Report of the

EFTA Court

2024

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EFTA Court
1 rue du Fort Thüngen
L-1499 Luxembourg

www.eftacourt.int

Concept and Design by
Imprimerie Centrale, Luxembourg

Printed by
Imprimerie Centrale, Luxembourg

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Foreword by the President

Páll Hreinsson
President

The year 2024 was a historic and eventful year in the life of the EFTA Court. The EEA Agreement and the Court celebrated their 30th anniversary and, in addition, the year was marked by a record level of activity at the Court.

We celebrated the anniversary by continuing with our proud tradition of publishing a Festschrift to mark the occasion, as the Court did in both 2004 and 2014. We were once again fortunate in receiving many outstanding contributions for the book, including from the Presidents of the Court of Justice and the General Court, the Presidents of the highest Courts of the EEA EFTA States and many other prominent contributors.

In the autumn, the Court held an anniversary conference, which drew on a few of the contributions published in the Festschrift. The conference addressed many of the fundamentals of EEA law, such as homogeneity, fundamental rights and their judicial protection. In a very favourably received speech, a top ten of the EFTA Court's most significant cases was presented, highlighting the important contributions the Court has made to the development of the EEA Agreement during the last three decades. I would like to offer my sincere thanks to all those who contributed to making the anniversary celebrations a great success.

In 2024, 32 cases were registered at the Court and 27 judgments were handed down. This is without a doubt a high-water mark in the Court's 30-year history.

Turning to the judgments handed down in 2024, the first one I would like to highlight is a case stemming from Liechtenstein, *X v Finanzmarktaufsicht*, which afforded the Court an opportunity to clarify certain aspects of the advisory opinion procedure. The Court held that in that context, the term EEA Agreement had to be interpreted to include rules laid down in the Surveillance and Court Agreement. The reasons for that conclusion were essentially twofold: first, there were no indications that substantive issues regulated therein, in particular in the field of state aid, were to be excluded from the EFTA Court's jurisdiction; and, second, holding otherwise would be liable to jeopardize homogeneity. Moreover, national courts in the EEA EFTA States are permitted under Article 34 SCA to ask questions related to the interpretation of EEA law irrespective of any prior decisions by a higher-ranking national court.

In *A and B* the Court was faced with a question on how to assess a divorced parent's, with joint parental responsibility, wish to move from Norway to Denmark, which under Norwegian law required consent from the

other parent or a court order. The EFTA Court found that the fundamental principle of the best interests of the child is a general principle of EEA law and accordingly, a restriction on a parent's freedom to relocate within the EEA may be justified if it is based on an objective that genuinely seeks to ensure the best interests of the child and is proportionate. In this judgment, the EFTA Court had, for the first time, the occasion to draw on the findings of the Court of Justice that the principle of mutual trust between EU States also extends to the EEA EFTA States.

The Court has received several requests for an advisory opinion regarding the environment. Currently, two such cases are pending, *Friends of the Earth* and *Greenpeace*, concerning the Water Framework Directive and the Environmental Impact Assessment Directive. In *Norwegian Air Shuttle*, the Court interpreted the obligation to surrender greenhouse gas emission allowances in the context of restructuring of an airline. The Court concluded that satisfying that obligation by dividend in a compulsory debt settlement in connection with the restructuring of an insolvent company, was not compatible with the ETS Directive. This conclusion followed both from the wording of the Directive and its purpose to reduce greenhouse gas emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate.

In *Gylfason and Gröndal* and *Sverrisdóttir and Sigurðsson*, highly important cases for consumer rights in Iceland, the Court examined the compatibility of the contract terms of Icelandic banks under the Unfair Contracts Term Directive. We concluded that such terms must not only be formally and grammatically intelligible but also enable an average consumer to be in a position to understand them and assess their potential economic consequences. Moreover, certain vague and discretionary contract terms were, subject to verification by the referring courts, considered to be liable to cause a significant imbalance in the rights and obligations of the banks on the one hand and the consumers on the other.

At the time of writing this address, the state of international affairs is more uncertain and disturbing than ever before in my lifetime. I therefore think it appropriate to end this foreword with my final remarks from the foreword to the Court's Festschrift: In his thought provoking book, *What's Left of the Law of Integration?*, Julio Baquero Cruz wonders whether the fact that generations have only known peace has caused the impetus for European integration to be forgotten. Since this book was published in 2018, global events have very sadly shown us that war has most definitely not left the European continent. Moreover, the situation worldwide remains extremely uncertain into the near future. Even if the EEA Agreement and the EFTA States are not at the heart of European integration, they make a valuable contribution to it and most importantly share with the EU and its Member States a commitment to peace, democracy, human rights and the rule of law. The fundamentals and a rule-based international order are crucial to securing a peaceful future. Now that a peaceful future is more uncertain than since the outbreak of the second world war, the commitment to the rule of law and democracy is more important than ever before.

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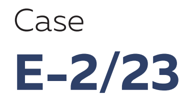
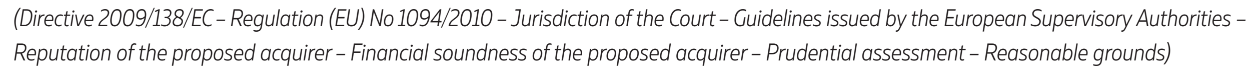
Case Summaries

Case



E-2/23

A Ltd v the Financial Market Authority (Finanzmarktaufsicht)



(Directive 2009/138/EC – Regulation (EU) No 1094/2010 – Jurisdiction of the Court – Guidelines issued by the European Supervisory Authorities – Reputation of the proposed acquirer – Financial soundness of the proposed acquirer – Prudential assessment – Reasonable grounds)

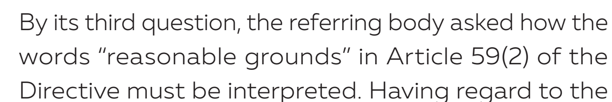
Judgment of the Court of 25 January 2024

The case concerned questions referred to the Court by the Board of Appeal of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*) concerning the interpretation 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) ("the Directive") and Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority ("EIOPA")) ("the Regulation").

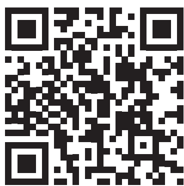
The main proceedings concern an appeal by A Ltd of a decision by the Financial Market Authority ("FMA"), in which the FMA opposed the proposed acquisition by A Ltd of all the shares in Z AG, a joint-stock company established under Liechtenstein law licensed to operate life insurance business. In particular, the FMA had serious concerns as to whether Z AG would be able to comply and continue to comply with the relevant prudential requirements with Ms C, the ultimate shareholder of A Ltd, indirectly as sole shareholder.

The referring body's first and second questions concerned the interpretation of the criteria set out in points (a) and (c) of Article 59(1) of the Directive, which are relevant to the assessment of a notification of a proposed acquisition. As regards point (a) of Article 59(1), the Court found that the term "reputation" of the proposed acquirer must be interpreted as referring to both the integrity and professional competence of a proposed acquirer. The Court further held that Article 59(1) of the Directive must be interpreted as not precluding a national supervisory authority from taking into account in its assessment with regard to the criterion laid down in point (c), any necessary supply of funds by a proposed acquirer to an insurance undertaking through a bank guarantee or the making available of funds on a trust account, which may be drawn on by the insurance undertaking at any time.

By its third question, the referring body asked how the words "reasonable grounds" in Article 59(2) of the Directive must be interpreted. Having regard to the



structure, context and legislative history of that provision, the Court held that the term "reasonable grounds" must be interpreted as not requiring certainty of non-compliance with the criteria set out in Article 59(1).



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Furthermore, the referring body sought guidance on whether a declaration by a competent authority, pursuant to Article 16(3) of the Regulation, to make every effort to comply with guidelines has binding effect on the courts of an EEA State so that they are also obliged to make every effort to comply with such guidelines. The Court held that the joint guidelines issued by EIOPA, at issue in the main proceedings, are not a legal act that has been incorporated into the EEA Agreement and, as such, are not binding upon the Contracting Parties. Accordingly, the Court held that declarations pursuant to Article 16(3) of the Regulation do not have binding effect on the courts of an EEA State. However, it is for the courts of an EEA State to take such guidelines into consideration in order to resolve the disputes submitted to them, in particular when those guidelines are intended to supplement binding provisions of EEA law.

Case

E-10/22

Eviny AS v ESA

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Admissibility – Time limit – Recovery – Market economy operator principle – Private acquirer test – Private debtor test – Manifest error of assessment – Reliability of evidence – Burden of proof – Standard of proof – Negative presumption – Information from undertakings)

Judgment of the Court of 21 March 2024

The case concerned an application of annulment of a decision of 6 July 2022 of the EFTA Surveillance Authority ("ESA") on aid in relation to streetlight infrastructure in Bergen (Norway).

In the contested decision, ESA found that there had been overcompensation for maintenance and operation and capital costs paid to companies within the Eviny group in respect of streetlights along municipal roads within Bergen municipality. ESA considered this overcompensation to amount to unlawful State aid that was incompatible with the functioning of the EEA Agreement. The contested decision ordered that the Norwegian authorities should take all necessary measures to recover the unlawful and incompatible aid.

In its application, Eviny AS ("Eviny") sought the annulment of the contested decision. By its second plea, Eviny submitted that ESA had committed a manifest error of assessment by concluding that Eviny had received an economic advantage through overcompensation. In essence, Eviny argued that the evidence that ESA had relied on, whether taken separately or in combination with other evidence, was neither indicative nor could be considered proof of any overcompensation for operation and maintenance services or capital costs. Moreover, Eviny disputed the factual accuracy, consistency and reliability of figures derived from Statistics Norway's KOSTRA database.

In its judgment, the Court held that a table of figures from the KOSTRA database, on which the contested decision relied to support its findings, was unreliable as evidence and unable to substantiate ESA's conclusion. ESA had neither sufficiently explained why certain data was not included in its assessment nor taken account of all of the relevant information. Furthermore, the Court held that ESA was not justified in relying on the absence of certain information in order to support its findings, in particular since ESA failed to request that information during the administrative procedure.

In conclusion, the Court held that the evidence relied on by ESA in its assessment of whether the measures conferred an advantage on Eviny was not reliable and its factual accuracy was uncertain.

Accordingly, the Court held that ESA's assessment as regards whether the measures conferred an advantage on Eviny was vitiated by manifest errors of assessment and that the second plea submitted by Eviny was well founded. Consequently, the Court found that the contested decision must be annulled.

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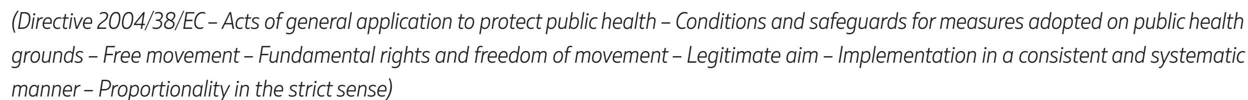
Case

E-5/23

Criminal proceedings against LDL



(Directive 2004/38/EC – Acts of general application to protect public health – Conditions and safeguards for measures adopted on public health grounds – Free movement – Fundamental rights and freedom of movement – Legitimate aim – Implementation in a consistent and systematic manner – Proportionality in the strict sense)

Judgment of the Court of 21 March 2024

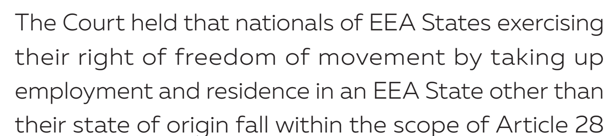
The Supreme Court of Norway (*Norges Høyesterett*) requested an advisory opinion regarding the interpretation of Articles 28 and 36 of the Agreement on the European Economic Area ("EEA") and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("the Directive").

LDL, a Swedish citizen, was charged in Norway for violating quarantine provisions under the Norwegian COVID-19 Regulation after entering from Sweden in early May 2021, as he had chosen to quarantine at home instead of staying at an assigned hotel. Violations of this regulation were punishable by criminal sanctions and could result in a fine or imprisonment for up to six months.

The referring court submitted a series of questions regarding which specific provisions of the Directive should be used to evaluate the designated restrictions and whether Articles 28 or 36 EEA provide more extensive rights than the Directive to enter and reside in Norway. Further, the referring court asked whether an examination of Article 36 EEA is material in circumstances such as in the main proceedings if a restriction of Article 28 EEA may be justified.

The referring court inquired whether Chapter VI of the Directive allows regulations of general application on rights under the Directive with the objective of safeguarding public health as well as about the implications for the assessment of the restrictions if Articles 30 and 31 of the Directive are applicable.

Additionally, the referring court inquired about the aspects of the justification of the measure in question with regard to the principle of proportionality and requested clarification on the relevant legal aspects to consider.



The Court held that nationals of EEA States exercising their right of freedom of movement by taking up employment and residence in an EEA State other than their state of origin fall within the scope of Article 28

EEA and Article 7(1)(a) of the Directive. These conditions also apply to LDL. Any restrictions on the right of residence must comply with the requirements outlined in Chapter VI of the Directive and its aim, which is to facilitate and strengthen the exercise of the right to move and reside freely within the territory of EEA States. The Court declared that neither Article 28 EEA nor Article 36 EEA provide a broader right for LDL to enter and reside in Norway than what is granted by the Directive. The Court found that Article 7(1)(a) of the Directive can only be limited by very narrow conditions for reasons of public policy, public security, or public health, as stated in Article 27(1) of the Directive. Further, any interpretation of these restrictions must align with fundamental rights and freedoms. Moreover, the Court held that the right to provide services as a traveller under Article 36 EEA is entirely secondary to the right of free movement of workers under Article 28 EEA in the present case.

The Court found that EEA States may adopt measures restricting the freedom of movement in order to respond to a threat linked to a contagious infectious disease which is of a pandemic nature recognised by the World Health Organisation. In pursuance of Articles 27(1) and 29(1) of the Directive, these restrictions may be adopted in the form of an act of general application. However, these measures must uphold the general principles as outlined in Articles 30 to 32 of the Directive. Thus, such a restricting act must be publicly announced, ensuring the public understands its content, effects, health justifications, and the remedies and time limits for challenging it. Moreover, any such restricting act must be open to challenge in judicial and, where appropriate, administrative redress procedures.

The Court stated that measures restricting the freedom of movement adopted on the basis of Article 27(1) and Article 29(1) of the Directive must be proportionate, which ensures they are appropriate, necessary, and not excessive in relation to the public health objective they aim to achieve. The Court held that even if there is uncertainty as to the existence or extent of risks to human health, EEA States must be able to take protective measures in accordance with the precautionary principle, without having to wait until the reality of those risks becomes fully apparent. Restrictive measures have to genuinely reflect a concern to attain it and are implemented in a consistent and systematic manner.

The Court held that EEA States have discretion in determining how to protect public health by the introduction of general rules. However, these rules must comply with the general principles of EEA law. Regarding the question on proportionality in the strict sense, national measures must balance public health protection, taking into account the positive obligation under Article 2(1) of the European Convention on Human Rights ("ECHR") to protect human life and health, and on the other hand the protection of fundamental rights, in the present case particularly the right to free movement of nationals of EEA States and their families, linked to the right to respect for private and family life under Article 8(1) ECHR and the right to liberty and security under Article 5 ECHR.

https://eftacourt.int/cases/e-523/

Case

E-3/23

A v Arbeids- og velferdsdirektoratet (Norwegian Labour and Welfare Directorate)

(Regulation (EC) No 883/2004 – Article 58 – Minimum benefit – Invalidity benefits – Calculation of benefits – Type B legislation – Coordination of national social security systems – Equality of treatment)

Judgment of the Court of 18 April 2024

The National Insurance Court (*Trygderetten*) requested an advisory opinion concerning the interpretation of Article 58 of Regulation (EC) No 883/2004 on the coordination of social security systems ("the Regulation").

A, a Norwegian citizen, resided in Ireland until 2014, after which he moved back to Norway. In 2018, he claimed invalidity benefits, and since he had been insured in both Ireland and Norway, the NAV Employment and Benefits Office (*NAV Arbeid og ytelser*) calculated his benefits pro rata. A argued before the National Insurance Court, that he was entitled to a supplement benefit pursuant to Article 58 of the Regulation, since the total of his benefits was lower than the minimum specified by Norwegian law.

The referring court asked whether the benefit under Norwegian law constitutes a minimum benefit within the meaning of Article 58 of the Regulation. In particular, the referring court queried the significance of the fact that the national benefit is expressed in specific amounts that are proportionally reduced in the event of a period of insurance shorter than 40 years.

The Court held that Article 58(1) of the Regulation refers to a minimum benefit set by national legislation, which applies to the total period of insurance or residence considered under Article 52 of the Regulation. Article 58(1) of the Regulation therefore gives effect to the principle of aggregation, meaning that periods from different EEA States can be combined to calculate eligibility for benefits. The Court found that the purpose of that reference period is essentially to address a situation where the amount of the minimum benefit under national legislation varies according to the period of insurance or residence completed.

The Court explained that the minimum benefit refers to a national guarantee that ensures recipients of social security benefits receive a certain income level, which is higher than what they would get based solely on their insurance periods or contributions. Even if the benefit is reduced proportionally according to the length of insurance periods, this is not relevant as long as the legislation guarantees a minimum income.

The Court emphasised that if national legislation didn't consider periods worked in other States of the EEA, it would hinder the free movement of people, disadvantaging individuals for having exercised their right to move within the EEA.

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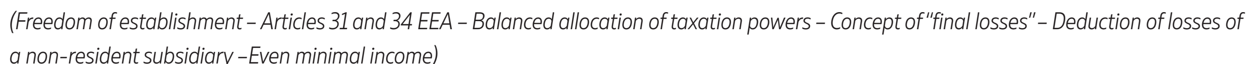
Case

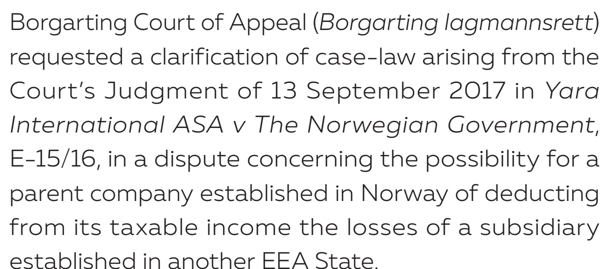
E-7/23

ExxonMobil Holding Norway AS v Staten v/Skatteetaten (the Norwegian State, represented by the Tax Administration)



(Freedom of establishment – Articles 31 and 34 EEA – Balanced allocation of taxation powers – Concept of "final losses" – Deduction of losses of a non-resident subsidiary –Even minimal income)

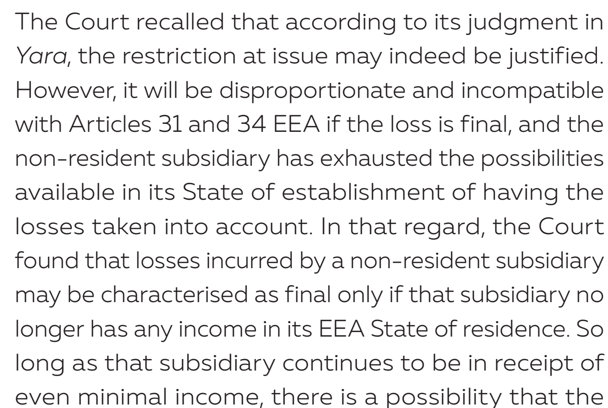
Judgment of the Court of 13 May 2023



Borgarting Court of Appeal (*Borgarting lagmannsrett*) requested a clarification of case-law arising from the Court's Judgment of 13 September 2017 in *Yara International ASA v The Norwegian Government*, E-15/16, in a dispute concerning the possibility for a parent company established in Norway of deducting from its taxable income the losses of a subsidiary established in another EEA State.

The case before the national court concerned the validity of a decision of the Norwegian authorities, in which the appellant company was disallowed deduction for a cross-border group contribution to its Danish subsidiary on the grounds that the subsidiary's business activities had continued in the following year, generating income for the company, and that, consequently, there were no "final losses", with reference to the exception set out in the Court's judgment in *Yara*.

Borgarting Court of Appeal requested the Court to clarify, in particular, whether the "final losses" exception is precluded where a subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed, or whether a specific assessment must be conducted to determine whether the subsidiary's continued income will actually reduce its losses, or that part of the losses for which a deduction is claimed. That is, whether "minimal income" is only decisive if it may indicate to what extent it is possible to obtain an income in the company, or whether the existence of a minimal income itself is decisive and precludes the application of the exception.



The Court recalled that according to its judgment in *Yara*, the restriction at issue may indeed be justified. However, it will be disproportionate and incompatible with Articles 31 and 34 EEA if the loss is final, and the non-resident subsidiary has exhausted the possibilities available in its State of establishment of having the losses taken into account. In that regard, the Court found that losses incurred by a non-resident subsidiary may be characterised as final only if that subsidiary no longer has any income in its EEA State of residence. So long as that subsidiary continues to be in receipt of even minimal income, there is a possibility that the

losses sustained may yet be offset by future profits made in the EEA State in which it is resident. Consequently, the final losses exception is precluded where a subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed.

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The Court moreover pointed out that even if it is established that the subsidiary no longer has any income in its EEA State of residence, the losses would not be characterised as final if there is a possibility of deducting those losses economically by transferring them to a third party. In that context, the Court observed that losses which are not usable because of legal restrictions, for example if they cannot be transferred to a third party, are not intended to constitute final losses in accordance with settled case-law.

The Court also held that it is compatible with Articles 31 and 34 EEA for an EEA State to require, in order to demonstrate that a loss is final, that a liquidation process be formally decided upon immediately after the end of the fiscal year for which a deduction is claimed.

Case

E-8/23

Trannel International Limited v Staten v/ Kultur- og likestillingsdepartementet (the Norwegian State, represented by the Ministry of Culture and Equality)

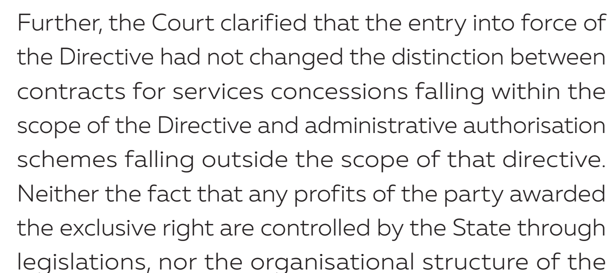
(Directive 2014/23/EU – Article 5(1)(b) – Exclusive right – Horse race betting – Services concessions – Contract for pecuniary interest – Administrative authorisation)

Judgment of the Court of 13 May 2024

The case concerned questions referred to the Court by Oslo District Court (Oslo tingrett) concerning the concept of a service concession contract in relation to Articles 5(1)(b) and 10(1) of Directive 2014/23/EU on the award of concession contracts ("the Directive") and administrative authorisation schemes not covered by the Directive.

In the main proceedings, Trannel International Limited sought a declaration that the award of an exclusive right to offer horse race betting in Norway, awarded to Stiftelsen Norsk Rikstoto, is ineffective on account of breach of EEA law. Oslo District Court sought guidance on when an exclusive right for gaming is to be regarded as an administrative authorisation scheme, falling outside the scope of the public procurement rules, and when it must be regarded as an award of a service concession within the meaning of Article 5(1)(b) of the Directive.

The Court found that in order to determine whether an award constitutes a service concession, regard must be had as to whether the right is subject to a contract concluded in writing for pecuniary interest between one or more economic operators and one or more contracting authorities. Furthermore, the contract must have as its object a concession for services, in return for consideration and to the benefit of the acquiring authority, and be legally binding on both parties, as well as legally enforceable. Such contracts differ from administrative authorisation schemes, which are not within the scope of the Directive. Administrative authorisation schemes grant an authorisation to an economic operator, regulate and establish the conditions for the exercise of the activity whilst the economic operator remains free to withdraw from the provision of the service, and cannot be legally enforced.



Further, the Court clarified that the entry into force of the Directive had not changed the distinction between contracts for services concessions falling within the scope of the Directive and administrative authorisation schemes falling outside the scope of that directive. Neither the fact that any profits of the party awarded the exclusive right are controlled by the State through legislations, nor the organisational structure of the

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entity awarded an exclusive right, is relevant for the assessment of whether the arrangement constitutes a services concession.

Finally, the Court addressed the exception to the scope of the Directive provided for in Article 10(1). It concluded that the application of the exception is not affected by whether the national legislation granting the exclusive right specifically name the holder of the right, or whether the foundation awarded the exclusive right has continuously held it under previous national legislation.

Joined Cases

E-13/22 and E-1/23

Birgir Þór Gylfason and Jórunn S. Gröndal v Landsbankinn hf. and Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson v Íslandsbanki hf.

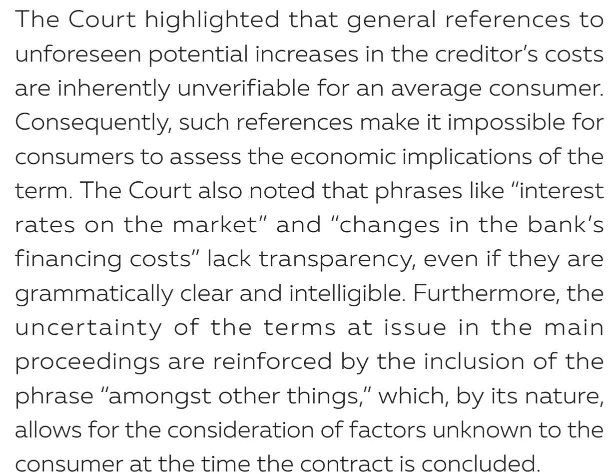
(Consumer protection – Directive 2014/17/EU – Variable interest rates – Mortgage loans – Transparency requirements – Directive 93/13/EEC – Directive 2008/48/EC – Unfair contract terms)

Judgment of the Court of 13 May 2023

The case concerned questions referred to the Court in two joined cases from Reykjavik District Court (Héraðsdómur Reykjavíkur) and Reykjanes District Court (Héraðsdómur Reykjaness) regarding consumer protection in mortgage agreements with variable interest. In particular, the judgment concerned the requirements of good faith, balance and transparency laid down in Articles 3(1) and 5 of Directive 93/13/EEC ("the Unfair Contract Terms Directive" or "UCTD").

Firstly, the Court held that the transparency requirement set out in Article 5 of the UCTD entails, as a starting point, that contractual terms must be formally and grammatically intelligible. In the context of a variable interest rate clause in a mortgage agreement, the transparency requirement must be understood as enabling an average consumer to be in a position to understand the specific functioning of the method used for calculating that rate and thus to evaluate, on the basis of clear, intelligible criteria, the potential economic consequences of such a term.

To meet the requirement of good faith under Article 3 of the UCTD, it is crucial that any term allowing a bank to unilaterally adjust the interest rate ensures that an average consumer can reasonably foresee the conditions and procedures for such adjustments with a sufficient degree of predictability. Additionally, it is equally fundamental to consider whether consumers have the right to terminate the contract if the interest rate is indeed adjusted.



The Court highlighted that general references to unforeseen potential increases in the creditor's costs are inherently unverifiable for an average consumer. Consequently, such references make it impossible for consumers to assess the economic implications of the term. The Court also noted that phrases like "interest rates on the market" and "changes in the bank's financing costs" lack transparency, even if they are grammatically clear and intelligible. Furthermore, the uncertainty of the terms at issue in the main proceedings are reinforced by the inclusion of the phrase "amongst other things," which, by its nature, allows for the consideration of factors unknown to the consumer at the time the contract is concluded.

https://eftacourt.int/cases/joined-cases-e-13-22-and-e-1-23/

Moreover, the Court assessed the implications of Article 24 of Directive 2014/17/EU ("the Mortgage Credit Directive") on the terms of the mortgage agreements in question. It held that the provision would be deprived of its effectiveness if other elements used in addition to indexes or reference rates to calculate the borrowing rate are excluded from the outset from an assessment of transparency. Therefore, the requirements of Article 24 as to clarity, accessibility, objectivity, and verifiability apply whenever an index or a reference rate is used to calculate the borrowing rate.

Whether an interest rate clause in a mortgage agreement meets the requirement of good faith, balance, and transparency is for the national courts to determine, having regard to the particular circumstances of the case and the high level of consumer protection thus warranted. Clauses such as those at issue in the main proceedings must be regarded as unfair in accordance with Article 3(1) UCTD where they cause a significant imbalance in the parties' rights and obligations under a contract to the detriment of the consumer.

Finally, the Court found that it is for the referring courts to determine whether the invalidity of any terms held to be unfair in the mortgage agreements in question would be likely to prevent the contracts from continuing in existence. Should the annulment of such terms prevent the contracts from remaining in existence, the referring courts may replace the unfair terms with supplementary provisions of national law. However, if the contracts can continue to exist without the terms in question, the unfair term may not be substituted with such a supplementary provision.

Case

E-4/23

Neytendastofa (the Icelandic Consumer Agency) v Íslandsbanki hf.

(Directive 2008/48/EC – Consumer credit agreements – Consumer protection – Annual percentage rate of charge – Variable interest rates – Pre-contractual information –Information in the credit agreement – Transparency – Clear and concise information –Comparing different offers – SECCI standard form)

Judgment of the Court of 23 May 2024

Similarly to Joined Cases E-13/22 and E-1/23, the case of Neytendastofa (the Icelandic Consumer Agency) v Íslandsbanki hf. concerned consumer protection, but in the context of credit loan agreements. The Icelandic Court of Appeal (Landsréttur) requested an advisory opinion on the interpretation of Directive 2008/48/EC on credit agreements for consumers ("the Consumer Credit Directive") concerning the adequacy of the information provided by the Icelandic bank, Íslandsbanki, to consumers in its standard form and credit agreement.

Firstly, the Court held that a creditor is obliged to specify, in an exhaustive list in both the Standard European Consumer Credit Information ("SECCI") standard form and in the credit agreement, the conditions on which the decision to adjust the borrowing rate on credit that bears variable interest is based. The pre-contractual information given must be sufficiently clear and concise to achieve full transparency, meaning to place an average consumer in a position in which he or she is able to compare different offers and, more generally, genuinely understand the rights and obligations under the credit agreement. These requirements are not met if, among the conditions for changing the borrowing rate, there is a general reference to an unforeseen increase in the creditor's costs or other conditions that are not known to the creditor. Additionally, the use of general and open-ended references such as "etc." and "amongst other things", absent of additional contextual information, will not be sufficient to meet the requirements under the Consumer Credit Directive.

Further, the Court held that where information on charges deriving from the credit agreement, and the conditions under which those charges can be changed, is not provided in the credit agreement itself, the agreement must state that such charges apply, that they may be changed, and contain a clear and precise cross-reference to other paper, or other durable media containing further information on those aspects. Additionally, the SECCI standard form must contain all information on charges to be paid in the event of late payment, as well as the conditions under which those costs can be changed.

https://eftacourt.int/cases/e-423/

Case

E-6/23

Criminal Proceedings against MH

(Directive 2004/38/EC – Derived rights for third-country nationals – Right of entry – National legislation restricting rights of entry and residence because of an exclusion order prior to becoming a family member of an EEA national – Article 32 of Directive 2004/38/EC – Article 36 of Directive 2004/38/EC)

Judgment of the Court of 2 July 2024

The case concerned questions referred to the Court by the Supreme Court of Norway (*Norges Høyesterett*) in criminal proceedings against MH concerning the interpretation of Directive 2004/38/EC ("the Directive").

MH is an Iranian national who came to Norway as an asylum seeker in 2008. He received the final rejection of his application from the Immigration Appeals Board by decision of 4 April 2011, having until 28 February 2012 for exiting Norway and the Schengen Area. However, MH did not leave Norway before the expiry of that time limit and consequently, the Directorate of Immigration adopted a decision on expulsion and an exclusion order prohibiting MH's entry into Norway for five years. On 23 February 2017, he was sentenced to nine months' imprisonment for storage and transport of hashish and marijuana, and for providing a false statement and using false identity papers during a police check. Later that year, the Directorate of Immigration adopted a decision on the expulsion of MH from Norway including a permanent exclusion order prohibiting entry into Norway. MH was then arrested by the Norwegian police on 6 February 2019 and expelled to Iran on 11 March 2019. In 2020 MH was granted a residence permit with refugee status in Greece. He subsequently travelled to Sweden, where he took up residence with his wife and her daughter, both of whom are Norwegian nationals. MH and his wife married in 2019. MH is employed in Sweden. MH and his wife have a daughter together, who was born in Norway in March 2022.

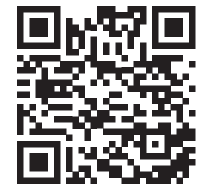
On 24 May 2022, MH was arrested in Moss, Norway, initially for driving while intoxicated. He was subsequently indicted with a violation of the Immigration Act, for staying in the realm despite having been expelled from Norway and subject to a permanent exclusion order. By judgment of 6 July 2022, Søndre Østfold District Court (*Søndre Østfold tingrett*) found MH guilty. MH appealed against that judgment. Subsequently, Borgarting Court of Appeal (*Borgarting lagmannsrett*) arrived at the same result as the District Court. MH appealed against the latter judgment to the Supreme Court, which requested an Advisory Opinion from the

Court. The Supreme Court submitted three questions on 22 June 2023.

By its first question, the referring court asked, in essence, whether the Directive grants a third-country national who is a family member of an EEA national who has exercised her right to move to and taken up residence in an EEA State other than that of her origin, a right of entry and short-term residence in the EEA national's State of origin, even where the third country national has, prior to becoming a beneficiary of the Directive, been the subject of an exclusion from the EEA national's State of origin in accordance with national rules applicable to third country nationals. The Court held that the rules laid down by Chapter VI of the Directive must be interpreted as not permitting an EEA State to refuse entry and residence in its territory to a third-country national spouse of an EEA national on the sole ground that the third-country national spouse has been the subject, in the past, of an exclusion order on the basis of national measures imposed in connection with past infringements at a time before he or she acquired derived free movement rights under the Directive, without first verifying that the presence of that person in the territory of the EEA State constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of Article 27(2) of the Directive.

By its second question, the referring court asked whether Article 32 of the Directive applies, potentially by analogy, in a situation as described in the first question, with the result that the national authorities in the State of entry may require that the third-country national files an application to have the exclusion order lifted prior to entering that State. The Court held that Article 32 of the Directive has no application, directly or by analogy, in a situation where a refusal of the right of entry and residence is not founded on the existence of a genuine, present and sufficiently serious threat to public policy or public security.

By its third question, the referring court essentially sought guidance on whether Article 36 of the Directive or any other EEA law obligations restrict the EEA State's possibility to sanction violations of national decisions on exclusion orders. In particular, the referring court enquired whether there are any limitations on the EEA States' use of sanctions in a case such as the present, in terms of types of sanctions and sentencing. The Court held that Article 36 is not applicable in a situation such as in the present case. Compliance with Article 27 of the Directive is however required, in particular, where the EEA State wishes to penalise the national of a third country for entering and/or residing in its territory in breach of the national rules on immigration before becoming a family member of an EEA national. In the absence of a new assessment in compliance with the Directive, his or her presence on the territory of the EEA State is lawful as a matter of EEA law. Accordingly, such a person cannot be made subject to sanctions under national law for having breached the original expulsion decision by exercising the derived rights conferred on him or her by the Directive.



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Case

E-14/23

ESA v The Kingdom of Norway

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights)

Judgment of the Court of 2 July 2024

The EFTA Surveillance Authority ("ESA") brought an action before the Court, requesting a declaration that Norway failed to fulfil its obligations under Article 7 of the Agreement on the European Economic Area ("EEA") and under Article 8 of Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights ("the Directive"). Norway admitted its failure to implement Article 4(1)(c) of the Directive and agreed to dispense with the oral procedure.

It was undisputed that Norway had failed to fulfil its obligations arising from Article 8 of the Directive by the expiry of the time limit set out in the reasoned opinion. The Court found that Norway had failed to fulfil its obligations under Article 7 EEA and Article 8 of the Directive by failing to fully implement the Directive into its internal legal order.

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Case
E-10/23

X v the Financial Market Authority (Finanzmarktaufsicht)

(Directive 2013/36/EU – Article 53 – Obligation of professional secrecy – Effective judicial protection – Surveillance and Court Agreement Article 34 – Jurisdiction in advisory opinion cases)

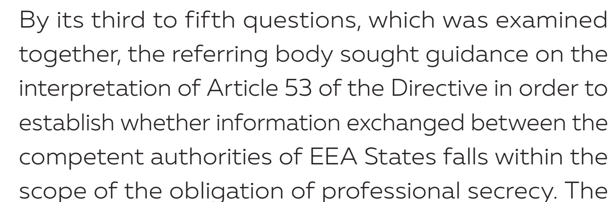
Judgment of the Court of 9 August 2024

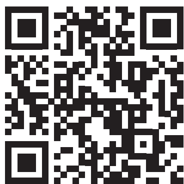
The case concerned questions referred to the Court by the Board of Appeals of the Financial Market Authority (Beschwerdekommission der Finanzmarktaufsicht) in regard to the interpretation of Article 53 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms ("the Directive").

The case in the main proceedings concerned X, a majority shareholder and chair of the board of directors of a bank established in Liechtenstein. In 2022, X proposed to acquire a qualifying holding in a bank established in Luxembourg. X was notified by his lawyers that the Luxembourg Financial Sector Supervisory Commission (Commission de Surveillance du Secteur Financier "CSSF") had expressed an unambiguously negative view of the planned transaction after having exchanged information with the Liechtenstein Financial Market Authority (Finanzmarktaufsicht "FMA"). X alleged that the negative information provided by the FMA to the CSSF led his counterparty to step back from the transaction. The FMA later rejected some of X's requests concerning access to the information exchanged between the said authorities.

By its first two questions, the referring body essentially asked whether the Court had jurisdiction to give an advisory opinion on the interpretation of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). The referring body further asked whether Article 34 SCA must be interpreted as meaning that a request for an advisory opinion is permitted where the same legal question has, in an earlier set of proceedings in the same procedure, already been answered, in accordance with national procedural law, by a higher-ranking court with binding effect. Both questions were answered in the affirmative.

By its third to fifth questions, which was examined together, the referring body sought guidance on the interpretation of Article 53 of the Directive in order to establish whether information exchanged between the competent authorities of EEA States falls within the scope of the obligation of professional secrecy. The





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Court held that the prohibition on the disclosure of confidential information applies to information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of credit institutions and investment firms that the legislature established in adopting the Directive. Moreover, Article 53(1) lists exhaustively the specific cases where, exceptionally, that general prohibition on the disclosure of confidential information does not preclude their communication or use. The protection of the confidentiality of the information covered by the obligation of professional secrecy must, however, be guaranteed and implemented in such a way as to reconcile it with general principles of EEA law, including the principle of effective judicial protection, the rights of the defence and the protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities.

Case

E-11/23

Låssenteret AS v Assa Abloy Opening Solutions Norway AS

(Directive (EU) 2016/943 – Rules on evidence and disclosure of confidential information – Confidentiality rings – Trade secrets – Private enforcement of competition law – Weighing-up of interests – Article 5 of Directive 2014/104/EU)

Judgment of the Court of 9 August 2024

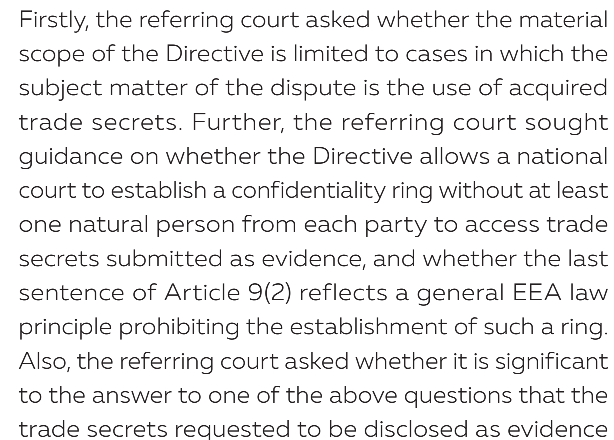
The Eidsivating Court of Appeal (*Eidsivating lagmannsrett*) requested an advisory opinion concerning the interpretation of Article 54 of the Agreement on the European Economic Area ("EEA") and Article 9 of Directive (EU) 2016/943 on the protection of undisclosed knowhow and business information (trade secrets) against their unlawful acquisition, use and disclosure ("the Directive").

Låssenteret AS ("Låssenteret"), a company selling and maintaining locks and security systems, alleged that Assa Abloy Opening Solutions Norway AS ("Assa Abloy"), a major manufacturer of locks and access control systems, had abused its dominant position in the market for mechanical and electromechanical locks and related after-sales services. Låssenteret claimed that Assa Abloy had terminated agreements with it without proper justification, reduced its discounts, and denied it the ability to produce certain components. Additionally, Låssenteret accused Assa Abloy of sharing confidential business information with competitors, all of which allegedly harmed its ability to compete in the market.

Assa Abloy contended that it does not hold a dominant position in any market or, alternatively, disputes that there has been an abuse of a dominant position.

The referring court sought clarification on whether Låssenteret should be granted access to confidential documents concerning Assa Abloy's market position and dealings with competitors, given their potentially harmful impact on Assa Abloy's competitive standing. More specifically, it posed the following questions.

Firstly, the referring court asked whether the material scope of the Directive is limited to cases in which the subject matter of the dispute is the use of acquired trade secrets. Further, the referring court sought guidance on whether the Directive allows a national court to establish a confidentiality ring without at least one natural person from each party to access trade secrets submitted as evidence, and whether the last sentence of Article 9(2) reflects a general EEA law principle prohibiting the establishment of such a ring. Also, the referring court asked whether it is significant to the answer to one of the above questions that the trade secrets requested to be disclosed as evidence



were competitively sensitive in relation to the party requesting access to the information. Finally, the referring court inquired whether, in a case involving abuse of a dominant position under Article 54 EEA, EEA law requires a national court to order the party alleged to have abused its dominant position to disclose evidence constituting trade secrets, without that court having to weigh up the parties' interests.

The Court held that the scope of the Directive concerns only the unlawful acquisition, use or disclosure of trade secrets and does not provide for measures to protect the confidentiality of trade secrets in other types of court proceedings. The Court ruled that the Directive was not intended to provide protection for trade secrets in all legal contexts, but specifically in cases where the secrets are unlawfully obtained or disclosed. Regarding confidentiality rings, the Court clarified that the Directive does not prohibit national courts from establishing such mechanisms. However, national courts must ensure that the method of disclosure is balanced and respects both the protected interests and the effectiveness of legal proceedings. The Court emphasised that national courts are bound by the EEA principles of equivalence and effectiveness when applying procedural rules in competition law cases.

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Further, the Court explained that, under EEA law, it is the responsibility of national courts to weigh the parties' interests before ordering the disclosure of trade secrets. In competition cases, particularly those involving abuse of a dominant position under Article 54 EEA, national courts must ensure that the disclosure of confidential information does not undermine the effectiveness of competition law enforcement.

The Court also held that while the Directive restates principles such as effectiveness and equivalence, it introduces more detailed rules regarding the disclosure of evidence. However, since the Directive, which concerns actions for damages related to competition law infringements, has not been incorporated into the EEA, there is no obligation under EEA law to interpret national law in accordance with its provisions.

Case

E-12/23

Norwegian Air Shuttle ASA v the Norwegian State, represented by the Ministry of Climate and Environment (Staten v/Klima- og miljødepartementet)

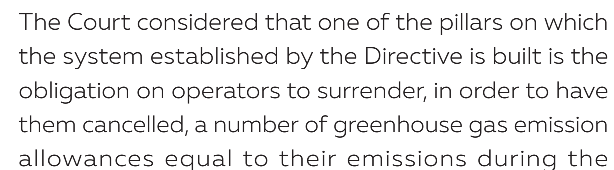
(Directive 2003/87/EC – Article 12(2a) – Obligation to surrender emission allowances – National insolvency law – Emissions trading system (ETS) – Greenhouse gases – Climate change)

Judgment of the Court of 9 August 2024

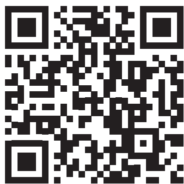
The case concerned questions referred to the Court by the Oslo District Court (Oslo tingrett) concerning the interpretation of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC ("the Directive").

In the main proceedings Norwegian Air Shuttle ASA ("NAS") challenged a decision imposing an administrative penalty of NOK 399 685 275 on NAS for failure to surrender greenhouse gas emissions allowances. Prior to the decision at issue being taken, NAS had offered to settle the obligation incumbent on it to surrender allowances for emissions by way of a dividend as part of a compulsory debt settlement in connection with its restructuring. The Norwegian Environment Agency declined to receive such a dividend settlement, on the grounds that the obligation to surrender allowances could be settled only by surrendering allowances that fully covered the total emissions for the year 2020.

By its question, the referring court asked whether Article 12(2a) of the Directive precludes national legislation that provides that the obligation to surrender emissions allowances may be settled by dividend in a compulsory debt settlement in connection with restructuring of an insolvent company. The Court found that the purpose of the Directive is to establish an emission allowance trading system which seeks to reduce greenhouse gas emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system and the ultimate objective of which is protection of the environment. The overall scheme of the Directive is based on the strict accounting of the issue, holding, transfer and cancellation of greenhouse gas emission allowances. As such, accurate accounting is inherent in the very purpose of the Directive.



The Court considered that one of the pillars on which the system established by the Directive is built is the obligation on operators to surrender, in order to have them cancelled, a number of greenhouse gas emission allowances equal to their emissions during the



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preceding calendar year and that that obligation must be applied particularly strictly. Failure to surrender allowances would undermine the requirements as to strict accounting, accuracy and correlation between actual emissions and those authorised under the Directive. Accordingly, the Court held that Article 12(2a) of the Directive must be interpreted as precluding national legislation from providing that the obligation to surrender emissions allowances may be settled by dividend in a compulsory debt settlement in connection with the restructuring of an insolvent company.

Case

E-2/24

Bygg & Industri Norge AS and Others v the Norwegian State, represented by the Ministry of Labour and Social Inclusion (Staten v/Arbeids- og inkluderingsdepartementet)

(Fundamental freedoms – Article 28 EEA –Article 31 EEA – Article 36 EEA– Directive 2008/104/EC – Temporary work agencies – Internal situation – Restriction – Justification)

Judgment of the Court of 20 November 2024

The case concerned questions referred to the Court by Oslo District Court (Oslo tingrett) concerning national rules restricting the activities of temporary work agencies in Norway.

The plaintiffs in the main proceedings are Norwegian temporary work agencies, who claim that recent amendments to Norwegian legislation on temporary agency work are contrary to EEA law.

In December 2022, the Norwegian Parliament (*Stortinget*) adopted rules limiting the possibility to hire in workers from temporary work agencies. The amendments abolished the general possibility to hire in workers when the work is of a temporary nature and prohibited temporary agency workers for construction work in Oslo, Viken and former Vestfold. However, it is still possible to hire in temporary agency workers in a selected number of situations.

In its judgment, the Court held that in order to determine whether the national rules fall within the scope of one or more of the fundamental freedoms enshrined in the EEA Agreement, the purpose of the rules as well as the facts of the individual case must be taken into consideration.

The Court found that, in relation to one of the plaintiffs in the main proceedings which is a subsidiary of a Danish parent undertaking, the national rules limited the activities of temporary work agencies and therefore restricted the freedom of establishment under EEA law. The freedom of establishment guarantees the right to participate, on a stable and continuous basis, in the economic life of an EEA State.

Such a restriction may, however, be justified by overriding reasons of general interest. The Court found that the objectives pursued by the national rules at issue were, in principle, legitimate. Thus, it has to be examined whether the measures at issue comply with the principle of proportionality under EEA law, which requires that they are suitable for ensuring, in a consistent and systematic manner, the attainment of the objectives pursued, and do not go beyond what is necessary for them to be attained.

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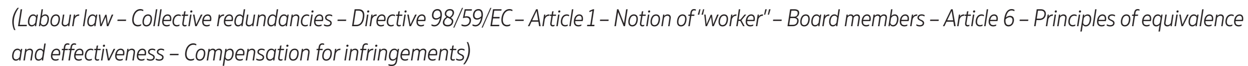
Judge
President

Case

E-3/24

Margrét Rósa Kristjánsdóttir v Icelandic Health Insurance (Sjúkratryggingar Íslands)



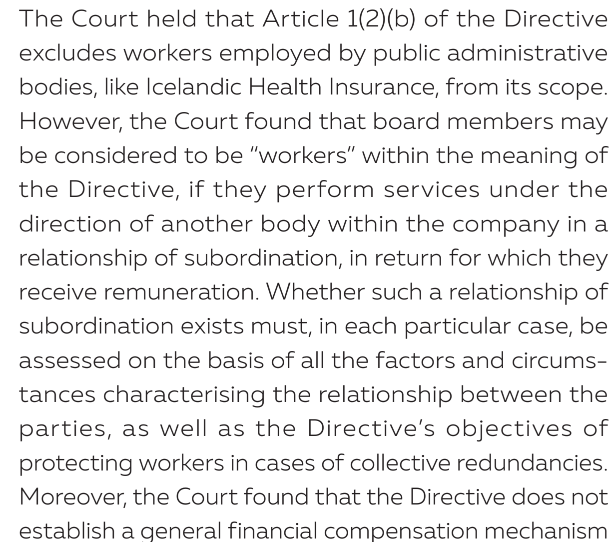
(Labour law – Collective redundancies – Directive 98/59/EC – Article 1 – Notion of "worker" – Board members – Article 6 – Principles of equivalence and effectiveness – Compensation for infringements)

Judgment of the Court of 20 November 2024

Reykjavík District Court (*Héraðsdómur Reykjavíkur*) requested an advisory opinion concerning Articles 1 and 6 of Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies ("the Directive") as regards the interpretation of the notion of "worker" and procedural requirements relating to damages for infringements of the Directive.

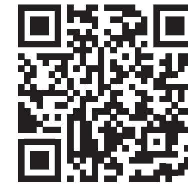
Ms Kristjánsdóttir, the former department head at Icelandic Health Insurance, had been dismissed as part of organisational changes. Ms Kristjánsdóttir claimed that Icelandic Health Insurance did not comply with the procedural rules laid down in the national legislation implementing the Directive during her dismissal. Icelandic Health Insurance argued that the Directive does not apply to state employees and that the board members' inclusion was justified since they were salaried employees.

The referring court inquired whether board members of public-interest entities are considered "workers" under the Directive for the purpose of assessing whether the threshold for a collective redundancy has been reached. In addition, it requested guidance as to whether the Directive entails other or further requirements than those that EEA States prescribe, in general, for any liability for damages resulting from infringements of the Directive.



The Court held that Article 1(2)(b) of the Directive excludes workers employed by public administrative bodies, like Icelandic Health Insurance, from its scope. However, the Court found that board members may be considered to be "workers" within the meaning of the Directive, if they perform services under the direction of another body within the company in a relationship of subordination, in return for which they receive remuneration. Whether such a relationship of subordination exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties, as well as the Directive's objectives of protecting workers in cases of collective redundancies. Moreover, the Court found that the Directive does not establish a general financial compensation mechanism

in the event of dismissal and that it is for the concerned EEA State to lay down the detailed arrangements for the procedures to enforce the obligations under that Directive. Those procedures must, however, respect the principles of equivalence and effectiveness and provide effective, proportionate and dissuasive sanctions for infringements.



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Case

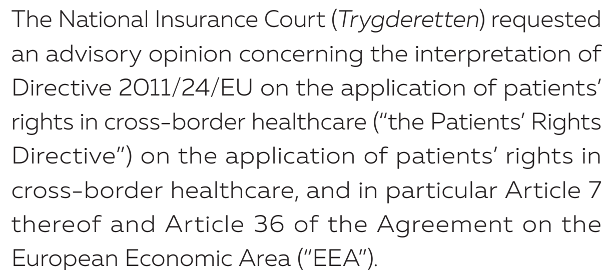
E-15/23

K v Nasjonalt klageorgan for helsetjenesten (National Office for Health Service Appeals)

(Social security law – Free movement of patients – Article 36 EEA – Directive 2011/24/EU – Article 7 – Patients' rights – Reimbursement of costs of cross-border healthcare – Article 129 EEA)

Judgment of the Court of 20 November 2024

The National Insurance Court (*Trygderetten*) requested an advisory opinion concerning the interpretation of Directive 2011/24/EU on the application of patients' rights in cross-border healthcare ("the Patients' Rights Directive") on the application of patients' rights in cross-border healthcare, and in particular Article 7 thereof and Article 36 of the Agreement on the European Economic Area ("EEA").

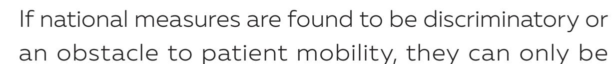


Norwegian authorities had rejected K's application for reimbursement of dental treatment in Poland, citing the treating dentist's lack of specialisation. In response to the rejection, K challenged that decision, lastly before the National Insurance Court.

The referring court raised the issue of whether a national rule that requires healthcare practitioners to have a specific specialisation for the reimbursement of cross-border healthcare is compatible with EEA law, especially Article 36 EEA and Article 7 of the Patients' Rights Directive. In addition, the referring court queried the significance of the professional specialisations listed in Annex V of Directive 2005/36/EC on the recognition of professional qualifications ("the Professional Qualifications Directive") in determining whether the specialisation requirement is fulfilled.

The Court found that national conditions for reimbursement of cross-border healthcare within the European Economic Area must not discriminate or constitute obstacles to the free movement of patients unless objectively justified under the Patients' Rights Directive. If the conditions set out in the Professional Qualifications Directive are not met, the right to recognition may still be derived from Articles 28 and 31 EEA. Even if a specialisation requirement accepts equivalent foreign qualifications, it may nevertheless amount to an obstacle if it in practice represents an unjustified additional burden on patients seeking treatment abroad. This may be particularly true if patients must provide extensive documentation of the practitioner's qualifications and the burden of proof for the acceptance of these qualifications falls on the patient.

If national measures are found to be discriminatory or an obstacle to patient mobility, they can only be



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justified by planning requirements or objectives related to ensuring sufficient and permanent access to a balanced range of high-quality healthcare in the EEA State concerned, or to controlling costs and avoiding waste of financial, technical, and human resources, as permitted by Article 7(7) of the Patients' Rights Directive. Restrictions should also be interpreted in light of the broader context of the Patients' Rights Directive and the principle of proportionality must be followed. The Court further held that the specialisations listed in Annex V of the Professional Qualifications Directive may be sufficient proof of competence. However, since the list is not conclusive, it cannot be considered necessary to prove substantive competence. The authorities of the host state are required to assess the qualifications and experience of an applicant from another EEA State against the qualifications required for access to the relevant profession under national law. This assessment must take into account all diplomas, certificates, and relevant experience of the applicant. The authorities must ensure, on an objective basis, that the foreign diploma attests to knowledge and qualifications that are at least equivalent to those required by the national diploma, considering the nature and duration of the studies and practical training.

Case

E-16/23

ESA v The Kingdom of Norway

(Failure to fulfil obligations – Directive 2004/38/EC – Article 7(1)(b) – Child with the nationality of one EEA State residing in another EEA State – Condition of sufficient resources – Right of residence of third-country nationals who are primary carers of EEA national minors – Effectiveness of residence rights)

Judgment of the Court of 12 December 2024

The case concerned questions whether third country primary carers of EEA national children may have a right to residence according to the Free Movement Directive ("Directive").

The case, brought by the EFTA Surveillance Authority ("ESA") against Norway, concerned whether Norway's interpretation and application of its Immigration Act aligned with its obligations under the Directive.

Norway has refused to grant residence rights to third-country national primary carers of EEA national children. ESA argued that Norway's administrative practice prevented children who depend on their primary carers from fully exercising their right to reside in Norway, as guaranteed by Article 7(1)(b) of the Directive.

The Court found that EEA national children with sufficient resources, regardless of the source of those resources, have a right to residence under the Directive. It emphasised that this right encompasses that the children's primary carers can reside with them, even if the primary carers are third-country nationals. The Court reasoned that denying such residency to the third-country national primary carers would render the children's right of residence ineffective, thereby undermining the fundamental principles of the Directive.

https://eftacourt.int/cases/e-1623/

Case

E-8/24

Nordsjø Fjordbruk AS v the Norwegian State, represented by the Ministry of Trade, Industry and Fisheries (Staten v/Nærings- og fiskeridepartementet)

(Animal health law – Regulation (EU) 2016/429 – Article 10 – Article 181 – Article 269 – Right of national competent authorities to prohibit movement of farmed fish between aquaculture establishments)

Judgment of the Court of 2 July 2024

The case concerned questions referred to the Court by the Supreme Court of Norway (*Norges Høyesterett*) regarding the application of EU's Animal Health Law No 2016/429 ("the Regulation"). The case examined the extent of the powers national authorities have to manage disease risks in aquaculture and the balance between precautionary measures and the operational freedom of companies.

The case arose when Nordsjø Fjordbruk AS, a Norwegian aquaculture company, challenged a decision by the Norwegian Food Safety Authority to refuse approval of its operating plan for the Nappeholmane aquaculture site. Despite no evidence of disease at the site, the authority deemed the proposed movements of fish from another aquaculture site to exceed an acceptable level of risk, citing concerns about latent diseases and the potential for disease transmission during transport.

The Court found that under the Regulation, national authorities are allowed to impose restrictions or refuse approvals when disease risks are assessed as unacceptable. Furthermore, the Court found that such measures must be grounded in a scientific risk assessment that is independent, objective, and transparent. While purely hypothetical risks are insufficient to justify such restrictions, the precautionary principle allows for preventive actions based on substantiated concerns.

The Court further observed that EEA States may impose stricter animal health biosecurity measures as long as they are consistent with the Regulation. Contrary to the submissions of Nordsjø Fjordbruk AS, a measure that essentially prohibits the movement of farmed fish between aquaculture establishments may be consistent with the Regulation, provided that the central veterinary authority, following a specific and scientific risk assessment in accordance with the precautionary principle, determines that considerations of fish health at the individual site or in an area warrant such a measure.

https://eftacourt.int/cases/e-0824/

Case

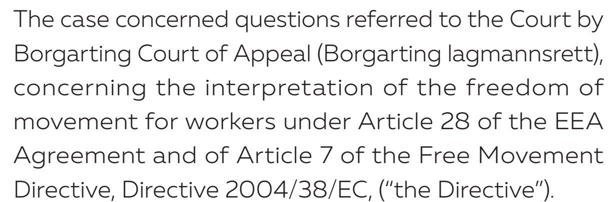
E-15/24

A v B

(Article 28 EEA – Article 7 of Directive 2004/38/EC – Relocation to another EEA State with child – Necessity of restriction requiring consent or a court permission – Joint parental responsibility – Sole custody – Best interests of the child)

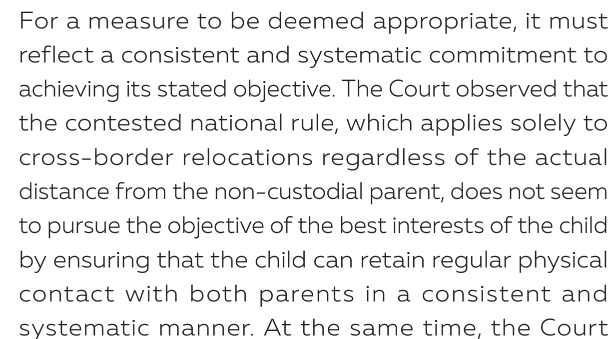
Judgment of the Court of 12 December 2024

The case concerned questions referred to the Court by Borgarting Court of Appeal (Borgarting lagmannsrett), concerning the interpretation of the freedom of movement for workers under Article 28 of the EEA Agreement and of Article 7 of the Free Movement Directive, Directive 2004/38/EC, ("the Directive").

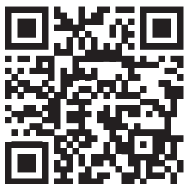


The request for an advisory opinion was made in relation to proceedings between A and B, respectively the mother and father of a minor child, relating to a request made by A to obtain a court permission to relocate with the child to Denmark. The essential question in the main proceedings was whether a requirement for a parent with sole custody, but joint parental responsibility, to obtain a court permission or consent from the other parent when moving abroad is compatible with EEA law when there is no such a requirement when relocating within the EEA State in question.

Firstly, the Court held that the principle of the best interests of the child, as enshrined in inter alia the European Convention on Human Rights and the UN Convention on the Rights of the Child, constitutes a general principle of EEA Law. Seeking to ensure the protection of the best interests of the child may therefore justify a restriction on a parent's freedom to relocate within the EEA under Article 28 of the EEA Agreement and Article 7 of the Directive. EEA Law requires that any national measure, such as the obligation to obtain consent or a prior court approval before relocating, must be appropriate for achieving the objective of protecting the child's best interests and must not exceed what is necessary to obtain that objective.



For a measure to be deemed appropriate, it must reflect a consistent and systematic commitment to achieving its stated objective. The Court observed that the contested national rule, which applies solely to cross-border relocations regardless of the actual distance from the non-custodial parent, does not seem to pursue the objective of the best interests of the child by ensuring that the child can retain regular physical contact with both parents in a consistent and systematic manner. At the same time, the Court



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acknowledged that relocating abroad typically involves greater implications for the child compared to domestic moves, such as changes in school systems, language, and culture. Additionally, the Court noted that under Norwegian law, decisions about relocation abroad fall under parental responsibility, whereas domestic relocation can be decided by the parent with sole custody. The Court recognised that potential restrictive effects resulting from this substantive distinction under national family law, in principle, could be justified by the best interests of the child.

When assessing whether the national rule goes beyond what is necessary to obtain the objective pursued, the Court observed that a change of jurisdiction cannot per se justify the restriction, because decisions regarding a child will still be upheld and enforced when a child relocates from Norway to Denmark. However, the Court found that the requirement may be appropriate and necessary to ensure that significant decisions affecting the child's life are made by those with parental responsibility and that the relocation is in the best interests of the child.

Lastly, the Court emphasised that, to ensure the case-by-case assessment conducted by the referring court does not exceed what is necessary to safeguard the best interests of the child, the court must balance the custodial parent's freedom to relocate within the EEA with the child's best interests. In this assessment, the referring court cannot presume that it is always in the child's best interests to remain in Norway.

Case

E-13/23

ESA v The Kingdom of Norway

(Failure by an EFTA State to fulfil its obligations – Directive 2009/138/EC – Directive 2013/36/EU – Directive 2003/41/EC – Directive (EU) 2015/2366 – Directive 2009/110/EC – Article 31 EEA – Admissibility – Formal requirements of the application initiating proceedings – Coherent statement of the pleas in law)

Judgment of the Court of 20 December 2024

The case concerned an application brought by the EFTA Surveillance Authority ("ESA") against Norway.

The dispute revolved around Section 4-1 of the Norwegian Financial Institutions Act, which requires Norwegian financial institutions to notify the Norwegian Financial Supervisory Authority (*Finanstilsynet*) before establishing or acquiring subsidiaries in other EEA States and empowers that authority to intervene if the acquisition or establishment will expose the Norwegian institution or the group to a particular risk or impede supervision of the group. ESA argued that these measures amounted to a breach of several directives in the field of financial services, as well as the right of establishment under Article 31 of the EEA Agreement.

The Court dismissed the action brought by ESA as partly inadmissible and partly unfounded. Concerning the directives, the Court dismissed the claims on procedural grounds. Regarding Article 31 EEA, the Court found that any part of this plea related to financial institutions coming within the scope of the directives was also inadmissible. In examining this plea regarding financial institutions outside the scope of the directives, the Court dismissed the plea as unfounded

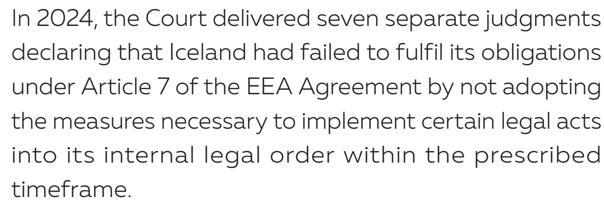
https://eftacourt.int/cases/e-13-23/

EFTA COURT

Cases

E-4/24 ESA v Iceland, E-5/24 ESA v Iceland, E-6/24 ESA v Iceland, E-9/24 ESA v Iceland, E-10/24 ESA v Iceland, E-11/24 ESA v Iceland and E-12/24 ESA v Iceland

Seven cases against Iceland for lack of or delayed implementation of EEA related Directives and Regulations



In 2024, the Court delivered seven separate judgments declaring that Iceland had failed to fulfil its obligations under Article 7 of the EEA Agreement by not adopting the measures necessary to implement certain legal acts into its internal legal order within the prescribed timeframe.

Each case was initiated by the EFTA Surveillance Authority ("ESA"), seeking a declaration from the Court under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). Iceland did not dispute the declaration sought by ESA in any of the cases, and therefore, leading the Court to dispense with the oral procedure.

The cases concerned the following directives:

- Case E-4/24 concerned Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.
- Case E-5/24 concerned Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights.

- Case E-6/24 concerned Commission Implementing Regulation (EU) 2021/1042 of 18 June 2021 laying down rules for the application of Directive (EU) 2017/1132 of the European Parliament and of the Council as regards technical specifications and procedures for the system of interconnection of registers and repealing Commission Implementing Regulation (EU) 2020/2244.
- Case E-9/24 concerned Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions.
- Case E-10/24 concerned Commission Delegated Regulation (EU) 2021/923 of 25 March 2021 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit's risk profile, and

setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution's risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that Directive.

- Case E-11/24 concerned Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports.
- Case E-12/24 concerned Regulation (EU) 2020/697 of the European Parliament and of the Council of 25 May 2020 amending Regulation (EU) 2017/352, so as to allow the managing body of a port or the competent authority to provide flexibility in respect of the levying of port infrastructure charges in the context of the COVID-19 outbreak.

News and Events

30th Anniversary Conference

The year 2024 marked the 30th anniversary of the EEA Agreement and the EFTA Court. The anniversary is an occasion to look back and reflect upon the importance and achievements of the EEA Agreement but also, and just as importantly, look ahead to the future of the prospects of the development of the Agreement.

To celebrate that milestone the Court stayed true to the tradition of publishing an Anniversary Festschrift as well as dedicating its annual conference to the anniversary.

The anniversary publication, titled *The EFTA Court – Developing the EEA over Three Decades* included articles on several subjects, under different headings such as Judicial Architecture of the EEA Agreement, the cooperation between the EFTA Court and the Supreme Courts of the EEA EFTA States, the Interpretation and Application of Internal Market Law, the EEA Agreement and Fundamental Rights and the Development and Future of European integration. Many different topics were addressed by numerous prominent authors under those headings.

The book was published during the summer of 2024 and launched at the EFTA Court Anniversary Conference on 26 September 2024.

The conference was attended by more than 250 participants, including a former President and Judges of the EFTA Court, Presidents and Members of EFTA States' supreme courts, the Vice President and judges of the European Court of Human Rights, the President, judges and advocates generals of the European Court of Justice, the President and judges of the General

Court, ambassadors, civil servants, practitioners, academics and other well-wishers of the EFTA Court. The conference was also streamed via the Court's website reaching a broad audience.

President Páll Hreinsson, gave an opening speech at the conference and introduced the keynote speaker, the President of the European Court of Justice, Koen Lenaerts. In his speech, titled "Fostering homogeneity within the EEA through constructive dialogue: 30 years of coexistence of the CJEU and the EFTA Court", President Lenaerts emphasised the importance of judicial dialogue and cooperation and mutual trust between judges and courts in the creation and maintenance of judicial and legal homogeneity. This was elaborated on by his legal secretary Professor Stanislas Adam, emphasising the constructive and fruitful cooperation between the European Court of Justice and the EFTA Court.

The first session of the conference was moderated by Judge Michael Reiertsen and started with the contribution of the Vice President of the European Court of Human Rights, Arnfinn Bårdsen, who introduced the "Strasbourg Perspective" on the Protection of Fundamental Rights under the EEA Agreement and the development of the relationship between the Strasbourg Court and the EFTA Court.

Following this, Thérèse Blanchet, Secretary General of the Council of the European Union took to the podium. In her speech she contemplated the potential extension of the surveillance and judicial pillar of the EEA to other agreements such as the Schengen, Dublin and Swiss bilateral agreements.

The later session was moderated by Judge Bernd Hammermann and started with Hilde K. Ellingsen lawyer and associate professor at Oslo University giving a talk on "Effective Judicial Protection under the EEA Agreement". She addressed, inter alia, the question of whether there was full parallelism or relevant differences between the EEA and EU legal orders.

All the speeches were received with great interest and enthusiasm by the audience and were followed by questions and comments, including from former President of the EFTA Court, Carl Baudenbacher. The speeches were based on articles published in the EFTA Court Anniversary publication, *The EFTA Court – Developing the EEA over Three Decades*.

Professor Halvard Haukeland Fredriksen and Professor Gunnar Þór Pétursson, who also contributed chapters to the EFTA Court Anniversary publication, were given the task of presenting their list of the 10 most important cases in the EFTA Court's case law. Their lively presentation touched upon many of the Court's best known cases, including *Sveinbjörnsdóttir*, establishing state liability, which they called the jewel in the crown of EFTA Court case law.

After their presentation, Judge Hammermann invited former EFTA Court judges in the audience to air their views on the list of the 10 most influential judgments and add their own choices. The presentation was followed by lively discussions and comments from the audience, completed by President Hreinsson's intervention.

The anniversary publication of the Court, *The EFTA Court – Developing the EEA over Three Decades*, was launched by the Registrar of the Court, Ólafur Jóhannes Einarsson. He introduced the contents of the book, and the Court's tradition of publishing a book to commemorate milestones in its existence. Jonathan Tomkin, a member of the European Commission Legal Service, then elaborated on the subjects addressed by numerous authors contributing to the book and the common threads running through the book.

The closing remarks at the 30th anniversary conference came from State Secretary, Maria Varteressian, Ministry of Foreign Affairs in Norway. In her address, she stressed the continued importance of the EEA Agreement and the institutional framework making the Agreement unique. She then ended her address by mentioning the importance of the EFTA Court being capable of meeting future challenges, and by extending her thanks and congratulations to the Court for a successful anniversary conference and publication.

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Other News and Activities

As every year, President Hreinsson, Judge Hammermann and Judge Reiertsen attended several conferences and seminars and gave speeches in the EFTA States during the course of the year. The Registrar of the Court, Ólafur Jóhannes Einarsson, also gave lectures on the functioning of the Court on several occasions.

Visits to the Court

Throughout the year, the Court welcomed numerous groups and individuals interested in learning about the functioning and the activities of the Court. They were welcomed by the President, Judges and Registrar of the Court.

At the beginning of the year, President Hreinsson, Judges Hammermann and Reiertsen and the Registrar, Ólafur Jóhannes Einarsson, welcomed ambassadors from Iceland, Liechtenstein and Norway; Pascal Schafhauser, Kristján Andri Stefánsson and Anders Eide, with delegations, at the Court.

In November, the Prime Minister of the Principality of Liechtenstein, H.E. Dr Daniel Risch, paid an official visit to the EFTA Court accompanied by Simon Biedermann, Secretary-General of the Ministry of General Government Affairs and Finance. It was Dr Risch's second visit to the Court but his first as Prime Minister. The Prime Minister was welcomed to the Court by President Páll Hreinsson, Judge Bernd Hammermann and Judge Michael Reiertsen. The Court held discussions with the Prime Minister and his delegation on the role and operation of the Court. Further discussions were held between Judge Bernd Hammermann, the Prime Minister and his delegation.

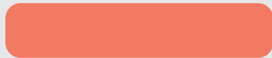
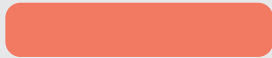
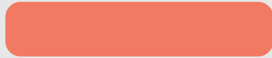
During the summer, the Court had the pleasure of welcoming EFTA Secretary-General, Siri Veseth Meling, at the Court. The Court´s Judges and Registrar hosted a meeting allowing for an interesting discussion on wide ranging topics related to the EEA alongside a tour of the Court.

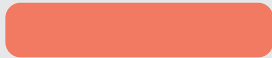
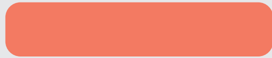
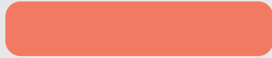
In addition, Judge Reiertsen´s cabinet welcomed delegations from the Norwegian Ministry of Trade, Industry and Fisheries and the Norwegian Data Protection Authority.

Several groups of judges from the Icelandic district Courts, Norwegian district and appeals Courts, and the German Supreme Court, visited the Court during the summer and autumn months. During those visits, the President and the Registrar gave presentations on various topics in EEA law.

Other notable visits to the Court in the course of the year, included a visit from Professor Mads Andersen of the University of Oslo, a delegation from the Council of Bars and Law Societies of Europe (CCBE) and several other groups of lawyers and scholars, as well as student groups from universities in the EFTA States and trainees from the EFTA organisations.

EFTA COURT

Judges and Staff

Judges and Staff

The members of the Court in 2024 were as follows:

Mr Páll Hreinsson, President (nominated by Iceland)
Mr Bernd Hammermann (nominated by Liechtenstein)
Mr Michael Reiertsen (nominated by Norway)

The judges are appointed by common accord of the Governments of the EFTA States.

Mr Ólafur Jóhannes Einarsson is the Registrar of the Court.

Ad hoc Judges of the Court are:

Nominated by Iceland:
Ms Ása Ólafsdóttir, hæstaréttardómari (Supreme Court Judge)
Mr Gunnar Þór Pétursson, Reykjavik University (Professor)

Nominated by Liechtenstein:
Ms Nicole Kaiser, Rechtsanwältin (Lawyer)
Mr Martin Ospelt, Rechtsanwalt (Lawyer)

Nominated by Norway:
Mr Ola Mestad, University of Oslo (Professor)
Ms Siri Teigum, Advokat (Lawyer)

In addition to the Judges, the following persons were employed by the Court in 2024:

Ms Agnes Lindberg, Legal Secretary
Ms Annette Lemmer, Receptionist/Administrative Assistant
Ms Bryndís Pálmarsdóttir, Administrator
Ms Candy Bischoff, Administrative Assistant
Ms Erica Worsley, Administrative Assistant
Mr Gjermund Fredriksen, Financial Officer
Mr Hans Ekkehard Roidis-Schnorrenberg, Legal Secretary
Mr Håvard Ormberg, Legal Secretary
Ms Hrafnhildur Mary Eyjólfsdóttir, Personal Assistant
Ms Katie Nsanze, Administrative Assistant
Ms Kerstin Schwiesow, Personal Assistant
Mr Kristján Jónsson, Legal Secretary
Mr Michael-James Clifton, Legal Secretary
Mr Ólafur Ísberg Hannesson, Legal Secretary
Mr Ólafur Jóhannes Einarsson, Registrar
Mr Per Tandberg, Legal Secretary
Ms Silje Næsheim, Personal Assistant
Mr Thierry Caruso, Caretaker/Driver

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Google Maps Link

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