

EFTA Court Speech

Brussels - 15.12.2015

In 2004, 200 of the great and the good of Europe's transnational lawyers gathered for an EFTA family party. As is common at birthday celebrations, the speeches were charming, cheerful, possibly fuelled by alcohol. No metaphor was too extravagant. Bo Vesterdorf spoke of the ECJ having two daughters, the Tribunal and the EFTA Court, and delicately alluded to the dramas associated with the child's conception when sniffily rejected by the ECJ and exiled as a baby to Geneva. There the child passed a 30 month (quarantine?) period, after which she moved to Luxembourg and life with neighbouring courts proceeded. And here we are again, this time in Brussels, with cousins, siblings and godparents gathered to say nice things about the growing prodigy, but more particularly to celebrate its latest biography.

The biography

Handbooks, like telephone directories, are not usually either enthralling or exceptionally entertaining. Legal textbooks are not notorious for their drama. A book with 12 sections by 42 authors varying in age from 28 to 81 and coming from 12 different countries (from Iceland to Spain plus an arguable Latin American) can be soporific to a torpid degree; or quite fun. The list of authors is very eclectic. The book has been written by serious lawyers (professors, judges, civil servants, lawyers, a prime minister, an ambassador, référendaires and others). It is intended for practitioners and legal scholars. It is solid, but, thanks to its approachable style, it is accessible also for human beings. It is neither dull nor superficial; it manages to be both interesting and (so far as I could detect) complete.

Style

The style of the Handbook reflects the style of the output of the EFTA Court's judgments. If we compare the EFTA Court and the ECJ, there are some evident differences between a court of three judges using one common second language (English with its grammatical tolerance and brevity) and with a moderate case-load, and a court with thirty-eight members (judges plus Advocate Generals) with twenty-three official languages and French (grammatically conservative) as a working language, as well as a bulging case-load. The style of the EFTA Court judgments is therefore perceptibly different to that of the EU Courts. It is obviously easier for a small mono-lingual court to remain consistent and to identify sensitivities in the drafts: some questions can be best postponed, while others require a very cautious narrow response; some permit a certain stylistic relaxation where the court essentially calls for common sense.

Independence

Any court which performs judicial review of administrative action must sometimes displease the public authority. That is a necessary part of the judicial function. The EFTA Court has managed to gain recognition for the quality of its output even though its role and function and status are controversial in the eyes of some, notably in the Kingdom of Norway. The Court has demonstrated a marker of constitutional independence in various cases, such as *Icesave* and – I would suggest – the Icelandic Hell’s Angels case.

So that is the big picture, the constitutional setting.

Wine and food

If you wish to find details about judgments in specific areas, the new book offers plenty of details. On whether there is a competitive relationship between wine and medium strength beer and the fiercely restricted world of national alcohol monopolies review pages 431 and 530 (E-1/97 *Gundersen*). On whether magazines about wine can damage public health, see pages 379 and 847 (E-4/04 *Pedice*). These cases present the delicate question of whether a ban on publicity for alcohol or tobacco can be justified by reference to the precautionary principle (which supposedly allows action to ban a possibly hazardous product before the hazard’s existence has been scientifically demonstrated). Where the hazard is not in doubt (alcoholism or respiratory disease) can the precautionary principle be used to justify how measures to address that hazard are taken?

If you want to deepen your knowledge about how cornflakes fortified with vitamins and iron were banned in Norway, please have a look at pp. 37-38, pp. 184-185, p. 378, pp. 839-840 and also pp. 844-850 (*Case E-3/00 Kellogg’s*). (*“The Norwegian Government contended that there was no nutritional need in the Norwegian population for these cornflakes. Every school child up to the age of 15 was given a piece of goat cheese fortified with iron every morning. As a consequence, according to the Government, Norwegians could have enough iron for the rest of their life.”*). The pleasure of varied foods at breakfasts in Norway were defended by the court accordingly.

EU lawyers who are here not by accident but by a vocation will remember that the ECJ had been called on to examine an infringement proceeding against Denmark, which subjected the marketing of reinforced cranberry juice to the proof of specific needs of the population: more information on p. 846 (*Case C-192/01 Commission v. Denmark*).

Gambling and discretion

If you are interested in gaming machines and gambling activities please have a look at p. 263, p. 365, p. 531 and pp. 690-691 (*E-1/06 Gaming Machines and Case E-3/06 Ladbrokes*). *“Moral, religious and cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order”*. But that discretion is not absolute.

These are a very few examples of numerous well presented and prudently drafted comments in a large book. So I commend the new publication and its authors; I wish the publishers lots of sales; and I welcome scholarly attention to the work of the EFTA Court.

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General Court of the European Union