UKLegalFuture

Legal Insight into the UK's Relationship with Europe

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BEYOND BREXIT: THE UK AND EFTA COURT

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I. The EEA – its evolution and current functions

1. General

Goals:

- Extension of the EU single market to the EFTA States.
- EFTA States open up their markets.

Content:

- Prohibition to discriminate.
- Fundamental freedoms.
- Competition and State aid law.
- Harmonised economic law.

Revolutionary step: Two pillar system (in 1961-1963 nobody thought of this):

Legislation: Co-determination right of the EFTA States, but no co-decision right.

Enforcement: Own Surveillance Authority ("ESA") (3 College Members) and own Court of the EFTA States (3 Judges).

2. Common policies excluded

In the fields of foreign trade, agriculture, fisheries, taxation, currency, the EFTA States have retained their sovereignty.

The EEA is no customs union, but an enhanced free trade area.

3. Backbones

(1) Reciprocity:

As a matter of principle, there ought to be the same enforceable rights for individuals and economic operators in both pillars.

But no direct effect and no primacy, no written obligation on courts of last resort to make a reference ("more partner-like" relationship), preliminary rulings are "advisory."

Still: Duty of loyalty, but difficult to enforce.

No penalty payments in case of non-implementation of an infringement judgment.

Knut Almestad: EEA Agreement tilted in favour of the EFTA States.

(2) Homogeneity:

Case law must develop in a uniform way in both pillars.

Securing a level playing field.

Homogeneity on the books: EFTA Court follows/takes into account relevant ECJ case law.

Homogeneity in action: Judicial dialogue.

Time factor.

"Case-law on a particular issue of EU or EEA law often does not derive from one judgment only, but from a series of judgments rendered over a long period of time." (Vassilios Skouris in 2004.)

4. History

Signature on 2 May 1992 by the 7 EFTA States (AUT, CH, ICE, FIN, LIE, NOR, SWE) and the EU and its then 12 Member States (mixed).

Entry into force on 1 January 1994 with five EFTA States (AUT, ICE, FIN, NOR, SWE).

On 1 January 1995, AUT, FIN and SWE join the EU.

On 1 May 1995, LIE joins the Agreement on the EFTA side.

Since mid-1995, the EFTA Court has consisted of 3 Judges and 6 ad hoc Judges.

Eastern enlargement of EU/EEA from 2005 on (28 + 3).

II. The role of the EFTA Court

Independent court of law (unlike the originally planned EEA Court).

One of two EEA courts.

Upholding the law in the EFTA pillar.

Methods of interpretation: Not rules of the Vienna Convention; micro- and macro-teleology; but no *finalité politique*.

EEA Agreement as a living instrument, *effet utile* and dynamic interpretation.

Room for specific EFTA values (free trade, competition, strict proportionality principle, full judicial review, image of man).

III. The judicial dialogue between the EFTA Court and the ECJ

1. Who follows whom? - Law on the books and law in action

Law on the books: EFTA Court is bound to follow/take into account relevant ECJ case law, whereas the ECJ is free.

Law in action: System has largely been replaced by judicial dialogue. In this discourse, Advocates General and the General Court also play an important role.

ECJ President Vassilios Skouris in 2004:

"These statutory provisions seem to impose one-sided obligations on the EFTA Court. This could be true in theory but in practice they have proven to provide an adequate framework in order to achieve a harmonious co-existence between the ECJ and the EFTA Court. In fact avoiding conflicting case-law and developing coherent jurisprudence are tasks that require constant cooperation and vigilance from all institutions involved. The day-to-day practice of the ECJ and the EFTA Court clearly illustrates this statement."

ECJ President Vassilios Skouris in 2014:

The relationship between the two EEA courts is a symbiotic one marked by mutual respect and dialogue that allows the flow of information in both directions.

ECJ AG Verica Trstenjak in C-300/10 *Marques Almeidea*: "Unique judicial dialogue."

See also Professor Catherine Barnard in the festschrift 20 years EFTA Court.

Homogeneity has therefore become a process-oriented concept.

HM Government's "Enforcement and dispute resolution" paper is limited to the law on the books.

2. ECJ going first

As a rule - but not always - the EFTA Court follows relevant ECJ case law.

Occasionally EFTA Court case law was adjusted to later ECJ jurisprudence (for example regarding State alcohol monopolies and international exhaustion of trade mark rights).

A mature court has more self-confidence than a new court. A lot depends on individuals.

The EFTA Court has deviated from ECJ case law. C-174/82 *Sandoz*: Free movement may be restricted based on the lack of a nutritional need - E-3/00 *Kellogg's* rejected this – in C-192/01 *Commission v Denmark*, the ECJ, disregarding the opinion of AG Mischo, overruled *Sandoz* and followed the EFTA Court.

3. EFTA Court going first

In most cases.

ECJ follows EFTA Court case law, both explicitly and implicitly.

Examples of express references: TV without frontiers; succession of contracts; precautionary principle in food law; taking a ride with an intoxicated driver; repackaging of pharmaceuticals; taxation of outbound dividends relationship between freedom to provide services and free movement of capital; liability for pain and suffering; website as a durable medium.

- 288 EFTA Court cases altogether; 210 contested cases.
- 213 affirmative references by ECJ, AGs and GC to EFTA Court case law in 145 cases.
- 140 references of AGs to EFTA Court in 90 cases.
- 59 references to AG's in 38 cases.

References by Supreme Courts of GER, AUT, CH, and by Appeal Courts of EU States (i.a. England and Wales) and of CH.

There are many more going first judgments.

EFTA Court is the only court of general jurisdiction whose jurisprudence is regularly taken into account by the ECJ when interpreting EU law.

Advocates General have a gateway function.

There are cases in which the ECJ initially did not follow the EFTA Court, but in later cases put itself in line:

- Taxation of outbound dividends (E-1/04 *Fokus Bank* – ECJ C-374/04 *Test Claimants in Class IV* and C-170/05 *Denkavit* – ECJ C-487/08 *Commission vs Spain*).

- Compatibility of State gambling monopolies with fundamental freedoms; proportionality (E-1/06 *Gaming Machines* and E-3/06 *Ladbrokes* –C-42/07 *Liga Portuguesa* – C-316/07 *Markus Stoß*.

- Notion of "durable medium" in internet law (E-4/09 *Inconsult* – C-49/11 *Content Services* – C-375/15 *BAWAG*).

There is an important case in which the England and Wales Court of Appeal asked the ECJ whether it shared the EFTA Court's approach concerning the modalities of reboxing of pharmaceuticals (C-348/04 *Boehringer Ingelheim II*). The ECJ, following AG Sharpston, did share the EFTA Court's approach.

4. The EFTA Court may have to deal with cases where the ECJ's case law is unclear, or even inconsistent

Example: Is a public body which has unlawfully awarded a contract to a bidder liable for damages under normal liability rules or under the State liability rules (E-16/16 *Fosen-Linjen*)?

5. What happens in the event of a conflict between the two EEA courts?

We have to again distinguish between written law and practice.

Again, HM Government's dispute resolution paper is confined to the written law.

Written law: Under Article 105(2) EEA the EEA Joint Committee ("JC") must keep the development of the case law of the ECJ and the EFTA Court under constant review and shall eventually "act so as to preserve the homogeneous interpretation of the Agreement." The JC is a diplomatic body consisting of representatives of the EU and of the EFTA States Iceland, Liechtenstein and Norway; it can only decide by consensus.

If the JC does not succeed, the Contracting Parties to the dispute may

- agree to request the ECJ to give a ruling on the interpretation of the relevant (EEA) rules.

- If this is not done and the conflict persists, a Contracting Party may either take a safeguard measure or declare the provisional suspension of a part of the Agreement (Article 111[3] EEA).

Practice: These provisions have never been applied in the almost 25 years of the EFTA Court's existence.

They are, in fact, hardly operational.

- It is unthinkable that a political body such as the EEA Joint Committee would interfere with the judgment of a court of law. Under Protocol 48 to the EEA, decisions of the Joint Committee may not affect the case law of the ECJ. The same must apply to decisions of the EFTA Court. That follows from the principle of judicial independence.

- It is hard to imagine that the EFTA side would agree to submit a judicial conflict to the ECJ, the court of the other side.

- It is unlikely that the EU will take safeguarding measures or declare the provisional suspension of parts of the EEA Agreement because of a judicial conflict; such a step could put the existence of the agreement at risk. The essential thing is that the judges of the EFTA Court are truly independent and knowledgeable.

6. The first Icesave case (E-16/11 *ESA v Iceland*, 2013)

ESA sought a declaration that by not compensating depositors of the Icelandic Landsbanki's branches in the UK and the Netherlands ("Icesave" online savings accounts) to the amount of 20,000 euros prescribed by the relevant directive, Iceland had violated its obligations under the EEA Agreement.

EFTA Court dismissed the action of the EFTA Surveillance Authority (ESA) against Iceland.

Statutory interpretation and economic law considerations (principle of liability, avoiding moral hazard, reference to economic literature).

The Commission intervened on ESA's side and the British and the Dutch Governments submitted observations in favour of ESA. Norway and Liechtenstein participated on the side of Iceland.

Although the Commission was not amused, no action was taken. The EU is a community of law which will not easily attack a judgment of the EFTA Court on a political basis. It would risk to lose face. Politicians and diplomats have difficulties understanding this.

7. Relevance of the case law of the ECtHR

18 references to ECtHR in 12 cases.

Triangle ECJ – ECtHR – EFTA Court.

Important examples:

Freedom of expression (E-8/97 *TV 1000*, reference to ECtHR *Handyside*).

Scope of judicial review in competition law (E-15/10 *Posten Norge*, reference i.a. to ECtHR *Menarini*).

Right to respect for business premises (E-14/11 *DB Schenker I*, references to ECtHR *Société Colas Est*, ECtHR *Robathin*, ECtHR *Société Canal Plus*).

Fair trial and access to justice (E-2/02 *Bellona*; E-2/03 *Ásgeirsson*; E-15/10 *Posten Norge*; E-18/11 *Irish Bank*, references to ECtHR *Pafitis* and ECtHR *Ullens de Schooten and Rezabek*).

Negative freedom of association (E-14/15 *Holship*, reference to ECtHR *Sørensen and Rasmussen*).

On the other hand, the ECtHR made several references to our judgment in the first *Icesave* case in ECtHR *Ališić*.

With the latter citations, the Strasbourg Court made it clear that it is aware of the important function the EFTA Court plays in the enforcement of fundamental (in the Strasbourg language "human") rights in Europe.

8. Consequences

Modern literature (Ehlermann, Müller-Graff, Speitler) considers that the two EEA courts have to sort out any problems by way of dialogue. One could say that in this, they are doomed to success. There is room for a certain degree of regulatory competition.

As ECJ President Koen Lenaerts has recently confirmed, the system works well.

The EFTA Court is much smaller than the ECJ and its case load is limited. Nevertheless, it has its own voice, and on essential questions of European single market law, it has gone its own way.

As a court of three, the EFTA Court must convince its audiences. The court aims at making a virtue of this necessity by giving comprehensive reasons. It has developed its own style.

With a British judge, the EFTA Court could further strengthen its profile without giving up the overall goal of realising a homogeneous European Economic Area.

Mats Persson's contention that under Articles 105 and 111 EEA, the EFTA Court is "easily 'outgunned' by the ECJ," would then even be less appropriate than it is now.

IV. Switzerland's relationship with the EU

1. 120 bilateral sectoral agreements

20 of them important.

No common institutions, only Joint Committees, "institution-free bilateralism".

Since 2008, the EU has been pushing for a surveillance and a court mechanism. Reiterated every two years.

The Swiss from the start used the term "dispute settlement." No coincidence.

Since 2008, no new market access agreement has been concluded.

Switzerland's proposal to establish an arbitration tribunal was rejected by the EU.

Traditional Swiss model is outdated.

2. Planned "framework" or "institutional" agreement

In 2012, the EU rejected the idea to establish a "Swiss pillar."

Proposed by the Swiss to the EU.

"Non-Paper" of May 2013; negotiation mandates based on this.

Docking proposed by EU, rejected by CH.

"Three phase" model:

(1) Conflict dealt with in the Joint Committee.

(2) Each side has the right to unilaterally ask the ECJ for a (binding) interpretation (decontextualisation of Article 111[3] EEA).

(3) Conflict goes back to the Joint Committee which is the only decision-maker. The Federal Council contends that:

- If CH wins, the EU will feel bound; it cannot go against its own court; since CH tends to be compliant, it will win in most cases.
- If CH loses, it can still say no or negotiate an intermediate solution. This intermediate solution will not be subject to the ECJ's jurisdiction.
- Unlike the EFTA Court in infringement proceedings, the ECJ cannot "sentence" Switzerland in dispute settlement proceedings.
- The only real problem is the scope compensatory measures (sanctions) that can be imposed by the EU. They should be subject to arbitration (like under Article 111[4] EEA).
- Switzerland is not subject to surveillance by a European body.

Postfactual contentions

- Switzerland's liberty to say no exists only on paper.
- That Switzerland is mostly compliant is a euphemism.
- Since it can unilaterally invoke its own court, the Commission is Switzerland's surveillance body.
- That the ECJ would not "sentence" Switzerland is pure sophistry.
- ECJ would hardly accept to act as a deputy sheriff with a bobby pistol in a half-political procedure (Article 218 [11] TFEU).

3. EFTA model (docking) ruled out based on untenable assumptions

EFTA Court can in infringement proceedings not oblige the EU. If the EFTA Court were to find in favour of Switzerland, this would not bind the EU.

Mixing-up of jurisdiction and effect (beginners mistake).

"Speech intended to persuade without regard to truth" as defined by Princeton philosopher Harry G. Frankfurt.

Swiss Foreign Service trying to put the country on an EU track (proof: "Non-Paper" speaks of a preliminary ruling procedure to the ECJ).

4. Negotiations appear to have come to a stop

Whether such an agreement would be acceptable for the ECJ is an open question.

Chances that such an agreement would be accepted in a referendum are slim.

17 negotiation rounds without success.

Foreign Minister resigned in June 2017.

Switzerland will probably wait and see what the UK does.