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GUEST EDITORIAL

The EFTA Court

On 1 January this year, after one year's delay, the Agreement on the European Economic Area (EEA) finally came into force. Thus almost ten years after the political decision taken by EC and EFTA Ministers in Luxembourg to create a dynamic European Economic Space the EEA became reality.

Through the EEA Agreement, which applies in relations between the European Community and its Member States and the EFTA States, as well as between the latter,[1] the EFTA States have committed themselves to a dramatic transformation of their legal systems. Indeed, this transformation is much quicker and larger in scope than that which any of the present Member States of the European Union has undergone upon accession to the European Community. This follows from the fact that the EFTA States have taken over all the EEA-relevant legislation of the completed Internal Market, including the 1992 White Paper legislative programme. In order to ensure that this widening of the Internal Market, as it is frequently called, functions and that there really will be a dynamic and homogeneous EEA, where all individuals and economic

1. The Contracting Parties to the EEA are on the Community side the European Community and the European Coal and Steel Community and their twelve Member States and on the EFTA side Austria, Finland, Iceland, Norway and Sweden. The non-ratification of Switzerland also meant that Liechtenstein has not yet been able to accede to the Agreement but may do so, if it manages to satisfy the EEA Council that the conditions therefore, in particular that this does not impair the good functioning of the Agreement, are fulfilled.

operators in the seventeen EEA States are treated equally and without discrimination, the EFTA States have furthermore had to agree to establish a structure for judicial control and monitoring of the application of EEA law, which is parallel to that which for the EC side is composed of the Court of Justice of the European Communities (ECJ) and the EC Commission. This EFTA structure consists of the creation of two new independent international organizations, the EFTA Court and the EFTA Surveillance Authority (ESA), both of which formally were established on 1 January 1994, when the EEA Agreement came into force.[2]

During the first half of this year the EFTA Court has been fully occupied in getting established and working out the necessary instruments for its proper functioning. The Court has also received its first cases and established links with its counterpart in the EEA, the ECJ. In addition, due to the rapid conclusion of the accession negotiations to the European Union, the Court has had to consider various aspects of its activities following a possible accession of four of the five EFTA States to the European Union. In the following, I will briefly give a few comments on these developments as well as on the role of the Court in the EEA.

1. Composition, organization and competences of the EFTA Court

While the obligation to establish the EFTA Court is contained in Article 108 of the EEA Agreement, which also outlines the main functions of the Court, the provisions regarding the EFTA Court, its organization, competences, and work are laid down in the Surveillance and Court Agreement.[3] Almost all of the provisions in that Agreement regarding

2. The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the Surveillance and Court Agreement) is concluded between Austria, Finland, Iceland, Norway and Sweden with a corresponding possibility for Liechtenstein to join as under the EEA Agreement.

3. For a more comprehensive presentation of the EFTA Court, see for instance Chapter XXVI in Norberg, Hökborg, Johansson, Eliasson and Dedichen, *EEA Law. A commentary to the EEA Agreement* (Kluwer, 1993).

the EFTA Court reproduce or closely follow corresponding provisions in the EC treaty regarding the ECJ.

However, as to composition and organization the EFTA Court differs from the ECJ in some aspects. There is for instance no EFTA Court of First Instance. The number of Judges is only five, reflecting the number of EFTA States in the EEA. The EFTA Court sits only in plenary session, and has no Advocate Generals. The competences of the EFTA Court correspond to a very large extent to those of the ECJ, the main significant difference probably being the replacement of the preliminary ruling procedure by a similar one for advisory opinions. Another fact is that the EFTA Court, being situated in Geneva, has its seat in a State which does not participate in the EEA.

The most striking difference, however, may be that the EFTA Court has only one working language, English, which moreover is not a language of any of the EFTA States. The choice of English should be seen in relation to the good experience gained during the 34 years of EFTA's existence as well as from the EEA negotiations, when English was the only working and negotiating language. The one exception in the EFTA Court concerns requests for advisory opinions from national courts in the EFTA States regarding the interpretation of provisions of the EEA Agreement. They are put in the language of the national court and answered in that language as well as in English.

Apart from this, and notwithstanding the fact that obviously the EFTA Court has a much smaller number of employees (only 27 so far) it may be said that the similarities between the ECJ and the EFTA Court are considerable.

2. The establishment of the EFTA Court

Although the EFTA Court was formally established through the Surveillance and Court Agreement as a new international organization wholly independent of EFTA and the ESA, a number of additional instruments necessary for the functioning of the Court have had to be negotiated, established or worked out during the first months of this year. While some of those instruments such as the Rules of Procedure

have much in common with corresponding instruments for the ECJ and the Court of First Instance of the European Communities (CFI), others are particular to the EFTA Court, due to its character as an independent international organization. The Court had thus as one of its first tasks early this year to conclude a Headquarters Agreement with the Swiss Federal Council, through which its legal personality, immunities and privileges in Switzerland have been recognized. This was not only needed for the benefit of the Court itself but also with a view to securing the rights of its "clients", e.g. Governments and Institutions of the EEA as well as individuals and economic operators who may have to appear before the Court. It may be recalled in this context that, as a means of furthering the achievement of the homogeneity objective, not only the EFTA States and ESA but also the Commission and the Community (interpreted by the Court as also including the EU Member States) are entitled to submit statements of case or written observations to the Court in all cases before the Court (Article 20 of the Statute). They are furthermore entitled to intervene in all disputes before the Court (Article 36 of the Statute).

Since EFTA lacks the supranational character of the EC it was also necessary to establish a number of administrative instruments for the Court, such as Staff Regulations and Rules as well as a Staff Insurance Scheme, the latter jointly set up for the EFTA Court and the ESA.

Although for a lot of this work, there have been models to follow, it should be emphasized that it was never possible simply to copy another provision. Even in cases where the same circumstances would seem to apply, it was necessary to make an analysis of the real meaning of the provision before it could be taken over. This task was hardly facilitated by the frequent differences between the language versions of the original texts. While for the Rules of Procedure, on the one hand, there was an interest not to confuse those who already were familiar with the ECJ and CFI rules too much, there was, on the other hand, also a wish to see to it that simplifications could be made where possible. With regard to the administrative instruments, above all the independence of the Court in relation to the EFTA States had to be secured, which, inter alia, implied certain differences in relation to the corresponding EFTA instruments. Taking into account the small number

of staff, as well as the absence of a translation service for the Court, it all implied a busy first semester for the EFTA Court.

3. Rules of procedure

The Rules of Procedure of the EFTA Court adopted by the Court and approved by the EFTA States,[4] are to a large extent based upon those of the ECJ and the CFI, thereby providing for a parallel procedure and simplifying the task for parties and agents before the two Court structures. It may be of more general interest to mention that the Rules of Procedure (Article 96(3)) lay down that an advisory opinion from a national Court shall be accompanied by a description of the facts of the case as well as a presentation of the provision in issue in relation to the national legal order, necessary to enable the EFTA Court to assess the question to which a reply is sought. The EFTA Court may further take up "a dialogue" with the national court by asking it for clarification, if need be (Article 96(4)). It was felt that such rules would be helpful taking into account the experience from the preliminary ruling procedure before the ECJ. The Instructions to the Registrar are also inspired by the corresponding instruments for the ECJ and the CFI.

Following an agreement between the Parties to the EEA Agreement, an EEA publication régime similar to that for the EC has been established by publishing all relevant information from the EEA institutions in the nine EC languages in an EFTA section of the Official Journal of the EC and in the four additional Nordic EFTA languages in an EEA supplement to the Official Journal of the EC. While the production is coordinated with a view to obtain simultaneous publication, the EEA supplement is produced by an EFTA publication unit. In addition the EFTA Court has, in order to facilitate access to the rather scattered provisions contained in various instruments, published separately a selection of texts relating to the Organization, Jurisdiction and Procedure of the Court. This "EFTA Court Texts" is published in English, Finnish, German, Icelandic, Norwegian and Swedish and can be ordered from the Court.

4. Published in the Official Journal of the EC No. L 278, 27 Oct. 1994 and in CMLR 1994 p. 832.

4. Some developments after the entry into force of the EEA

As foreseen in the Agreement, the EEA Joint Committee has continued to integrate new EEA relevant EC acts adopted by the EC Council or the EC Commission, through amendments to the EEA Agreement on a regular basis. Thus on 21 March 1994 the EEA Joint Committee adopted the first such decision integrating totally around 480 Community Acts, which represent the number of EEA relevant EC acts adopted after the "cut-off date" 31 July 1991, which for technical reasons was applied for the drafting of the EEA Agreement, until the entry into force of the EEA. The decision entered into force on 1 July 1994, from when the new acts thus became applicable throughout the EEA. From this and past experiences it would seem that EC institutions annually would deliver around 200 legal acts of EEA relevance and which thus should be integrated into the EEA Agreement.

The EFTA Court has also received its first cases under the Agreement. In April a request for an advisory opinion was lodged from a Finnish Customs' appeals body. The request concerns the right to import alcoholic beverages into Finland and the interpretation of provisions such as Articles 11 and 16 of the EEA Agreement (corresponding to Articles 30 and 37 EC) in relation to the continued operation of the Finnish alcohol monopoly. In another case a direct action has been lodged by an association of Scottish salmon growers which contests a decision by the ESA to close its file due to lack of competence. The applicant had complained to ESA concerning alleged infringements of the State aid provisions of the EEA Agreement by the Norwegian Government in granting state aid to its salmon industry. Both of these two first cases contain not only legal questions which are at the very heart of EEA law, but they concern also matters of great political importance in the Nordic States. From the Market Court in Stockholm two requests for advisory opinions have been received regarding the interpretation of the EEC Directive "Television without frontiers" in relation to more restrictive Swedish rules on advertising. The Swedish Supreme Court has asked, in another reference for an advisory opinion, whether requiring a UK company to provide security for costs – a deposit of money against the legal costs if the company loses – is contrary to the EEA Agreement,

and in particular the prohibition of discrimination on grounds of nationality, since no corresponding requirement may be imposed on Swedish nationals.

As is clear from the foregoing the EFTA Court is to a very great extent modelled on the ECJ. Unlike the provisions concerning the two surveillance authorities, the ESA and the Commission, the EEA Agreement does not, however, contain any provisions obliging the two Courts, the EFTA Court and the ECJ to cooperate. Article 6 EEA lays down the general rule that provisions in the EEA Agreement which in substance are identical to provisions of EC law shall be interpreted in conformity with the relevant rulings of the ECJ given prior to the date of signature of the Agreement. Article 3(2) of the Surveillance and Court Agreement furthermore obliges the ESA and the EFTA Court, in the interpretation and application of the EEA Agreement, to take due account of the principles laid down by the relevant rulings of the ECJ given after the date of signature of the EEA Agreement and which concern the interpretation of the EEA Agreement or such in substance identical provisions as mentioned above.

Although for obvious reasons it is thus not possible for courts of this kind to cooperate on individual cases, it is, however, essential that the Courts get to know each other well in order to create as good as possible an understanding of each other's work and thereby furthering the interest of achieving a homogeneous EEA. To this end contacts have already been established on all levels between the EFTA Court, on the one hand, and the ECJ and the CFI, on the other. Invaluable assistance has been provided from the two EC courts during the building-up phase, both in the form of practical advice given on the basis of experience and in a more substantial form, such as equipping the EFTA Court with the ECJ case law as contained in European Court Reports.

One of the greater challenges for the EFTA Court in handling its share of ensuring the homogeneity of the EEA is not only that it is more likely that cases regarding the interpretation of the EEA Agreement may come earlier and in greater numbers to the EFTA Court than to the ECJ. The very fact that the EFTA Court has no backlog of cases means also that it will be the first one of the two Courts to interpret provisions of the EEA Agreement. Taking into account that the EEA Agreement

contains almost all of the Internal Market legislation which was adopted in the EC very recently, it may also be so that the EFTA Court may have to interpret EC texts which have not yet been subject to interpretation by the ECJ.

On 24 June 1994 at Corfu four of the five EFTA EEA States, Austria, Finland, Norway and Sweden signed the Accession Treaty with the twelve EU Member States with a view to accession taking place on 1 January 1995. Before that, however, national ratification procedures in all 16 contracting Parties, including some unpredictable referenda in the candidate countries, have to be successfully completed.

If, however, everything works out as expected by the signatories, the EEA could on 1 January 1995 consist of the EC and ECSC and their by then 16 Member States, on the one hand, and Iceland, on the other.[5]

Already before the EEA Agreement was signed it had become obvious, that most EFTA States did not look upon the EEA as a permanent solution but rather as a transitional arrangement on their way towards full participation in the European integration. It was evident, on the other hand, that there were too many unpredictable factors, which in the end would have to be taken into account when deciding on how to deal with the new structures established by the EFTA States, in a situation of accession to the EU, for it to be possible already then to work out any solutions. Whenever an accession takes place to the European Union and no matter the number of EFTA States participating therein, there are certain questions of principle which will have to be taken into account in the discussion of the future of the EFTA Court.

First of all it has to be recognized that the EEA Agreement apart from

5. It should also be kept in mind that, as mentioned in note 1 *supra*, Liechtenstein still formally has a possibility to accede to the Agreement, if it manages to satisfy the EEA Council that the conditions therefore, in particular that this does not impair the good functioning of the Agreement, are fulfilled. As to the remaining original signatory of the EEA, the Swiss Confederation, a Swiss accession to the EEA would, in line with a Joint Declaration by the remaining Contracting Parties in the Final Act to the Adjusting Protocol of 17 March 1993, require an opening of new negotiations, where the participation of Switzerland in the EEA would be based on the results laid down in the original EEA Agreement and bilateral agreements negotiated at the same time as well as on possible subsequent changes in these Agreements. So far there have been no indications that an application from Switzerland to accede to the EEA would be forthcoming.

the EU Treaty is almost unique as to the extent to which it creates rights for individuals and economic operators, which national governments and their Courts are obliged to respect. Securing these rights and thereby homogeneity in the EEA was also one of the main reasons for the creation of the EFTA Court. The problems involved in winding up activities of the kind entrusted to the EFTA Court are mainly those which concern central problems of judicial protection.

Since no transfer of any judicial competences from the EFTA Court to any other judicial body has been foreseen and could hardly be arranged easily, the EFTA States have in a separate Agreement of 28 September 1994 provided for some transitional arrangements allowing for the termination of pending cases and the securing of the rights of individuals and economic operators under the Agreement for at least six months after accession to the EU, which period could be extended by another six months if needed. In this context it should be kept in mind that, not only will it be an open issue until the very last moment *which* of the EFTA States will join the European Union, but also *when* this will take place. Since, furthermore, Iceland has not applied for membership of the European Union, it may find itself in a situation where it will have on its own to provide an EFTA pillar structure, which evidently in such a case would have to undergo rather substantial changes.

When the merits of the EEA are to be assessed, it must be kept in mind that the EEA provides the closest possible relationship with the EU that could be imagined. In particular this concerns the internal market, to which it in fact grants access. The EEA negotiations have thus proven how close to a membership in the European Communities it is possible to get without actually becoming a member. They showed both the strengths and weaknesses in the internal decision-making mechanisms on the EC side as well as the constitutional character for the EC of the Treaty of Rome. The entry in force of the Maastricht Treaty and the creation of the European Union do not seem to have changed much in this picture. Looked upon as a stepping stone for the EFTA States on their way towards a full participation in European integration, the great historic achievement of this century, the EEA has been of crucial and indispensable importance, without which it neither would have been possible to foresee the coming enlargement of the EU nor to ar-

range the European Agreements associating the Central and East European States with the EU.

As should be clear from these comments, the EFTA Court is already facing great challenges, not only as to the adjudication of difficult cases but also as to the continuation of its activities. It may thus seem paradoxical that a new international court at the same time as it is faced with the building up of its activities has to make plans for a winding up thereof after a rather short time. This is, however, due to developments beyond the Court's control. Whether the life span of the EFTA Court will be of short duration or in fact last much longer, I am convinced that the Court is ready and will do its best to meet these challenges.

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