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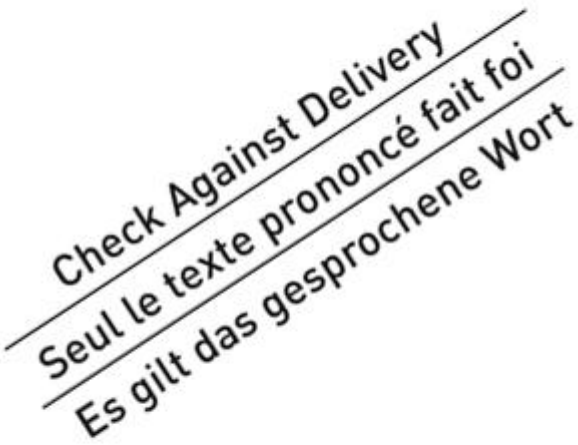
The EFTA Court 20 years on: an important contribution to wider European integration



Luxembourg, 4 December 2014

Dear Judges, dear Carl, Excellences, Ladies and Gentlemen,

More than 20 years ago, the Agreement creating the European Economic Area (EEA) entered into force. Still today, it remains a reference model; the most comprehensive instrument that ever extended the EU's internal market to third countries. This is no fiction! The Single Market is real. Given its breadth, it brings far-reaching benefits to citizens and businesses alike. The European Economic Agreement makes sure that those benefits are not only for the 28 Member States of the European Union, but they can also be fully shared with Norway, Iceland and Liechtenstein. Consumers can buy cheap and high-quality products that businesses can supply without facing any tariffs or non-tariffs barriers. More generally, people from these 31 countries can cross borders more easily to travel, work and study. How progressive!

Yet, such process would not have been so successful without the creation of a judicial mechanism ensuring jurisdictional control, enforcement and uniform implementation. The European Union and the associated States were right when they decided to complement the association Treaty with its own Court. Ever since its genesis, the EFTA Court has relentlessly enforced the applicable Internal Market acquis and dynamically upheld all new relevant Community legislation.

That is why it is a pleasure for me today to celebrate once again the 20th anniversary of the EFTA Court. There are several additional reasons for that:

- First and foremost, I am Luxemburgish. In addition to my deep attachment to this country and in particular to this city, I think small administrations tend to be more efficient. Well, this applies to the EFTA Court. With three judges, you ensure quick and efficient jurisdictional control in average handling time of only eight months.

- As a Luxembourger, I am also very well aware that Europe consists of two categories of countries: the small ones and those that still have not understood that they are small. And this brings me to my second point: only together we can all become bigger than we really are. In other words, I am very supportive of wider and deeper economic integration. That's the only way for our continent to meet global challenges. In this regard, the role of the Court to underpin the EEA Agreement is extremely worthy.

- My strong interest in speaking to you today also derives from a third important motive. At a time when pessimism prevails, positive stories must be conveyed to the wider public. The EFTA Court is one of them! Institutions must

be judged on their track record. Again, the EFTA Court sets a good example!

- As former Vice President of the European Commission in charge of Justice, I could not have declined to participate in such an evening, which reminds us of the utmost importance of having independent Courts. For what purpose, some may ask? Well, most importantly, to enforce the rule of law, to endorse strategic political decisions and discard short term views.

Ladies and gentlemen, since the 1st of January 1994, the EFTA Court has made more than 200 rulings. The commemorative book that will be presented in a minute reflects the breadth of its achievements. The authors - distinguished members from all branches of the legal profession - surely have more expertise than me in this field.

However, I can share my vision about both past decades and future realisations. To this end, I have selected 10 rulings, upon which I will anchor a clear message: The EFTA Court greatly contributed to transforming legal words from the EEA Agreement into concrete deeds for European people. Its judges developed EEA law by consistently applying it and reliably cooperating with the European Court of Justice.

After having outlined these past achievements, I will move on to the most recent and forward-looking developments.

Before going into more details, it is important to recall that the goal of the EEA Agreement is the extension of the EU Single Market to EFTA States. To reach this objective, there was to be "the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area" (ECJ ruling Ospelt, paragraph 29).

Yes there were two different integration mechanisms at play, two separate courts and two distinctive legal orders. But in the end, there was a unique substance, which is the EEA's Single Market law. Therefore the associated rights and duties were to be applied as rigorously and uniformly as possible.

That's exactly what the EFTA Court has been pushing for over the past twenty years. Regardless of whether the rulings were directly drawn from EEA law, directly from EU law or indirectly from ECJ rulings, the EFTA Court endorsed the fundamental doctrines which underpin the European Union as a partner Court to the EU's own Court of Justice. This approach relentlessly strengthened the development of the EEA Single Market. I want to give two illustrations of this that particular matter to me.

And don't get me wrong here! The enforcement of the free movement of services, in particular via the landmark ruling Mattel Scandinavia (1993) and Lego Norge (1994), as well as the application of the free movement of capital, notably via the Fokus Bank ruling (2004) are extremely valuable. But the fundamental rights of persons are dear to my heart.

So first, let me place the emphasis on the freedom of movement of persons. The EFTA Court played a decisive role in ensuring that existing rules are properly enforced and applied in the EEA context. For example in the so-called case Dr Joachim Kottke (2009), the Court strictly applied the general principle of non-discrimination on grounds of nationality. The judges examined the legality of the obligation for plaintiffs non-resident in Liechtenstein to provide a guarantee for the cost of proceedings; obligation not imposed on people from Liechtenstein. They held that such procedure disproportionately affected the interests of non-residents, and as such constituted discrimination. Here the Court clearly demonstrated its resolve to ensure equal treatment. As a politician, I could not agree more. No one should be impeded from starting legal proceedings.

Another example illustrates the EFTA Court's role in rebalancing the right to free movement with other public policy objectives. In the Wahl case (2013), a Norwegian national,

while travelling to Iceland on a holiday trip, was denied entry on grounds of his membership in a Norwegian motorcycle club. Icelandic authorities considered that the club activities constituted a threat to public security. In line with the EU Free Movement Directive and relevant case law of the European Court of Justice, the judges held that any derogation from the fundamental right to free movement ought to be interpreted strictly. In other words, an EEA/EFTA State can only prevent entry to its territory if a thorough risk assessment shows that the person is "a genuine, present and sufficiently serious threat to one of the fundamental interests of society".

I could go on citing several other fascinating rulings, such as Arnulf Clauder (2011). All these examples lead to the same conclusion: the EFTA Court clearly safeguarded the rights of mobile citizens to exercise their free movement also on grounds other than being workers or self-employed.

The EFTA Court did not rule out unfair discrimination and residency requirements for the benefit of economic agents only, but for all citizens in general. Whatever their situation, they need to be protected against inequitable treatment.

The second point I wanted to mention is the protection of fundamental rights. The EFTA Court has given an important role to both the provisions of the European Convention on

Human Rights and the judgements of the European Court of Human Rights. The cases TV 1000 (1997) and Asgeirsson (2003) clearly refer to respectively the Handyside judgment of Court and to the article 6 of the Convention. No need to elaborate on the specific features of these rulings to see that these developments contributed to a more comprehensive EEA law, protective of the rights of citizens.

Now, how these achievements have been made possible? In one word, cooperation. For the past twenty years, the EFTA Court and the ECJ have built robust channels of communications. That's one of the main reasons why there are no legal gaps today between EEA and EU Citizens. More precisely, two factors created mutual trust.

First, the legally enshrined cooperation. The principle of homogeneity is enshrined in the EEA Agreement. Article 6 states that the EFTA Court shall follow relevant ECJ case law published prior to the date of signature of the EEA Agreement. Article 3(2) of the Surveillance and Court Agreement adds that it should also take due account of new relevant ECJ case. What does that mean in layman's terms? That the case law in both EEA pillars shall develop in a consistent and complementary way. That rules should be applied with uniformity within the EEA.

This key principle was recently reaffirmed by the EFTA Court ruling Norwegian Waterfall (2007). The decision establishes the "presumption that provisions framed identically in the EEA Agreement and the EU Treaties are to be interpreted in the same way". In this way, the EFTA Court strengthened the unity of the Single Market and due tribute should be paid.

Second, cooperation in action. In everyone's opinion - at least those I have read, there seems to be clear consensus. The dialogue between EU and EFTA judges has been tremendous. Without any formal provision, both institutions often meet (at conferences or celebrations for example) and regularly exchange information (not least by crossing the Kennedy Avenue). Additionally, the Commission and EU Member States participate in EFTA Court cases by providing written observations. And the EFTA Judges directly use the opinions of the Advocates general of the ECJ. This makes sure that all actors cooperate in a "communauté de droit".

But anyway, what lessons can be drawn here?

- Cooperation reinforces the legitimacy and efficiency of the Institutions taking part in these joint efforts. It was and remains indispensable to level the regulatory playing field.

- By building bridges between each other, European Courts also encourage European countries to move closer to

each other. Differences between EEA law and underlying EU law would have jeopardised the goal of integrating the EEA/EFTA States into the internal market. Instead, strong cooperation led to the uniform application of law, in turn strengthening the European Economic Area.

– On a related note, being a fully-fledged member in the Single Market implies rights and duties. Integration cannot be a la carte! The message of the EFTA and the EU Courts is crystal clear: if you want to reap all the benefits from the four freedoms, then you must enforce the obligations that go with it. That's a clear restriction to a multi-speed Single Market.

By the same token, the communication channel I just mentioned is a two-way street. That means the Court of Justice can also take inspiration from EFTA Court rulings. In brief, your judges can also contribute to EU law. Simply because new legal challenges may not have been addressed by the ECJ yet. Also because the Court caters to the thrust for integration.

The figures speak for themselves: up until now, the Courts and Advocates General of the EU have already made more than 150 citations to EFTA Court case-law.

As promised, here is my tenth reference to a specific case: the seminal ruling EFTA Surveillance Authority vs Norway (2000),

also called-called the Kellogg's judgement, because it concerned a ban by Norway on sales of cornflakes fortified with vitamins and minerals on grounds of protection of human health. In this judgement, the judges broke new ground by recognising the precautionary principle but formulated strict conditions for its application.

This ruling has had substantial influence on the ECJ case law. It struck a new balance between free movement of goods and public health concerns, ensuring as much as possible that foodstuffs lawfully produced in one Member State can be supplied in another, but only if health concerns are satisfied.

This case serves therefore as a neat example of the dialogue between the EFTA Court and the Court of Justice - a dialogue that backs up a partnership.

To conclude, I want to come back to the early days, not to 1994 but to the 1st of September 1996. On that day, the EFTA Court moved to Luxembourg. Since then, it is an integral part in the Luxemburgish Community. Not only it is part of the Kirchberg judicial community. It is also an important member in the Luxemburgish family. That makes perfect sense to me because the EFTA Court disposes of all the necessary attributes to thrive in our country: it is small but efficient, diligent and proficient, in one word excellent!

20 years old is a good age. You have proven your maturity. No time to sit on your laurels. Your contribution to European integration is important.