

## **The EEA Agreement: roles of the EFTA Surveillance Authority and EFTA Court\***

### ***Post: 3***

*The EEA Agreement, often described as the ‘Norwegian model’ extends the Single Market to Norway, Liechtenstein and Iceland. This Monckton Brexit Blog post describes the roles and functions of the EFTA Surveillance Authority and the EFTA Court.*

The roles of the EFTA Surveillance Authority (“ESA”)<sup>1</sup> and EFTA Court<sup>2</sup> are not set out in the EEA Agreement itself<sup>3</sup> but rather in the separate Surveillance and Court Agreement (to which only the EEA/EFTA States are parties).<sup>4</sup>

### ***EFTA Surveillance Authority***

ESA<sup>5</sup> formally consists of, and is governed by, a College of three Members,<sup>6</sup> one put forward by each of the EEA/EFTA States and appointed by common accord for a term of 4 years.<sup>7</sup> Amongst them, the EEA/EFTA States agree on a President for a term of 2 years.<sup>8</sup>

ESA is divided administratively into four departments: the Internal Market Affairs Directorate (‘IMA’) and the Competition and State Aid Directorate (‘CSA’) are complemented by the Department for Legal and Executive Affairs (‘LEA’) and assisted by the Department for Administration (‘ADM’).<sup>9</sup>

ESA’s internal working language is English and all communications with the EEA/EFTA States are conducted in that language.

ESA’s main tasks are to ensure that the EEA/EFTA States live up to their obligations under the EEA Agreement by fully, correctly and timely transposing the common Internal Market rules (the *acquis communautaire*) into their domestic legal order and by applying these rules correctly. ESA’s monitoring and enforcement role and procedures vis-à-vis the EEA/EFTA States broadly resemble those of the Commission, with which it cooperates.<sup>10</sup>

### ***The EFTA Court***

The EFTA Court was founded in 1994 and shall follow relevant ECJ rulings handed down prior to the date of signature of the EEA Agreement (2 May 1992).<sup>11</sup> This aimed at ensuring that from the outset the Single Market playing field was perfectly flat. The EFTA Court is required also to pay “due account” to all subsequent relevant ECJ jurisprudence.<sup>12</sup> In practice, the EFTA Court makes no distinction between the two and pays equal regard to post 1994 ECJ case-law. These provisions are pure common-sense. It would prove impossible to ensure an equal playing field for individuals and economic operators across the EU/EFTA divide if the same law wasn’t interpreted in the same way. This pragmatism is the common thread of the EEA Agreement and defines its fundamental principles.<sup>13</sup> Indeed, with regard to two major issues, the EFTA Court found it appropriate to go its own way:<sup>14</sup> when deciding

whether a body of the national administration of an EEA/EFTA State constitutes a court or tribunal entitled to make a reference, it has more and more used a functional instead of an institutional approach.<sup>15</sup> And with regard to the question of whether an in-house attorney enjoys the right of audience, the Court has, contrary to the ECJ, opted for a case-by-case approach in the assessment of whether such a representative is sufficiently independent.<sup>16</sup>

Importantly, experience shows that the ECJ and its Advocates General, the General Court, but also national courts of EU Member States pay due account to the case law of the EFTA Court.<sup>17</sup> Indeed, the EFTA Court typically faces novel legal problems requiring it to go first.<sup>18</sup> For example, the Court of Appeal referred a case to the ECJ on the basis of the EFTA Court's findings in *Paranova v Merck*.<sup>19</sup> The ECJ subsequently adopted the EFTA Court's approach.<sup>20</sup>

The EFTA Court hears two main types of cases: advisory opinions and direct actions. Advisory opinions are identical, in all but name, to preliminary references made by national courts to the ECJ.<sup>21</sup> All direct actions brought before the EFTA Court are brought upon the basis of an infringement of the EEA Agreement itself or of the Surveillance and Court Agreement (i.e. actions for annulment, or for failure to act, of ESA decisions).

Just as at the ECJ, there are no dissenting opinions in EFTA Court judgments. The single judgment is the view of the bench as a whole and its deliberations as well as the vote remain secret. Likewise, the internal procedures of the two EEA courts illustrated their shared DNA. The EFTA Court is currently composed of three judges – one nominated by each EEA/EFTA State – who each has his own *cabinet* of Legal Secretaries (*référéndaires*) as well as administrative staff, and the registry headed by the Registrar.

While there are very many similarities, as mentioned above, the system is the same but different. Unlike the ECJ, the EFTA Court's working language is English.<sup>22</sup> Nor does the EFTA Court have advocates general. Following the receipt of all the written submissions a Report for the Hearing is prepared. This Report contains the relevant law, the facts at issue and a summary of the arguments of the parties. The parties may comment on the Report before it is published – thus providing a healthy dose of transparency.<sup>23</sup>

The EFTA Court is happy to cite ECtHR decisions directly<sup>24</sup> and even to cite academic literature - notably the concept in economics of moral hazard as formulated by Joseph E. Stiglitz the Nobel Laureate.<sup>25</sup>

A preliminary reference decision from the EFTA Court takes 8 months on average from the date of the request before judgment is handed down.<sup>26</sup> Direct action judgments – including competition and State aid law cases – take 9 months on average.<sup>27</sup>

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<sup>1</sup> [www.eftasurv.int](http://www.eftasurv.int)

<sup>2</sup> [www.eftacourt.int](http://www.eftacourt.int)

<sup>3</sup> Article 108 EEA provides: -

“1. The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including procedures for ensuring the fulfilment

of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.

2. 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.”

<sup>4</sup> Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”).

<sup>5</sup> See generally, *Frank Büchel and Xavier Lewis*, The EFTA Surveillance Authority, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016).

<sup>6</sup> Article 7 SCA.

<sup>7</sup> Article 9(2) SCA.

<sup>8</sup> Article 12 SCA.

<sup>9</sup> Article 2 EFTA Surveillance Authority Rules of Procedure (“ESA RoP”).

<sup>10</sup> *Frank Büchel and Xavier Lewis*, The EFTA Surveillance Authority, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) p.117.

<sup>11</sup> Article 3(1) SCA.

<sup>12</sup> Article 3(2) SCA.

<sup>13</sup> *Michael-James Clifton*, The Other Side of the Street: the EFTA Court’s Role in the EEA, *European Law Reporter* (2014), 7-8, 216-219, at p.217.

<sup>14</sup> Another scenario would be where scientific understanding for instance has evolved e.g. the EFTA Court’s ground-breaking development of the ‘precautionary principle’ in food law in E-3/00 *ESA v. Norway (Kellogg’s)* [2000-2001] EFTA Ct. Rep. 73; see *Alberto Alemanno*, The Precautionary Principle, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) pp.839 to 850.

<sup>15</sup> Case E-23/13 *Hellenic Capital Market Commission* [2014] EFTA Ct. Rep. 88, paragraphs 30 *et seq.* *Carl Baudenbacher*, The Relationship Between the EFTA Court and the Court of Justice of the European Union, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) p.184.

<sup>16</sup> Case E-8/13 *Abelia* [2014] EFTA Ct. Rep. 638, paragraph 46; see *Carl Baudenbacher and Philipp Speitler* Der Syndikus der Gegenwart – Interessensvertreter oder Anwalt des Rechts? *NJW* (2015) 17:1211–1214, pp. 211 *et seq.* *Carl Baudenbacher*, The Relationship Between the EFTA Court and the Court of Justice of the European Union, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) p.184.

<sup>17</sup> By 2014, the ECJ had referred to EFTA Court judgment in approximately 100 cases (*Michael-James Clifton*, *The Other Side of the Street: the EFTA Court’s Role in the EEA*, *European Law Reporter* (2014), 7-8, 216-219, at p.218). See, *inter alia*, Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Forlag AB and TV-Shop i Sverige AB* [1997] ECR I-3843, paragraph 37 (reference to Joined Cases E-8/94 and E-9/94 *Forbrukerombudet v. Mattel Scandinavia and Lego Norge* [1994–1995] EFTA Ct. Rep. 113, paragraphs 54–56 and paragraph 58); Opinion of Advocate General Poiras Maduro of 16 June 2005 in Joined Cases C-232/04 and C-233/04 *Nurten Gueney-Goerres and Gul Demir v. Securicor Aviation (Germany) Ltd and Koetter Aviation Security GmbH & Co. KG* [2005] ECR I-11237, fn. 23 (reference to Case E-2/04 *Rasmussen* [2004] EFTA Ct. Rep. 57); Opinion of Advocate General Elmer of 4 March 1997 in Case C-189/95 *Franzén* [1997] ECR I-5909, point 3 (reference to Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15); Case C-140/97 *Rechberger and Others* [1999] ECR I-3499, paragraph 39 (reference to Case E-9/97 *Sveinbjornsdottir* [1998] EFTA Ct. Rep. 95); Case C-41/02 *Commission v. The Netherlands*, paragraph 62 and Opinion of Advocate General Poiras Maduro of 14 September 2004, fn. 46 [2004] ECR I-11375 (reference to Case E-3/00 *ESA v. Norway* [2000-2001] EFTA Ct. Rep. 73, paragraphs 36 and 37); Opinion of Advocate General Trstenjak of 5 July 2002 in Case C-300/10 *Marques Almeida*, ECLI:EU:C:2012:414, fn. 25 (reference to Cases E-7/00 *Helgadottir* [2000–2001] EFTA Ct. Rep. 246, paragraph 30, and E-8/07 *Nguyen* [2008] EFTA Ct. Rep. 224, paragraph 24); Opinion of Advocate General Sharpston of 9 October 2008 in Case C-276/05 *The Wellcome Foundation* [2008] ECR I-10479, point 33 (reference to Case E-3/02 *Paranova v. Merck* [2003] EFTA Ct. Rep. 101, paragraphs 41–45); Opinion Advocate General Jaaskinen of 29 April 2010 in Case C-72/09 *Etablissements Rimbaud* [2010] ECR I-10659, fn. 39 (reference to Case E-1/04 *Fokus Bank ASA* [2004] EFTA Ct. Rep. 11, paragraphs 20 *et seq.*); Case C-49/11 *Content Services*, ECLI:EU:C:2012:419 paragraph 45 and Opinion of Advocate General Mengozzi of 6 March 2012, ECLI:EU:C:2012:126, fn. 14 (reference to Case E-4/09 *Inconsult Anstalt*, [2009-2010] EFTA Ct. Rep. 86); Opinion of Advocate General Kokott of 18 April 2013 in Case C-501/11 *P Schindler Holding and Others v. Commission*, ECLI:EU:C:2013:248, fn. 18 and 20 (reference to Case E-15/10 *Posten Norge v. ESA*, [2012] EFTA Ct. Rep. 246, paragraphs 87, 88 and 89); Case

T-345/12 *Akzo Nobel and Others v. Commission*, ECLI:EU:T:2015:50, paragraph 80 (reference to Case E-14/11 *DB Schenker v. ESA* [2012] EFTA Ct. Rep. 1178, paragraph 189).

<sup>18</sup> *Carl Baudenbacher*, The Relationship Between the EFTA Court and the Court of Justice of the European Union, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) pp.187 to 190.

<sup>19</sup> Case C-348/04 *Böhringer II* ECLI:EU:C:2007:249, paragraph 13.

<sup>20</sup> Opinion of Advocate General Sharpston of 9 October 2008 in Case C-276/05 *The Wellcome Foundation* [2008] ECR I-10479, points 33 to 36.

<sup>21</sup> While this is perhaps a little simplistic, "[f]or most intents and purposes Advisory Opinions are therefore analogous to the ECJ's judgments in references for a preliminary ruling." *Eleanor Sharpston/Michael-James Clifton*, The Two EEA Courts – Unequal Balance or Fruitful Partnership, in: *Judicial Protection in the European Economic Area*, (EFTA Court Ed.) German Law Publishers (2012) 170-186 at 174. For a more detailed analysis, see *Skuli Magnusson*, On the Authority of Advisory Opinions: Reflections on the Functions and Normativity of Advisory Opinions of the EFTA Court, *Europarättslig tidskrift* (2010) Vol 3, pp. 542 to 546, and more briefly, *Carl Baudenbacher*, Human Rights, Democracy and the Rule of Law in: *Liber amicorum Luzius Wildhaber*, Baden-Baden (2007), p.80.

<sup>22</sup> See Articles 25 and 27 EFTA Court Rules of Procedure.

<sup>23</sup> For the transparency perspective, see *Alberto Alemanno and Oana Stefan*, Openness at the Court of Justice of the European Union: Toppling a Taboo, *Common Market Law Review* (2014), 51(1), 97 (130).

<sup>24</sup> See *inter alia* Case E-14/15 *Holship Norge AS v Norsk Transportarbeiderforbund*, judgment of 19 April 2016, not yet reported, paragraph 123, Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 18, paragraph 23, and Case E-15/10 *EFTA Surveillance Authority v Posten Norge AS* [2012] EFTA Ct. Rep. 246, paragraphs 88 to 91. Compared to the EFTA Court, the ECJ is more hesitant in citing the case-law of the European Court of Human Rights, although it does still sometimes refer to it directly (for example, Case C-398/12 *M* ECLI:EU:C:2014:1057, paragraphs 39 and 40).

<sup>25</sup> Case E-16/11 *EFTA Surveillance Authority v Iceland* ("*Icesave I*") [2013] EFTA Ct. Rep. 4, paragraph 167. Tim Ward QC, Joint Head of Monckton Chambers represented Iceland in this case.

<sup>26</sup> *Michael-James Clifton*, The Other Side of the Street: the EFTA Court's Role in the EEA, *European Law Reporter* (2014), 7-8, 216-219, at p.218.

<sup>27</sup> *Michael-James Clifton*, The Other Side of the Street: the EFTA Court's Role in the EEA, *European Law Reporter* (2014), 7-8, 216-219, at p.218.