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25 years after Liechtenstein saved the EFTA Court: the case for reform

Professor Dr. Dr. Halvard Haukeland Fredriksen, University of Bergen

1. Introduction

Liechtenstein's 25 years anniversary as a member of the European Economic Area (EEA) is an opportunity both to recall how Liechtenstein's accession on 1 May 1995 essentially saved the EFTA Court, and to discuss the current need for reforms of the Court and the procedural framework within which it operates if the success of the EEA is to be extended to the next 25 years.[1]

2. 1995: Liechtenstein as the saviour of the EFTA Court

When Austria, Finland and Sweden became members of the European Union on 1 January 1995, only Iceland and Norway were left in the EFTA-pillar of the EEA. The three key EEA/EFTA institutions in the architecture of the EEA – the Standing Committee of the EFTA States (with the EEA section of the EFTA Secretariat), the EFTA Surveillance Authority (ESA) and the EFTA Court – were originally planned to serve an EFTA-pillar of seven states. The Swiss "no" to the EEA Agreement in 1992, and the resulting uncertainty as to Liechtenstein's participation in the EEA, was a considerable blow to the EFTA-pillar, but not one that threatened the whole set-up. An EFTA Court with seven judges would have been even better than the five-member court that was inaugurated on 1 January 1994, but no one questioned the ability of the EFTA Court to function with five judges. This was very different with the departure of Austria, Finland and Sweden only twelve months later, as it left the EFTA-pillar with only two members and, consequently, the EFTA Court with only two judges.[2]

The pragmatic provisional solution found by Iceland and Norway, pending a much-hoped for Liechtenstein accession to the EFTA-pillar of the EEA, was to entrust the remaining Icelandic and Norwegian judge with the task to elect a third judge, on a case by case basis, from a list established by common accord by the Icelandic and Norwegian government.[3] The sustainability of this solution, not least with regard to the EU's trust in the judicial set-up of the EEA Agreement post 1995, was very much in doubt. This was particularly so because the list of ad hoc judges agreed by Iceland and Norway included Icelandic and Norwegian citizens only, thus guaranteeing an all Icelandic-Norwegian court to deal with any disputes concerning Iceland's and Norway's fulfilment of their EEA law obligations. If the two regular judges could not agree, the ad hoc judge was to be chosen from the list by lot, with the inherent risk of a politically sensitive case against e.g. Norway being decided by a court with a majority of Norwegian members, or *vice versa* concerning Iceland. As the EEA Agreement's objective to integrate the EEA/EFTA States into the EU's internal market rests on the Court of Justice of the EU (CJEU) being willing to interpret EEA law in line with its own interpretation of corresponding provisions of EU law, it was clear from the very beginning that the EFTA Court's ability to gain the trust of the CJEU was a *sine qua non* for the success of the EEA Agreement.[4]

If an all Icelandic-Norwegian EFTA Court could have convinced the CJEU of the merit of the EEA in the same way as the Icelandic-Liechtenstein-Norwegian EFTA Court eventually did, we will never know. Much to the relief of the governments of Iceland and Norway, the Liechtenstein electorate confirmed its will to participate in the EEA also without Switzerland in a referendum on 9 April of 1995, thus allowing for the entry into force of the EEA Agreement for Liechtenstein on 1 May that year. Fortunately, no case happened to be brought before the EFTA Court in the first four months of 1995, so that the provisional solution was never put to the test. The rest, as far as the first 25 years of the EEA is concerned, is a by now well documented history. The EFTA Court demonstrated its commitment to a homogeneous EEA by rejecting pleas from the EEA/EFTA States for EEA-specific ("State-friendly") exceptions from the CJEU's interpretation of corresponding provisions of EU law on numerous occasions, and strengthened the enforcement of EEA law at the national level through EEA-versions of the EU law principles of State liability for breaches of EU law and the principle of EU-conform interpretation of national law.[5] The CJEU responded in kind by shelving the initial scepticism towards the EEA voiced in its Opinions 1/91 *EEA I* and 1/92 *EEA II*, opting instead for an interpretation of the EEA Agreement which essentially puts citizens and

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[1] Some of the proposals in this paper was originally presented in the speech "The EEA 25 Years On: Resting on the laurels or facilitating mutual trust and dynamic homogeneity also in future?", Joint ESA and EFTA Court celebratory conference, Brussels 14 June 2019, but they have since been honed as a result of constructive critique from several colleagues.

[2] The same considerations applied, and still applies, to the number of college members of the EFTA Surveillance Authority, but that is outside the scope of this contribution. As to the Standing Committee of the EFTA States, and thus the EFTA Secretariat, the number of EEA/EFTA states was less of a concern as long as the remaining states would continue to provide the secretariat with sufficient resources. However, the Standing Committee has in recent years been entrusted by the EU-side with certain administrative tasks that it will not be able to fulfil with less than three member states, see further Halvard Haukeland Fredriksen and Johanna Jonsdottir, Comments on Art 3 of the Standing Committee Agreement in Finn Arnesen et.al. (eds.), *The Agreement on the European Economic Area – a Commentary*, 2018.

[3] Article 12 of the Agreement between Iceland and Norway Adjusting Certain Agreements Between the EFTA States, 29 December 1994. The text of the agreement is reproduced in Annex II of the Report of the EFTA Court 1 January 1994 – 30 June 1995.

[4] See, e.g., Carl Baudenbacher, *The EFTA Court in Action*, German Law Publishers (2010), as well as numerous other books and articles by the same author, who served as the EFTA Court judge nominated by Liechtenstein for almost 23 years, 15 of which as the Court's president, and who better than most understood the importance to the EEA of the EFTA Court's standing in the eyes of the CJEU.

[5] See, e.g., Halvard Haukeland Fredriksen, "The EFTA Court 15 Years On", *International and Comparative Law Quarterly* 59 (2010), pp. 731–760.

economic operators from the EEA/EFTA States on the same footing as their EU counterparts.[6]

Liechtenstein's contribution to this success story is by no means limited to just providing the EFTA Court with a third regular judge. Given the many similarities between the legal culture of Iceland and Norway, and the considerable distance of both countries, both geographically and otherwise, from continental Europe, the inclusion of a continental, monist, German-speaking legal system with close ties to both Austrian and Swiss legal culture, brought much-needed perspectives and diversity to the EFTA-pillar of the EEA. This effect was strengthened further by the multinational character of the Liechtenstein cabinet of the EFTA Court, in contrast to its all-Icelandic and all-Norwegian counterparts. In short, without Liechtenstein's accession to the EEA, it would have been much harder for the EFTA Court to acquire and demonstrate the required command of the multicultural (but nevertheless predominantly continental) "melting-pot" methodology of the CJEU – with its emphasis on the need to compare different language versions of the *acquis communautaire*; its operationalization of the constitutional traditions common to the member states; its deduction of (in the eyes of Nordic lawyers) rather lofty general principles and its federalist approach to the relationship between EU law and the national legal orders of the member states, including a much more thorough review of decisions made by national legislators and administrative authorities than what Icelandic and Norwegian lawyers were accustomed to anno 1995. An all Icelandic-Norwegian EFTA Court would also have struggled even more than the EFTA Court indeed did for quite some time to convince the national courts of its superior expertise in EEA law, and thus the merit of the possibility to ask the EFTA Court for advisory opinions on the interpretation of EEA law.

Of importance is also the continuity provided by the fact that Liechtenstein nominated the same judge, the Swiss law professor Carl Baudenbacher, for no less than four consecutive six-year terms, reportedly also in the face of opposition from the other EEA/EFTA States.[7] Liechtenstein's firm stance allowed Mr. Baudenbacher to serve almost 23 years on the court before he stepped down in 2018. The continuity was further strengthened by the fact that his fellow judges elected him as president of the EFTA Court for five consecutive three-year terms (2003–2017). The close ties between the EFTA Court and the EU courts that this allowed for, undoubtedly contributed to higher awareness in the EU courts about both the EEA Agreement in general and the EFTA Court in particular.[8]

For all of these reasons, it seems justified to suggest that Liechtenstein saved the EFTA Court, and with it perhaps the entire EEA Agreement, when it became a member of the EEA on 1 May 1995.

3. 2020: the case for a reform of the EFTA Court and the procedural framework within which it operates

3.1 Introduction

The remarkable stability of the judicial architecture of the EEA in the 25 years after Liechtenstein's accession may be interpreted as proof that everything is just fine, and that no action is needed to prepare the EFTA Court for the next 25 years. However, resting on one's laurels is never a good strategy, and particularly not in a situation where developments within the EEA, within the EU and in the EU's relationship to other non-members all pose challenges to the two-pillar structure in general, and the EFTA Court in particular.

3.2 Less room for pragmatism due to developments in EU-UK and EU-Switzerland relations

Starting with the latter category, developments in both EU-UK and EU-Switzerland relations could spill over onto the EU's (and in particular the CJEU's) assessment of the judicial architecture of the EEA. A common feature of the Agreement on the withdrawal of the UK from the EU,[9] the political declaration setting out the framework for the future relationship between the EU and the UK[10] and the proposal for an Institutional Framework Agreement between the EU and Switzerland[11] is a firm and principled approach to matters of dispute settlement. In contrast, the EEA comes across as more pragmatic and trust-based, with the EU essentially counting on the EFTA Court to fill the void left by the stillborn EEA Court, thereby pre-empting the need for a legally binding dispute

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[6] See Fredriksen, op.cit., pp. 750 ff. The "same footing" remark stems from the more recent judgment in Case C-81/13 *UK v Council*, ECLI:EU:C:2014:2449, para. 59.

[7] According to Baudenbacher, *The EFTA Court in Action* (2010), p. 8.

[8] As acknowledged, e.g., in the editors' preface of Arnesen et al (eds.), *The EEA Agreement – a Commentary*: "[T]he EFTA Court and its long-serving President Carl Baudenbacher has initiated and published a number of important contributions, culminating in the Court's 20th anniversary *Festschrift* 'The EEA and the EFTA Court – Decentred Integration' (2014) and Baudenbacher (ed.), 'The Handbook of EEA Law' (2016). A notable achievement with the publications originating in and around the EFTA Court is the ability to engage leading commentators from the EU-pillar of the EEA, including Judges and Advocates General from the EU courts. In this way, the EFTA Court has managed to keep alive a debate about EEA law that makes sure that key actors in the EU-pillar remain aware of the existence and peculiarities of EEA law".

[9] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020).

[10] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (OJ C 34, 31.1.2020).

[11] Accord facilitant les relations bilatérales entre l'Union Européenne et la Confédération Suisse dans les parties du marché intérieur auxquelles la Suisse participe, 23 November 2018.

resolution mechanism for cross-pillar disputes between the EU-side and one or more EEA/EFTA States. A particularly striking example is the *Icesave* case, where the EFTA Court was essentially asked by the EFTA Surveillance Authority to settle an EEA-law based dispute between two EU member states (the Netherlands and the UK) and Iceland, and with the EU-side accepting the judgment in favour of Iceland as settling the matter even though legally not bound to do so.[12] This trust in the EFTA Court is the reason why the EU so far has accepted references to the weak dispute resolution mechanism found in Article 111 EEA in the increasing number of cases where the continued success of the EEA is dependent on the EEA/EFTA States being affiliated to the growing number of EEA-relevant EU agencies.[13] However, in a situation where both the UK and Switzerland can be expected to want affiliation to at least some of these agencies, questions of the merit of the pragmatic solutions may arise. In order to avoid potential spill-over onto the question of effective cross-pillar dispute resolution in the EEA in general, the EEA/EFTA States might want to single out and deal with the specific problems caused by their affiliation to the EU agencies (see section 4.4 below).

3.3 Less room for pragmatism due to the rule of law crisis in Poland

Secondly, internal challenges within the EU concerning the rule of law in certain member states may also limit the room for trust-based pragmatism in the EEA. Not because of developments in any of the EEA/EFTA States, but because of spill-over effects from the CJEU's firm and principled approach in the cases concerning the rule of law-crisis in Poland. Through the grand chamber judgments in Case C-619/18 *European Commission v Poland*[14] and Joined Cases C585/18, C624/18 and C625/18 *A.K. and Others*[15] the CJEU has made it very clear that the EU member states' competence to organize their judiciary is limited by the EU's adherence to the rule of law, as enshrined in Article 2 TEU and concretized in Article 19(2) TEU and Article 47 of the EU Charter of Fundamental Rights. To the EEA/EFTA States, it may be a matter of some concern that *none of these provisions* are mirrored in the EEA Agreement. The EEA/EFTA States can point to the fact that the EFTA Court has stated very clearly that the principle of effective judicial protection is a general principle of EEA law[16], but the CJEU may nevertheless follow the European Court of Human Rights' recent assessment that this is not sufficient to remedy the fact that the EEA Agreement does not include the EU Charter of Fundamental Rights, "or any reference whatsoever to other legal instruments having the same effect".[17]

Furthermore, in the abovementioned Case C-619/18, the CJEU stressed that "the European Union is a union based on the rule of law in which individuals have *the right to challenge before the courts the legality of any decision or other national measure concerning the application to them of an EU act*".[18] In the EFTA-pillar of the EEA, however, the EFTA Court has not been given jurisdiction to assess the legality of the decisions of the EEA Joint Committee, neither in direct actions nor by way of preliminary references from national courts who might wonder if the EU legal act they are asked to apply, is valid *as a matter of EU law*.[19] To a certain extent, as suggested by the EFTA Court in Case E-6/01 *CIBA*, this flaw in the judicial protection under the EFTA-pillar may be remedied by "interpreting away" an EEA norm which the EU courts, in the setting of EU law, would declare null and void.[20] Still, there are limits as to how far one can get by way of interpretation, and the underlying assumption that the validity of an EU legal act *qua EU law* is a premise for the validity of the Joint Committee's decision to incorporate it into the EEA Agreement is controversial.[21] In any event, the lack of any provision in the EEA Agreement or the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement; SCA) to support judicial review of the decisions of the EEA Joint Committee may make it hard to convince the CJEU that the judicial protection offered in the EFTA-pillar is indeed equivalent to the protection guaranteed within the EU.

Once again, this problem is accentuated by recent developments in the EU's administration of the internal market. The Commission's powers to enact so-called delegated or implementing acts[22] are constantly growing, in ever more fields of the internal market. As the main rule, such acts only become effective in the EEA once they have been adopted by the EEA Joint Committee, and their validity as a matter of EEA law is then based on the decision of the Joint Committee. If an affected individual or economic operator in the EFTA-pillar of the EEA wants to challenge the legality *as a matter of EU law* of such an act, citing the CJEU's abovementioned finding

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[12] Case E-16/11 *EFTA Surveillance Authority v Iceland ("Icesave")*, [2013] EFTA Ct. Rep. 4.

[13] See, e.g., the decisions of the EEA Joint Committee No 199/2016 of 30September 2016 (European Banking Authority); No 93/2017 of 5 May 2017 (Agency for the Cooperation of Energy Regulators) and No 154/2018 of 6 July 2018 (EU Data Protection Board).

[14] Case C-619/18 *European Commission v Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531.

[15] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Polish Supreme Court)*, ECLI:EU:C:2019:982.

[16] E.g. Case E-15/10 *Posten Norge* [2012] EFTA Ct. Rep. 246, para 86.

[17] Judgment of 5 November 2019 in the case of *Konkurrenten.no AS v. Norway* (Application no. 47341/15), para. 43. The context was an *obiter dictum* concerning the application to the EEA/EFTA States of the ECtHR's so-called *Boshporus* presumption of conformity with the ECHR in cases where an EU member state does no more than implement legal obligations flowing from its membership of the EU. According to the second section of the ECtHR, "the basis for the presumption established by *Bosphorus* is in principle lacking when it comes to the implementation of EEA law at domestic level within the framework of the EEA Agreement, due to the specificities of the governing treaties, compared to those of the European Union".

[18] Case C-619/18, para. 46.

[19] See Articles 36 and 34 SCA, respectively.

[20] Case E-6/01, *CIBA* [2002] EFTA Ct. Rep. 282.

[21] See further Halvard Haukeland Fredriksen and Christian N.K. Franklin, "Of pragmatism and principles: The EEA Agreement 20 years on", *Common Market Law Review* 52 (2015), pp. 629–684, on p. 682.

[22] Articles 290 and 291 TFEU.

in Case C-619/18, the EFTA Court's lack of jurisdiction to review the decisions of the EEA Joint Committee will be exposed. Furthermore, there is nothing the EEA/EFTA States can do to prevent an affected individual or economic operator to pursue this question before the EU Courts, e.g. as a reason to challenge the legality of the EU's decision to take part in the relevant decision of the EEA Joint Committee. Whilst it is true that the CJEU rejected one such an attempt almost 15 years ago in Case C-368/05 P *Polyelectrolyte Producers Group*, postulating that effective judicial protection would be offered by Norwegian courts,[23] the CJEU did not really analyse the ability of Norwegian courts to rule on the legality of a decision of the EEA Joint Committee, neither generally nor with regards to alleged underlying violations of EU law.[24] In light of subsequent developments of EU law, including the enactment of Article 19(2) TEU and the CJEU's emphasis of the right of individuals to challenge before the courts the legality of any decision or other national measure concerning the application to them of an EU act, the EEA/EFTA States should take for granted that the pragmatic approach adopted in *Polyelectrolyte Producers Group* will still be considered good law.

A recent example of how spill-over from the CJEU's firmer approach to the rule of law affects established caselaw, is the Grand Chamber judgment in Case C-274/14 *Banco de Santander*.[25] As a result of the CJEU linking the rule of law-based requirements of the independence of the national courts with the question of which bodies that qualifies as a 'court or tribunal' eligible to request a preliminary ruling from the CJEU under Article 267 TFEU, the Grand Chamber felt obliged to limit the access to the preliminary rulings procedure. The judgment may well be criticised for failing to explain why the requirements to the independence of the judicial bodies responsible for applying EU law at the national level needs to be the same in these very different contexts,[26] but for present purposes this only enforces the view that the CJEU's firmer approach to the rule of law will spill-over to related questions. The EEA/EFTA States should not take for granted that this will not also affect the CJEU's assessment of the judicial protection required in the EFTA-pillar of the EEA.

3.4 The ever-growing complexity of the EU's regulation of the internal market

Finally, at a more general level, the last 25 years have seen a steady increase in the volume and complexity of the EU's regulation of the internal market, and hence also of EEA law. As a natural reaction, a certain amount of specialization is emerging also within the EU courts – in particular within the General Court with its now 54 judges and among the CJEU's now 11 Advocates General. Even if the EFTA Court could never compete with the EU courts as regards the number of judges and assistants, the differences have become particularly stark since the enlargement of the General Court in 2015–2019. Between them, the two EU courts now have 81 judges and 11 Advocates General, each with their own cabinets with 3-4 legal secretaries, and backed up by a Research and Documentation Directorate (with a team of around 35 lawyers – covering in principle all the Member States' legal systems), a library of considerable size, a Terminological Coordination Unit, and a vast number of lawyer-linguists.[27] The EFTA Court's three judges and six legal secretaries hardly compare.

The challenge that the growing complexity and specialization of EEA law entails for the EFTA Court, is accentuated by the fact that it is met by increasing specialization at the national level. As a result, complex matters of competition law, tax law, intellectual property law, financial markets law, public procurement law etc. are pleaded by lawyers specializing in the relevant field of law, often before equally specialised courts or tribunals, or at least before national judges with considerably more insight into EEA law than what was the case in the EFTA Court's first years of existence. As a result, the questions referred to the EFTA Court under Article 34 SCA have become more complex,[28] whilst at the same time the expectations from those asking them have become higher. Thus, the task of the EFTA Court is becoming increasingly herculean.

4. What a reform might want to include

4.1 Introduction

Turning to the details, and leaving aside suggestions that would require changes to the Main Part of the EEA Agreement, the following are the most important matters that a reform of the EFTA Court and the procedural framework within which it operates, might include.

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[23] Case C-368/05 P *Polyelectrolyte Producers Group*, ECLI:EU:C:2006:771.

[24] The matter was pursued before Norwegian courts, but never put to the test as the EFTA Court, upon a request from the Oslo City Court, held the decision of the EEA Joint Committee to be within the committee's competences (Case E-6/01 *CIBA*), which again caused the plaintiffs to withdraw the action.

[25] Case C-274/14 *Banco de Santander,* ECLI:EU:C:2020:17.

[26] The objects and purposes of the preliminary ruling procedure – to ensure correct application of EU law at the national level in all fields of EU law and to facilitate for unclear questions of EU law to be brought before the CJEU, including questions that in many member states are dealt with almost exclusively by various kinds of complaints boards that might not live up to the standard of independence now required by the CJEU – suggest that the notion 'court or tribunal' in Article 267 TFEU ought to be interpreted rather generously. As long as any case involving EU-based rights can, if need be, eventually be brought before a court that lives up to the requirements of Articles 2 and 19 TEU and Article 47 of the Charter of Fundamental Rights, it is not a rule of law problem if also other judicial bodies have access to the CJEU by way of preliminary references, rather to the contrary.

[27] Source: the CJEU's homepage www.curia.europa.eu.

[28] Fairly recent examples include Cases E-3/13 *Olsen* [2014] EFTA Ct. Rep. 400 (referral from the Norwegian Tax Appeals Board for the Central Tax Office for Large Enterprises); Case E-27/15 *B* [2016] EFTA Ct. Rep. 740 (referral from Liechtenstein's Beschwerdekommission der Finanzmarktaufsicht); Case E-5/16 *Oslo kommune* [2017] EFTA Ct. Rep. 52 (referral from the Norwegian Board of Appeal for Industrial Property Rights); Case E-7/19, *Tak – Malbik* (referral from the Icelandic Public Procurement Complaints Committee) (pending).

4.2 Confirming adherence to fundamental rights and the rule of law

Inspired by Articles 2, 6 and 19 of the EU Treaty and Article 47 of the Charter of Fundamental Rights, the EEA/EFTA States could propose an amendment to Protocol 1 of the EEA Agreement in order to confirm their adherence to fundamental rights and the rule of law, thereby establishing a firm textual basis for the EFTA Court's approach to fundamental rights, including the right to effective judicial protection, as general principles of EEA law. Admittedly, the EFTA Court must be presumed to continue to protect the fundamental rights of individuals and economic operators also without any such amendment, but the added value of a firm legal basis, in particular in the eyes of the ECtHR and the CJEU, should not be underestimated.

The amendment could read as follows:

The European Economic Area is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Contracting Parties in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Fundamental rights, as guaranteed by the Charter of Fundamental Rights of the European Union and by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Contracting Parties, shall constitute general principles of EEA law.

The Charter of Fundamental Rights is not adapted for the purposes of the Agreement. It is relevant to the extent necessary for the proper interpretation and application of the Agreement, with a view to maintain a homogeneous European Economic Area with equal protection of fundamental rights.

The Contracting Parties shall provide remedies sufficient to ensure effective legal protection in the fields covered by EEA law.

If, for some reason, the EU-side should not agree to such an amendment to Protocol 1 EEA, the EEA/EFTA States could instead amend the Surveillance and Court Agreement accordingly. But it would be preferable to include this in the EEA Agreement as such, and it is very difficult to see why the EU would not agree to this.

4.3 Extending the EFTA Court

Turning to the EFTA Court as such, both the abovementioned specialization of EEA law and vulnerability to absences (due to illnesses, recusals etc.) that is inherent in a bench of only three[29], suggest that the court ought to be extended to, at least, its original size of five judges. A lighter version of such a reform was actually suggested by the EFTA Court itself in 2011, when the Court advocated for the possibility to add two ad hoc judges to the bench in important cases.[30] However, a more robust (but of course also costlier) solution would be to add two permanent judges. This is particularly so if the new judges are recruited from the EU-pillar of the EEA, as they will then be able to bring to the EFTA Court perspectives on EU/EEA law not already present within the institution. This would presumably also strengthen the EFTA Court's standing in the eyes of the EU, in particular if the EEA/EFTA States were to appoint renowned former judges or advocates general from the CJEU. It may also strengthen the understanding in the EEA/EFTA States that the EFTA Court has expertise in EU/EEA law that national courts or tribunals cannot match, which again may lead to more requests for advisory opinions.

As part of such an enlargement of the EFTA Court, the EEA/EFTA States should also establish an independent panel to give an opinion on the suitability of potential appointees, based on the template of the panel established in the EU by the Lisbon Treaty (Article 255 TFEU). There is no reason to believe that such a panel would have given a negative opinion on any of the judges so far appointed to the EFTA Court, nor that the EEA/EFTA States have any intention to nominate someone who would suffer such a fate in future. It may then of course be argued that there is no need for such a panel, but this argument fails to acknowledge the added value to the standing of the EFTA Court. The panel should cooperate with the EU's so-called Article 255-panel, preferably also by including some of the members of the latter. This will both help keep the costs down and assure its credibility.

4.4 Institutionalized cooperation with the CJEU

Even though an increase from three to five judges will help, it will remain impossible for the EFTA Court to match the manpower and resources of the EU courts. To add a lone Advocate General to the EFTA Court, as suggested by the EFTA Court itself in 2011[31], is hardly a solution in a situation of emerging specialisation among the now 11 Advocates General of the CJEU. A better approach would be to establish closer cooperation with the CJEU, with a view to a pooling of the resources available to support the judges.

A first element in such cooperation should be the CJEU's Research and Documentation Directorate. As long as the EEA/EFTA States are prepared to shoulder a fair share of the costs, thus enabling the Research and Documentation Directorate to offer even better support also to the CJEU's own judges and advocates general in future,

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[29] As demonstrated by the recent "Fosen-Linjen-saga", where the bench had to be completed by an ad hoc judge both in the first and the second round, and where one ultimately ended up in a situation where *none* of the three judges who sat in *Fosen-Linjen I* took part in *Fosen-Linjen II* (Case E-16/16 and E-7/18, respectively).

[30] See 'An Extended EFTA Court? The EFTA Court proposes amendments to the SCA', Press Release 11/11, 8 December 2011. For unknown reasons, the proposal is no longer available at the EFTA Court's homepage (www.eftacourt.int), but if may be obtained from the Court upon request to the Registrar. The decision to submit a case to the Extended Court was to be taken by the regular judges based on their assessment of the importance of each case. The two ad hoc judges were to be chosen randomly from a pool of nine (up from today's list of six). However, two ad hoc judges from the same EFTA State should not take part in the disposal of a case if ad hoc judges from other EFTA States were available.

[31] See 'An Extended EFTA Court? The EFTA Court proposes amendments to the SCA', Press Release 11/11, 8 December 2011.

there seems to be no reason why CJEU should deny the EFTA Court access to this resource. A Research and Documentation Directorate with lawyers with in-depth knowledge of the legal systems of Iceland, Liechtenstein, and Norway (and of the specifics of EEA law) would also benefit the CJEU itself in cases related to the EEA Agreement or any of the other agreements between the EU and one or more of the EEA/EFTA States, and indirectly also the EEA/EFTA States.

Another, admittedly more challenging but also potentially even more rewarding, proposal is for the EFTA Court to get access to the CJEU's pool of Advocates General. An opinion from an Advocate General will not bind the EFTA Court, and will therefore be problematic neither to the independence of the EFTA Court nor to the sovereignty of the EEA/EFTA States. As EU/EEA law becomes ever more specialized, input from an Advocate General with expert knowledge in just the relevant field of EU/EEA law would be very helpful for the EFTA Court. As long as the EEA/EFTA States are prepared to contribute to the CJEU's budget, e.g. by financing the costs of one of the court's Advocates Generals, there is no obvious reason why the CJEU should refuse to assist the EFTA Court in this way.[32]

4.5 Allowing for *Foto Frost* referrals from the EFTA Court to the CJEU

Furthermore, in light of the shortcomings of the judicial protection offered in the EFTA-pillar in cases where the decisive question is whether an EU legal act is valid *qua EU law* (see section 3 above), the EEA/EFTA States should introduce the possibility for the EFTA Court to ask the CJEU to rule on this specific question.[33] As long as this possibility is limited to questions of validity of EU legal acts *as a matter of EU law*, such a preliminary reference procedure should be acceptable to both the EEA/EFTA States and the EFTA Court – it will still be for the EFTA Court to rule on the consequences in the EFTA pillar of the EEA of an answer from the CJEU which either invalidates or upholds the EU legal act in question. Furthermore, following the logic behind the *Foto Frost* doctrine[34], a referral should only be made in cases where the EFTA Court is inclined to regard an EU legal act as invalid. It should be exclusively for the EFTA Court to decide if the assistance of the CJEU is called for.

Such a reform would fit well with the current trend towards more formalised forms of judicial dialogue,[35] and is better tailored to the specificities and current functioning of the EEA than the alternatives – direct referrals from the national courts of the EFTA States to the CJEU, or referrals from the EFTA Court to the European Court of Human Rights (ECtHR).[36] Importantly, it should not be viewed as any depreciation of the EFTA Court but rather as a reform elevating it to the status of a formal dialogue partner of the CJEU. In addition to remedying a flaw in the judicial protection offered in the EFTA-pillar of the EEA, it might also increase the number of preliminary references from national courts to the EFTA Court, and possibly even pre-empt the difficulties which might conceivably arise in the event that Protocol 16 ECHR were to be ratified and utilized by the EFTA States.[37]

It can be accomplished by the EEA/EFTA States unilaterally by operationalizing Article 107 and Protocol 34 EEA as follows:

Where a question concerning the validity of an act of an institution, body, office or agency of the European Union arises in a case pending before the EFTA Court, that court, as a court common to the EFTA States, may, if it considers this necessary, request the Court of Justice of the EU to decide thereon.

The Court of Justice of the EU shall only have jurisdiction the give preliminary ruling on the act's validity as a matter of EU law, leaving it to the EFTA Court to draw the EEA law consequences thereof.

A draft decision of an institution, body, office or agency of the European Union addressed to the EFTA Sur-

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[32] The CJEU's (not very convincing) view in Opinion 1/91 *EEA I* that it would be "difficult, if not impossible" (para. 52) for CJEU judges to tackle questions of EU law "with completely open minds" if they had already taken part in determining the same questions in an EEA law setting as members of the originally agreed EEA Court, cannot reasonably by extended to include the CJEU's Advocates Generals.

[33] See on this Fredriksen and Franklin, "Of pragmatism and principles: The EEA Agreement 20 years on", *Common Market Law Review* 52 (2015), pp. 629–684, on p. 683 f.

[34] Case 314/85 *Foto Frost*, ECLI:EU:C:1987:452, where the CJEU held that a national court that considers an EU legal act invalid, has to refer the matter to the CJEU by way of a preliminary reference.

[35] See the new preliminary reference procedures under Protocol 16 ECHR (referrals to the ECtHR from the highest courts and tribunals of the States party to the ECHR) and Article 21 of the Agreement on a Unified Patent Court (referrals to the CJEU) as well as the proposed 'prior involvement procedure' under Article 3(6) of the Treaty on the Accession of the EU to the ECHR (referrals from the ECtHR to the CJEU). The fate of the latter procedure is of course highly uncertain after the CJEU's Opinion 2/13, *ECHR*, but this does not change the fact that formalized forms of judicial dialogue appears to be on the rise.

[36] Article 107 EEA gives the EFTA States the possibility to allow their courts to send preliminary questions to the CJEU, but the result would be binding decisions on the interpretation of *EEA rules* (as opposed to matters of *EU law* only, as suggested here) and the EFTA States have made very clear that such an exception from the two-pillar structure is off the table. As to preliminary references from the EFTA Court to the ECtHR, based on the new Protocol 16 ECHR, see. Kokott and Dittert, "European Courts in Dialogue", in: EFTA Court (ed.), The EEA and the EFTA-Court-Decentred Integration, Hart Publishing 2015. However, direct involvement of the ECtHR would be rather alien to the already complex judicial architecture of the EEA and could, in particular in the light of the ECJ's assessment of this protocol in its Opinion 2/13, further complicate the relationship between the EFTA Court and the ECJ. In any event, it will only be of help in situations where the validity of an EU legal act is related to fundamental rights protected by the ECHR.

[37] In the light of the ECJ's very critical assessment of this protocol in its Opinion 2/13 ECHR, ECLI:EU:C:2014.2454 it will certainly be interesting to see if the EFTA States will ratify it and thus open up for indirect review of EU legal acts via the EEA Agreement and the highest courts of the EFTA States.

veillance Authority or an EFTA State is to be considered an act within the meaning of this provision.

4.6 Introducing an obligation to engage with the EFTA Court

A strengthening of the EFTA Court along the lines suggested here ought to be followed up by the introduction of an obligation on the highest courts of the EEA/EFTA States to make use of Article 34 SCA in cases where the legal situation lacks clarity. This will strengthen the standing of the EFTA Court, both within the EFTA-pillar and in the eyes of the EU, whilst at the same time preserving the partner-like relationship between it and the national courts.[38] An obligation to engage in a dialogue with the EFTA Court does not subordinate the national courts to it, and it does therefore not raise any questions related to transfer of judicial sovereignty.

It can be achieved by amending Article 34 SCA as follows:

4. Where any such question is raised in a case pending before a court or tribunal of an EFTA State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the EFTA Court.

At the same time, the EEA/EFTA States could add another paragraph to Article 34 SCA to the effect that national courts are to pay 'due account' to an advisory opinion from the EFTA Court, thereby clarifying that they are neither binding nor to be ignored.

An obligation on the highest courts to make use of Article 34 SCA could be expected to increase the number of references also from other courts and tribunals of the EEA/EFTA States, something which again could help justify the costs involved in the suggested strengthening of the EFTA Court.

5. Conclusion

In light of the developments and challenged described in section 3 above, the reform proposals set out in this contribution will facilitate continued EU/CJEU trust in the institutional set up of the EEA, strengthen the relationship between the EFTA Court and the CJEU, relieve the EFTA Court of the undesirable task of indirect review of EU acts, strengthen the position of the EFTA Court within the EFTA pillar, consolidate the two-pillar structure and prevent *ex post* ECtHR review of EFTA Court decisions. It will cost some money, of course, but given all of the three EEA/EFTA States' clearly stated interest in the continued success of the EEA Agreement, and acknowledging the EFTA Court's key role in this regard, it will be money well spent.

[38] See further Halvard Haukeland Fredriksen, «Judicial dialogue in the EFTA pillar of the EEA – developments and challenges», EftaStudies.org., 4 November 2019.

Unmittelbare Wirkung und Vorrang im EWR: Schutz einer abstrakten Souveränität der EFTA-Staaten oder konkreter Rechtschutz für Bürger und Unternehmen?

Georges Baur

I. Einführung

Man kann sich zu Recht fragen, wozu es schon wieder einen Beitrag zur Frage der unmittelbaren Wirkung und des Vorrangs von EWR-Recht in den EWR/EFTA-Staaten braucht. Was diese beiden Prinzipien im EU-Recht anbelangt, so sind die Publikationen dazu Legion.[1] Der Gerichtshof der Europäischen Union (EuGH) und die nationalen Gerichte haben sich immer wieder mit diesem Thema befasst, da seit der Weichenstellung in den Rs. *Van Gend en Loos*[2] vom 5. Februar 1963 (Unmittelbare Wirkung) bzw. *Costa/ Enel*[3] vom 15. Juli 1964 (Vorrang) immer neue Fallkonstellationen entstanden sind. Damit entstand jeweils neuer Diskussionsbedarf in der rechtswissenschaftlichen Literatur.

Sehr viel wurde auch zur unmittelbaren Wirkung und zum Vorrang hinsichtlich der Anwendung dieser Prinzipien im Rahmen des EWR-Abkommens (EWRA) geschrieben. Dies hat nicht zuletzt damit zu tun, dass es sich dabei um Prinzipien des EU-Rechts handelt, welche einerseits zur Sicherung der Homogenität im EWR notwendig sind, andererseits mit dem besonderen Charakter des EWR und seiner Zwitterstellung zwischen Völker- und Europarecht schwierig zu vereinbaren sind. Da das EWRA darauf beruht, dass von keiner Vertragspartei[4] verlangt wird, «einem Organ des Europäischen Wirtschaftsraums Gesetzgebungsbefugnisse zu übertragen»,[5] gibt es auch keine EWR-weite Festlegung auf den der EU-Rechtsordnung inhärenten Monismus,[6] welcher Voraussetzung für eine unmittelbare Wirkung bzw. den Vorrang von EU-Recht ist. Dies erschwert die homogene Rechtsetzung und -anwendung auf nationaler Ebene zusätzlich, da Liechtenstein der monistischen Völkerrechtstheorie folgt, während Island und Norwegen sog. dualistische Staaten sind. [7]

Das EWRA ist dadurch gekennzeichnet, dass es in sich viele gegensätzliche Interessen und Prinzipien vereini-

[1] Siehe etwa das Inhaltsverzeichnis bei *Kruis*, Der Anwendungsvorrang des EU-Rechts in Theorie und Praxis (2013) 682–707.

[2] EuGH C-26-62, *Van Gend en Loos*, ECLI:EU:C:1963:1.

[3] EuGH C- 6-64, *Costa/ENEL*, ECLI:EU:C:1964:66.

[4] Naturgemäss kann es sich dabei nur um die EFTA-Staaten handeln, da die EU-Mitgliedstaaten bereits im Rahmen der EU gebunden sind.

[5] EWRA, Präambel zu Protokoll 35.

[6] *Baur/Sánchez-Rydelski/Zatschler*, European Free Trade Association (EFTA) and the European Economic Area (EEA)[2] (2018) Rz. 214.

[7] Das heisst vereinfacht, dass nach der monistischen Völkerrechtstheorie das Völkerrecht Teil der nationalen Rechtsordnung ist, während Völkerrecht nach der dualistischen Völkerrechtstheorie einen vom nationalen recht getrennten Rechtsbestand darstellt und deshalb zu seiner innerstaatlichen Gültigkeit zunächst einer Transformation bedarf. Siehe zum Ganzen: *Keller*, Rezeption des Völkerrechts (2003).