

The EFTA Court in Action

Five lectures

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Lecture 2

Access to the EFTA Court

A. Overview

Article 108(2) EEA provides:

“The EFTA States shall establish a court of justice (EFTA Court). The EFTA Court shall, in accordance with a separate agreement between the EFTA States, with regard to the application of this Agreement be competent, in particular, for: (a) actions concerning the surveillance procedure regarding the EFTA States; (b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority; (c) the settlement of disputes between two or more EFTA States.”

These types of action have been further elaborated on in the SCA. Moreover, the SCA contains provisions on a preliminary reference procedure and a procedure for failure to act. For the sake of order, I must mention that so far there has not been a case under Article 108(2)(c) EEA.

The three most important types of procedure of the EFTA Court are the infringement procedure (ESA vs. an EEA/EFTA State), the preliminary reference procedure, and the nullity procedure. They are essentially taken from EC law, but there are certain differences.

B. The infringement procedure (ESA vs. an EEA/EFTA State)

1. General

The provisions regarding the infringement procedure are laid down in the EEA Agreement itself, Article 108(2)(a) and, in more concrete terms, in Article 31 of the Surveillance and Court Agreement. This provision states:

“If the EFTA Surveillance Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement or of this Agreement, it shall, un-

less otherwise provided for in this Agreement, deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the EFTA Surveillance Authority, the latter may bring the matter before the EFTA Court.”

The provision is essentially identical in substance to Article 258 TFEU (ex Article 226 EC). There is, however, no article in EEA law mirroring Article 260 TFEU (ex Article 228[2] EC). A non-complying EEA/EFTA State cannot be imposed a penalty payment.

2. ESA's policy

Five questions are of particular importance when dealing with ESA's record in the application of Article 31 SCA.

- (1) What is ESA's general policy in bringing cases? Is ESA active or passive? Is ESA giving governments a lot of leeway?
- (2) What is ESA's policy if it has opened a case and a court of an EEA/EFTA State makes a reference on the same legal question? Will ESA then pursue the case or drop it?
- (3) What is ESA's policy if it has opened a case and learns that the legal question which is at stake will be dealt with by the ECJ in a case involving EU law which is identical in substance to EEA law?
- (4) What is ESA's policy if it has opened a case and a court of last resort of an EEA/EFTA State subsequently finds that there is no infringement? Will ESA then pursue the case or drop it?
- (5) What is ESA's policy in cases in which a national court of last resort has refused to make a reference although the EEA law situation is not clear? Would ESA then say “something is rotten in the State of Denmark”?

The following **propositions** may be considered:

- (1) The answer to question 1 is rather clear. ESA is openly **less active** than the European Commission in bringing cases. In total, ESA brought 33 cases to the Court since 1994. If we subtract the 19 cases of non-contested failure of timely implementation of secondary law, the number drops to 14. That is less than one case a year. To put these numbers into perspective: Until the end of 2008, the Commission brought in total 206 infringement actions against the three countries having left EFTA for the EC shortly after the establishment of the EEA, i.e. Austria (114), Finland (47) and Sweden

(45)¹³. The ratio between “substantial” and non-contested infringement cases seems to be comparable in the EU. ESA admits that it is not eager to bring cases. It is following a **moral suasion approach** trying to convince the governments that they ought to comply with their obligations under the EEA Agreement. In ESA’s own words: “To the extent possible, the Authority endeavours to solve all matters by informal means, through contacts with the national administrations concerned. Formal infringement proceedings are opened only where an informal exchange of views fails to solve the problem at hand.”¹⁴

European Voice, the weekly magazine which is much read in Brussels had an article on this in October 2008 under the heading “Are national interests weakening the EFTA Court?” It suggested that there may be another explanation, namely that ESA College Members, unlike the EC Commissioners, are former civil servants from the Member States who often **go back** to the Member States or to a new post in the Member States’ diplomatic service after having finished their term in Brussels¹⁵. In fact, even some of the College Presidents have returned to government service in the country they came from after their time at ESA. To give an example, *Bjørn T. Grydeland*, a political scientist by training, was Permanent Under-Secretary of State before being appointed Norwegian ambassador to the European Union in 2001. In this capacity, he also served as a member of the ESA/Court Committee. From the beginning of 2006 to August of 2007, he was the President of ESA before being appointed Secretary General in the Foreign Ministry of his country. The Secretary General is the highest ranking civil servant in the Foreign Ministry. His appointment to the post in Oslo was publicly announced more than half a year before his term as President of ESA expired. I will not further comment, but you are free to draw your own conclusions.

(2) If ESA has opened a case and a national court in the EEA/EFTA State concerned makes a reference to the Court, ESA will normally stay the proceedings and submit observations in these reference proceedings. An example of this is the Liechtenstein **Single Practice Rule** case. On 10 April 2000, ESA delivered a reasoned opinion in accordance with Article 31 SCA to the Government of the Principality of Liechtenstein concluding that “by preventing nationals having a practice in another EEA State from establishing themselves as doctors or dentists in Liechtenstein, Liechtenstein has failed to fulfil its obligations under Article 31 of the EEA Agreement on freedom of establishment”. Liechtenstein was given two months to comply with the reasoned opinion¹⁶. On 13 June 2000, the Liechtenstein Administrative Court referred three cases to the

13 Cf. Annual Report of the ECJ 2008, 113, available online at http://curia.europa.eu/jcms/jcms/Jo2_7000/ (last visited on 28 July 2009).

14 EEA/EFTA States Internal Market Scoreboard February 2009, 12 (The EEA/EFTA Internal Market Scoreboards are available online at <http://www.eftasurv.int/information/internalmarket/>, last visited on 19 November 2009).

15 *European Voice* of 16 October 2008, 20. Available online at <http://www.europeanvoice.com/article/imported/are-national-interests-weakening-the-efta-court-62709.aspx> (last visited on 27 November 2009).

16 Dec. No. 73/00/COL.

EFTA Court in which it asked whether the Single Practice Rule was compatible with Article 31 EEA¹⁷. ESA then submitted observations in all three cases, but did not bring an action against Liechtenstein.

(3) The policy in question is, however, not limited to preliminary reference proceedings before the EFTA Court. If ESA has opened infringement proceedings and becomes aware that the legal question at stake will be dealt with by the ECJ in a case involving EU law which is identical in substance to EEA law, it may, as experience shows, stay its own proceedings and submit observations under Articles 20(3) or 40(3) of the ECJ's Statute. In other words ESA and the Contracting Party concerned may decide to resolve their dispute by means of taking a "free-ride" on the ECJ's preliminary ruling procedure. This may be seen as a particularly bold case of ESA's general low-profile strategy of avoiding open confrontation with the EEA / EFTA States' governments. To give some examples: The Governments of Norway and Iceland as well as ESA pleaded in Case C-341/05 *Laval*, a matter which involved the question of whether EU law could restrict labour unions from taking industrial action¹⁸. Of course, in this particular case the reason may also just have been that the proceedings involved issues of general interest: *Laval* was probably the most important case decided in 2007, and 15 governments of EU-Member States pleaded as well. But things were definitely different in C-170/04 *Rosengren and Others*¹⁹, a case on the legality of the Swedish prohibition of import of alcoholic beverages by private individuals, where both ESA and the Norwegian government pleaded. Indeed, a similar rule existed in Norway, and ESA had issues with it²⁰. With respect to C-42/02 *Lindman*²¹, a case on the taxation of winnings from games of chance which had been referred by a Finnish court, one wonders finally what other reason than "silent conflict settlement" might have induced both ESA and the Government of Norway to plead before the ECJ. Norway had comparable legislation in force before the *Lindman* ruling which had been the object of discussions with ESA²². Similar considerations are likely to have been decisive in C-223/01 *AstraZeneca v Lægemedelstyrelsen*²³, a case relating to marketing authorisations of generic medicinal products. It even seems that ESA is prepared to procrastinate bringing a lawsuit upon the request of a government which argues that a parallel case is pending before the ECJ.

As a result, one may conclude that ESA indeed prefers the "indirect" method of participating in preliminary reference proceedings before the EFTA Court or before the European Court of Justice over bringing infringement actions on its own.

17 Cases E-4/00 *Dr Johann Brändle*, E-5/00 *Dr Josef Mangold*, E-6/00 *Dr Jürgen Tschanett*, [2000–2001] EFTA Court Report 123, 163 and 203; see also *infra*, lecture 3.

18 Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767.

19 Case C-170/04 *Klas Rosengren and Others v Riksåklagaren* [2007] ECR I-4071.

20 Cf. ESA Annual Report 2004, p. 26.

21 Case C-42/02 *Diana Elisabeth Lindman* [2003] ECR I-13519.

22 Cf. ESA Annual Report 2006, p. 22.

23 Case C-223/01 *AstraZeneca A/S v Lægemedelstyrelsen* [2003] ECR I-11809.

(4) If a court of last resort of an EEA/EFTA State finds that there is no infringement, ESA may drop the case. An important example is the Liechtenstein **Security for Costs** saga. On 4 July 2001, ESA delivered a reasoned opinion in accordance with Article 31 SCA to the Government of the Principality of Liechtenstein stating that “by maintaining the rule provided in Article 57, paragraph 1, of the Law on Civil Proceedings [...] according to which natural plaintiffs not resident in Liechtenstein and having no chargeable assets in that country may be asked to furnish security for costs in court proceedings if the defendant so requests, where no such requirement can be imposed on natural plaintiffs residing in that State in the same circumstances, Liechtenstein has failed to fulfil its obligations under Articles 3 and 4 of the EEA Agreement²⁴. Liechtenstein was given three months to comply with the reasoned opinion²⁴. On 17 January 2003, the Liechtenstein State Court confirmed its case law according to which the rules in question of Liechtenstein law were compatible with the EEA Agreement²⁵. After this, ESA did not pursue the case although it was quite clear to most observers that the legal situation in Liechtenstein was untenable. I will come back to that case later.

With the Liechtenstein *Helplessness Allowance* case, there is an important exception to the policy just described. But the circumstances were somewhat special, as I will explain.

(5) If a court of last resort of an EFTA State has **refused to make a reference**, this will, as a rule, not have any consequences. Exceptionally, ESA may bring a direct action if the case in its view is important enough. There are two examples for that:

One is the *Gaming Machines* case E-1/06 which concerned the compatibility of the newly introduced Norwegian state monopoly for the operation of one-armed bandits, so-called gaming machines²⁶. ESA had opened an investigation upon complaints from private operators and at the same time the case was tried through the Norwegian judiciary. In October 2004, ESA issued a reasoned opinion; some days later, the Oslo City Court found the monopoly to be contrary to EEA law. In August 2005, this judgment was overruled by the Court of Appeal, and the matter was brought before the Norwegian Supreme Court. The Norwegian government urged the Supreme Court not to refer the case, but to keep it in the country. Who reads the Norwegian language? Few people do. Keeping the case in the country means to a certain extent keeping it **out of the lime light**. If the case goes to Luxembourg, the European Commission will appear and Member States from the EFTA side and from the EU side may participate. The fact that the case has been referred to the EFTA Court will be made public in the Official Journal of the European Union.

24 Dec. No. 239/01/COL.

25 Judgment of the State Court of 17 February 2003, StGH 2002/37 (LES 2005, 145).

26 Case E-1/06 *Gaming Machines* [2007] EFTA Court Report 7.

Allow me a side remark: Unfortunately, this has not been the only case in which government officials have tried to convince a national court to **refrain from making a reference** to the Court. What a commentator wrote in 1985 in a general international law context has therefore some truth when it comes to the functioning of the EFTA pillar: “The nature of decisions which can be referred by national courts to international jurisdictions are commonly delicate and sensitive ones ... and thus states may be tempted to put pressure on local national courts to avoid such references. This, in turn, would logically neutralize the effectiveness of international courts by starving them of work ...”²⁷.

Back to the *Gaming Machines* case. At the end, when even the Norwegian Supreme Court refused to make a reference, ESA stepped in and brought an infringement action. The Appeals Committee of the Supreme Court which had decided against the reference then decided by two votes against one to **postpone** the case until the Court had ruled on it. The Committee had discussed the case in a meeting with other justices of the Supreme Court, and there had been divided opinions amongst the justices²⁸.

On closer inspection, one must, however, conclude that ESA’s attitude in *Gaming Machines* was not that different from other cases. It seems quite clear that ESA had hoped that one of the three courts involved would bring the matter to the EFTA Court by way of a **preliminary reference**. In that regard, I may mention once more that ESA so far has not brought an infringement action to the EFTA Court in a case where, after it had opened an infringement procedure, a court of last resort had stated that EEA law is not infringed.

The second example is the Liechtenstein *Helplessness Allowance* case E-5/06²⁹. That is one of the most important matters the Court has ever decided. I am rather sure you never heard about it because your focus is on Iceland and Norway which, as I said, is understandable at first sight, but I am here to correct that a bit. All the wealthy countries in the European Economic Area, whether on the EC side or on the EFTA side, provide such allowances. That is a payment made to people who are helpless, it is – at least in Liechtenstein – not dependent on them having paid in (i.e. **non-contributory**) and it comes in addition to sickness and old age benefits. If someone is unable to dress without assistance, to go to the bathroom without assistance and the like, then he or she is entitled to receive this helplessness allowance. All the countries made payment dependent on **residence**, also Liechtenstein. In Liechtenstein there are thousands of commuters from Austria crossing the border every day. And at the end of their active life they spend their old age in Austria. The Liechtenstein government **denied** them payment of helplessness allowance. One of these Austrians brought a case and took it to the Supreme

27 Louis-Edmond Pettiti, Independence of International Judges, in: Shimon Shetreet and Jules Dechênes (eds.), *Judicial Independence*, Dordrecht/Boston/Lancaster 1985, 496.

28 Order of the Appeals Committee of the Høyesterett of 5 December 2005 in HR-2005-01895-U (Case Number 2005/1320).

29 Case E-5/06 Helplessness Allowance [2007] EFTA Court Report 295.

Administrative Court. The Supreme Administrative Court claimed that the provision at stake constituted *acte clair*, i.e. that the legal situation was clear and unambiguous³⁰. It **refused to make a reference** to the EFTA Court although the Austrian applicant had asked for it and on 12 February 2003, it ruled against the applicant³¹. The Court was therefore prevented from ruling on the case. In November 2003, ESA received a complaint and subsequently started infringement proceedings. In April 2005, it issued a letter of formal notice and delivered a reasoned opinion in March 2006. In November 2006, ESA brought the matter before the Court. The Court found in favour of ESA.

This case has a peculiar background. Rumour has it that ESA did not only act on its own initiative when it decided to sue Liechtenstein. There are indications that the Commission told ESA to go after that country. Not so much because tiny Liechtenstein was so important to the Commission, but because the same provisions which are part of EEA law (and which have been taken from EC law), namely Regulation 1408/71, are also part of the bilateral **Free Movement of Persons Agreement** concluded between Switzerland and the European Union in 1999. In other words, Regulation 1408/71 is valid in three different contexts, in supranational EC law, in EEA law and in classic international law. What the Commission wanted was ESA to obtain a victory against Liechtenstein, but what it probably really sought was to have a precedent and thereby an argument to go after **Switzerland**. The Swiss Supreme Court had, like the Liechtenstein Supreme Administrative Court, held in a judgment of 24 July 2006 that helplessness allowances need not be exported. Under the bilateral Free Movement of Persons Agreement, the Supreme Court is bound to follow old ECJ case law. The Court argued that there was no old ECJ case law³². The Commission may one day take the judgment of the EFTA Court and ask for an amendment of the Free Movement of Persons Agreement with the consequence that the Swiss too will have to pay the helplessness allowance to all the Italians, the French and the Austrians who spent their working life in the country as commuters and now live in their countries of origin.

3. Some remarks

ESA's policy has led to certain successes. However, whether it puts enough pressure on the governments of the EEA/EFTA States to comply with their obligations under the Agreement in a timely manner is debatable.

30 In its 1982 judgment in C-283/81 *CILFIT v Italian Ministry of Health* [1982] ECR 3415, 3430, the ECJ has qualified the obligation of EC courts of last resort to refer matters for preliminary rulings by recognising the *acte clair* doctrine. Under this approach, national courts or tribunals in the sense of the third paragraph of Article 267 TFEU (ex Article 234 EC) need not refer a case where the question of Community law is relevant to the outcome of the case and there is no previous judgment of the ECJ on the point of law if "the correct application of Community law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved" (paragraph 21).

31 See the reference in Case E-5/06 *ESA v Liechtenstein* [2007] EFTA Court Report 295, at paragraph 3.

32 ATF 132 V 423.

Firstly, there have been cases in which ESA's attempts to find a solution *à l'amiable* **have taken years**. This can come at the expense of the main beneficiaries of the EEA Agreement: **individuals and economic operators**. In the early days, ESA seems to have been inclined to wait patiently as long as governments maintained that the necessary implementation measures were imminent. In Case E-5/01 *ESA v Liechtenstein*, the Principality of Liechtenstein should have had informed ESA about the implementation of Council Directive 87/344/EEC on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance by 1 May 1995. ESA finally lodged an application with the Court on 27 April 2001³³. In recent years, the following cases may be mentioned: In the *Finnmark* case (E-3/05), ESA had received a complaint in April 1999, sent a letter of formal notice in October 2000, a supplementary letter of formal notice in December 2003, issued a reasoned opinion in July 2004 and brought Norway before the Court in April 2005. ESA finally lost the case³⁴. In E-1/05 *Life insurances*, ESA opened proceedings on its own initiative in December 2000, sent a letter of formal notice in April 2003, a reasoned opinion in July 2003 and brought the application to the Court in January 2005³⁵. In E-1/03 *Flight taxation*, proceedings were opened on ESA's initiative in April 1998, a letter of formal notice was sent in December 1998 and a reasoned opinion in September 1999. Iceland then promised to put a new bill to Parliament in October 2002, 3 years later. ESA sued only in January 2003, after not having received any new information³⁶. In E-2/06, the *Norwegian Waterfalls* case, again infringement proceedings were opened on ESA's own initiative in March 2001, a letter of formal notice was sent in June 2001 and a reasoned opinion was issued in February 2002. No application to the Court was made because the Norwegian government signaled its willingness to amend the legislation. After a change of government in April 2006, ESA brought the case before the Court in the same month³⁷.

Secondly, it is doubtful whether ESA's approach is able to provide sufficient guidance for the EEA/EFTA States and for private operators. Deals cut behind closed doors do not produce any effect beyond the case at hand. This is bad for **legal certainty** and **predictability**.

Thirdly, the question arises whether the policy at issue takes sufficient account of the fact that the courts of the EEA/EFTA States, and in particular the supreme courts, are **less active** in referring cases to Luxembourg than their counterparts in most EU countries.

Fourthly, the Court may be prevented from answering legal questions also in cases in which the well-understood interests of individuals and economic operators require such clarification. The EEA Agreement is an important example of what in legal theory

33 [2000–2001] EFTA Court Report 287.

34 [2006] EFTA Court Report 101.

35 [2005] EFTA Court Report 234.

36 [2003] EFTA Court Report 143.

37 [2007] EFTA Court Report 163.

has been called the judicialisation of international law. Diplomacy is thereby largely replaced as a dispute resolution mechanism by adjudication³⁸. ESA's policy gives preference to diplomacy and weakens adjudication. This may go against the very **essence of the Agreement**.

Fifthly: The Court's own experience shows that its contributions to the development of the case law of the Union Courts are highly appreciated **in the Union**. The same could be true in the case of ESA.

Finally: ESA's policy to drop its own proceedings once there is a case pending before the ECJ involving EC law which is identical in substance to the EEA law in question calls for (at least) one additional comment: To my best knowledge there are **no judges from the EEA/EFTA countries sitting on the ECJ**.

C. The preliminary reference procedure

1. General

The preliminary reference procedure is not mentioned in the EEA Agreement. Article 34 SCA provides:

“The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement. Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion. An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts or tribunals against whose decisions there is no judicial remedy under national law.”

The provision has to a large part been modelled on the template of Article 267 TFEU (ex Article 234 EC).

Similarly to the ECJ, the Court has dealt with **important cases** under the preliminary reference procedure. I may just mention the judgments concerning effect, State liability and fundamental rights³⁹, but also rulings on the four fundamental freedoms, on competition law and on important questions of secondary law⁴⁰. The question is, however, whether the right cases have come before the Court.

38 See, e.g., Cesare F. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, [1999] 31 N.Y.U. J. Int'l L. & Pol. 709 et seq.

39 With regard to fundamental rights, see *infra*, lecture 4.

40 See Carl Baudenbacher, *EFTA Court – Legal framework and case law*, 3rd ed., 2008, http://www.efta-court.int/images/uploads/Legal_Framework_Finalweb.pdf (last visited on 16 November 2009).

2. Notion of court or tribunal

Under the six-factor test usually applied by the ECJ when interpreting Article 267 TFEU (ex Article 234 EC), to constitute a “court or tribunal” within the meaning of that provision, the referring body must (1) be established by law, (2) be permanent, (3) have compulsory jurisdiction, (4) conduct inter-partes procedures, (5) apply rules of law and evidence, and (6) be independent⁴¹. The Court gave a broad interpretation of what qualifies as a court or tribunal in E-1/94 *Restamark*, where the *Tullilautakunta*, an appeal body that appeared to be linked closely to the Finnish customs administration, was held to constitute a court despite the fact that **no adversarial procedure** takes place before that authority⁴².

It is quite obvious that with the *Restamark* judgment the Court wanted to give individuals and economic operators **broad access to justice**. As I said before, it was the Court’s very first case, and it was a beautiful case. In fact the EFTA Court was more liberal than the ECJ at the time, but the ECJ adopted the same approach in its later judgments in C-54/96 *Dorsch Consult*⁴³ and in Joined Cases C-110/98 to C-147/98 *Gabalfrisa*⁴⁴. The Court confirmed its approach in two judgments with regard to the *Norwegian Marketsradet*, Joined Cases E-8/94 and E-9/94 *Mattel/Lego*⁴⁵ and Case E-4/04 *Pedichel*⁴⁶ as well as in a case with regard to the *Liechtenstein Appeals Commission of the Financial Market Authority*⁴⁷.

3. Admissibility of a request for a preliminary ruling and of the questions of a national court

The Court also was quite liberal when giving judgment on the admissibility of a request for a preliminary ruling and of questions by national courts. In the early years, governments frequently argued that certain questions should be deemed not admissible. The Court held repeatedly that the national court, which alone has direct knowledge of the facts of the case, is in the best position to appreciate, with full knowledge of the matter before it, the necessity for a preliminary ruling to enable it to give a judgment⁴⁸. But it is not for the Court to give opinions on general or hypothetical questions⁴⁹. Again, let me add a remark from the perspective of Legal Realism, as a marginal note so to speak:

41 See, e.g., Case C-393/92 *Municipality of Almelo and Others v. Energiebedrijf IJsselmij NV* [1994] ECR I-1477, at paragraph 21.

42 Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15.

43 Case C-54/96 *Dorsch Consult* [1997] ECR I-4961.

44 Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577.

45 Joined Cases E-8/94 and E-9/94 *Mattel/Lego* [1994–1995] EFTA Court Report 113.

46 Case E-4/04 *Pedichel* [2005] EFTA Court Report 1.

47 Case E-4/09 *Inconsult Anstalt*, judgement of 27 January 2010, nyr

48 See, e.g., Cases E-1/95 *Samuelsson* [1994-1995] EFTA Court Report 145, and E-5/96 *Nille*, 1997 EFTA Court Report, 30, at paragraph 12.

49 See, e.g., Case E-6/96 *Wilhelmsen* [1997] EFTA Court Report 53.