

The argument if it ain’t broke don’t fix it is unconvincing. The drafters of the EEA Agreement could not have foreseen that the EFTA Court would have to go first in most of its cases.

Global dimension of certain cases (for instance *Philip Morris*).

Five judges give more legitimacy than three.

II. Advocate General in important cases

The EFTA Court has no research department. An AG would enhance the legitimacy of the Court.

III. Panel

Compare Article 255 TFEU.