

EDITORIAL COMMENTS

European Economic Area and European Community: Homogeneity of legal orders?

Much has been achieved during the first half year of 1999 under an effective German presidency – despite the vicissitudes of a new government – which would merit a comment: Agenda 2000 with the reform of the Structural Funds, the Inter-institutional Agreement on the Financial Perspectives from 2000 to 2006, the establishment of a new European Anti-Fraud Office (OLAF), the integration of the Schengen acquis into the Union, the (until the last moment uncertain) adoption of a new Comitology Decision, etc. It would also be interesting from an institutional point of view to comment on the governing role of the European Council in all this: its firm grip on the decision-making process (and the institutions) throughout the three pillars of the Union which seems to go hand in hand with a strengthening of the Union *vis-à-vis* the Communities.

However, this issue of the *Review* pays extensive attention to the European Economic Area (EEA) and the evolution of the case law of the special Court established by the EFTA partners in the EEA (EFTA Court). The occasion should not be missed to make a more general comment on the relationship between the EEA and the EC as legal systems. That appears the more justified since the EFTA Court in an Advisory Opinion of 10 December 1998 has accepted, as a principle inherent in the EEA Agreement, the responsibility of the Contracting Parties for damages caused by breaches of obligations under the EEA Agreement, as *Francovich* did for the European Community. Reading this fairly daring Opinion, one is reminded of the European Court of Justice in the early days of *Van Gend en Loos* and *Costa v. Enel*.

It should first be recalled that the creation of a separate EFTA Court was only introduced into the EEA Agreement after the EC Court, in its Opinion 1/91,¹ had refused the judicial architecture initially proposed of an EEA Court “functionally integrated” into the EC Court. The Luxembourg Court considered such a supreme Court for the EEA as a whole as too serious a

1. [1991] ECR I-6099.

threat to its own autonomy, if it had to interpret Community rules similar to EEA rules. Indeed, that is precisely what the EEA is meant to do: extend the EC internal market regime to the EFTA partners, create one area in which individuals and economic operators can benefit both from the four freedoms and from a system of undistorted competition, together with common actions in a number of policy sectors. The relevant body of EC rules, present and future, whether of Treaty rank or secondary legislation, are to that effect taken over by the EEA as a whole, those rules having to find, as much as possible, the same interpretation and application in the EC and the EFTA Member countries. This fundamental objective of homogeneity is bolstered by a complex set of instruments and procedures elaborated by the EEA Agreement (see the article by Forman in this *Review*). Part and parcel of homogeneity is also that all those who can derive rights from the EEA, that is the geographically enlarged internal market regime, obtain adequate possibilities, also in terms of legal protection, to enforce their rights – an aim clearly expressed in the recitals of the EEA Agreement. For the EC side that was an important issue during the negotiations: since EFTA operators benefit from the characteristics of direct effect and supremacy of the EC legal order to enforce their EEA rights within the EC national Courts, their EC counterparts should be in a similar position to obtain a comparable level of legal redress in the EFTA national Courts. The EFTA partners, particularly those Scandinavian countries with a more dualist approach to the reception of international law were opposed to that.

The final version of the EEA Agreement appears to confirm the EFTA position. According to Article 7, acts of secondary Community legislation to be mirrored by the EFTA pillar “shall be binding upon the Contracting Parties and be, *or be made*, part of their internal legal order ...” It is then stated that an act corresponding to an EC regulation “shall as such be *made* part of the internal legal order of the Contracting Parties”. Clearer still is Protocol 35 of the EEA Agreement according to which: “For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, *if necessary*, a statutory provision to the effect that EEA rules prevail in these cases.” This wording seems to allow the more dualist approach followed by various EFTA countries to be continued for the incorporation of the EEA rules, an approach which can hardly be reconciled with the notions of direct effect and primacy as they have been developed by the EC Court on the basis of the concept of an *autonomous* Community legal order.²

2. See for a different view Van Gerven, “The Genesis of EEA Law And The Principles Of Primacy And Direct Effect”, *Fordham International Law Journal* 1992–1993, Vol. 16, 955.

The best guarantee for homogeneity would have been the acceptance of the jurisdiction of the EC Court also by the EFTA partners. For obvious reasons, also linked to the far-reaching scope of the EEA regime, they were not willing to do so. The existence of two Courts interpreting similar rules is of course a potential source of conflict. We have seen cases on the same important new legal issues brought to both Courts at about the same time. Who will come first, one wonders each time? But until now accidents have been avoided, the *Maglite-Silhouette* cases having been a narrow escape.³ At any rate the elaborate mechanisms of the Agreement to solve such conflicts have as yet not had to be used.

In this respect, how should we assess the judgment of the EFTA Court on the principle of State liability in the case with the beautiful name of *Sveinbjörnsdóttir*? In this judgment the EFTA Court concludes, from an analysis of the instruments of the EEA Agreement to ensure homogeneity and in view of the dependence of the EEA for its proper functioning on individuals and economic operators being able to rely on the rights conferred on them by the Agreement, that the EEA Agreement “is an international treaty sui generis which contains a distinct legal order of its own”. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty but its scope and objective go “beyond what is usual for an agreement under public international law”. This brings the EFTA Court to its final conclusion that the principle of State liability must be seen as an integral part of the EEA Agreement. All this is highly reminiscent of *Van Gend en Loos*, *Costa v. ENEL* and *Francovich* – the latter having been explicitly referred to by the EFTA Court. Furthermore, in detailing the conditions for such liability, particularly the one relating to a sufficiently serious breach, due account is taken of the post-*Francovich* case law of the EC Court, including *Brasserie du Pêcheur* and *Factortame III*.

Does this mean that the EFTA Court is stretching the homogeneity objective so far as to include also the basic characteristics of the Community legal order? Indeed, the EC Court, in *Francovich*, derived the principle of State liability directly from the basic qualities of the Community legal order, direct effect and primacy in particular. Should there be homogeneity between the legal orders of the EEA and the EC? That would meet with serious obstacles under the EEA Agreement itself, particularly its Article 7 and Protocol 35 already referred to. It would also clearly conflict with the analysis of the characteristics of the EEA Agreement made by the EC Court in Opinion 1/91, where that Court went so far as to say that essential elements of the EC legal order (direct effect and primacy) “are irreconcilable with the characteristics of the agreement” (para 28), having earlier stressed the absence of any transfer of

3. See the annotation of Case C-355/96, *Silhouette*, by Gippini Fournier in this *Review*.

sovereign rights to the inter-governmental institutions set-up by the agreement (para 20).

However, extending homogeneity to both legal orders is precisely what the EFTA Court has not done. It has in no way based its acceptance of the principle of State liability as an integral part of the EEA Agreement on a premiss of homogeneity between the EC and the EEA legal order. This conclusion is entirely based on an autonomous interpretation of the system and objectives of the EEA Agreement itself. That analysis conforms to Opinion 1/91 in that it also recognizes the absence of a transfer of legislative powers under the EEA Agreement (para 63). Whether, it may be said in passing, the EFTA Court will at some point accept direct effect and primacy within the meaning those concepts have under Community law, hence remains uncertain, to say the least. When considering that question, account should also be taken of the interesting final sentence of para 63, where the Court holds – after having stated that the principle of State liability is an integral part of the EEA Agreement –: “Therefore, it is natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of State liability”. This seems to imply that in the absence of direct effect of this principle it only becomes effective through the incorporation in the national laws of the EFTA countries of the substantive EEA rules. It is clear, on the other hand, that the analysis of the EFTA Court differs from Opinion 1/91 by its emphasis on the rights conferred on individuals and economic operators under the EEA rules and the importance of an appropriate enforcement of those rights, as clearly expressed in the recitals of the agreement. Thus up to now the conclusion of the EC Court that the EEA Agreement “essentially, merely creates rights and obligations as between the Contracting Parties” (Opinion 1/91, para 20) has been too one-sided. In a way, the EC Court has now admitted that. In its preliminary ruling in *Rechberger*,⁴ the EC Court, after having established its lack of jurisdiction to rule on a question of interpretation related to the application by Austria of the EEA Agreement during the period preceding its accession to the EU, explicitly refers to the judgment of the EFTA Court in *Sveinbjörnsdóttir*, at the same time “taking into account the objective of a uniform interpretation and application which underlies the EEA Agreement” (our translation). This is more than a “*coup de chapeau*”, a salute to the EFTA Court. With this statement, it is important to note, the EC Court appears to endorse the EFTA Court’s judgment.

What are the practical consequences of all this? First of all, the EC beneficiaries of the EEA regime see the possibility of adequately enforcing their EEA rights in the EFTA countries enhanced, as do the EFTA economic operators themselves. However, there will be no change in substance for the

4. Case C-140/97, *Rechberger*, judgment of 15 June 1999, nyr.

position of the latter in the EC countries. They benefit already from the rule in *Francovich* under the Community legal order – at least, assuming that *Francovich* liability of EC Member States would also apply to EEA rules granting rights to individuals. There seem to be no reasons not to do so, the EEA rules forming an integral part of the Community legal order. As long as the principle of State liability under the EEA Agreement as to its scope and conditions coincides with the rule in *Francovich* the results in terms of fostering enforcement will then remain similar in substance.

We conclude therefore that, without at all imposing a homogeneity of legal orders which would indeed be all too dynamic, *Sveinbjörnsdóttir* and its reception by the EC Court in *Rechberger* demonstrate homogeneity of interpretation of the EEA Agreement by the EFTA Court and the EC Court, and what is more important still, a clear intention of both Courts to achieve that aim.