Judicial dialogue in the EFTA pillar of the EEA – development and challenges

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This blog post analyses the relationship between the EFTA Court and the highest courts of the EEA/EFTA States. In the first part, Prof Halvard Haukeland Fredriksen explains how judicial cooperation in the EFTA-pillar of the EEA differs from that found in the EU, and how this played out in the recent *Fosen-Linjen* case. The second part of this blog post offers some thoughts on the credibility of the institutional framework of the EEA and presents some reform proposals.

1. A partner-like relationship

The relationship between the EFTA Court and the highest courts of the EEA/EFTA States is complicated. For reasons of sovereignty, the EEA/EFTA States were unwilling to copy the hierarchical relationship that exists between the EU Court of Justice (CJEU) and the national courts of the EU Member States. In a significant manifestation of the pragmatism that underpins the entire EEA Agreement, the EU accepted this. As a result, the Main Part of the EEA Agreement acknowledges the role of the courts of last instance of the EEA/EFTA States in a way that finds no parallel in the EU treaties (Article 106 EEA). Furthermore, the EEA Agreement does not oblige the EEA/EFTA States to establish a procedure for preliminary references to the EFTA Court equalling the one found in EU law (now Article 267 TFEU). The EEA Agreement itself only mentions the possibility for an EEA/EFTA State to allow a court or tribunal to ask the CJEU to decide on the interpretation of an EEA rule (Article 107 EEA). Rather than opening up for preliminary rulings from the 'foreign judges' of the CJEU, however, the EEA/EFTA States strengthened the two-pillar structure of the EEA by establishing their own, 'softer', version of the preliminary reference procedure: Courts and tribunals of the EEA/EFTA States 'may' request the EFTA Court to give 'advisory opinions' on the interpretation of the EEA Agreement (Article 34 SCA). As noted by the EFTA Court in a case from 2012, the result is a more 'partner-like' relationship between it and the highest courts of the EEA/EFTA States (Case E-18/11).

At best, a partner-like relationship between courts leads to a genuine judicial dialogue, in which different perspectives and arguments contribute to more thorough (and thus persuasive) judicial decisions than the courts involved would be able to deliver on their own. This, however, presupposes that the courts are prepared not only to engage with each other through transparent reasoning, in which also relevant counter-arguments are shown to have been considered, but also to reconsider previous conclusions in the light of new legal material and new legal arguments brought forward by their dialogue partners. This is particularly so in cases where the courts of the EFTA-pillar of the EEA deal with parts of EEA law that are simply taken over from EU law, as the judicial

dialogue in such cases is complicated by the CJEU's role as the authoritative interpreter of EU law (Article 19 TEU). Unlike the courts of the EFTA-pillar, the CJEU can rely on its authority, something that may help explain why the reasoning in its preliminary rulings is not always as thorough and comprehensible as one would wish for. Gaps and inconsistencies in CJEU case law complicates the judicial dialogue in the EFTA-pillar of the EEA, but it also makes it more important. In a nutshell, the challenge is to come up with an interpretation of the common EU/EEA rules that will persuade also the CJEU if it is asked to rule on the matter in future.

2. Judicial dialogue in cases of potential judicial conflicts

For quite some time, the main obstacle to a genuine judicial dialogue between the EFTA Court and the highest courts of the EEA/EFTA States was the lack of referrals, in particular from the Supreme Courts of Iceland and Norway. With the laudable increase in such referrals in the last couple of years, however, attention has shifted to how the dialogue is, and ought to be, conducted, in particular in cases where the point of departure appears to be quite different views on the proper interpretation of EEA law.

At the centre of the current discussion stand two recent referrals from the Supreme Court of Norway, both of which essentially ask the EFTA Court for clarification and amplification, or possibly even reconsideration, of earlier advisory opinions. The first one, in the *Fosen-Linjen* case, caused the EFTA Court to clarify its view on the liability for public authorities for breaches of EU/EEA public procurement law in a way that to most observers came very close to a retreat (Case E-7/18). The second referral, in the *Campbell* case, questions the EFTA Court's analogous application of the Citizenship Directive to situations outside the Directive's reach as a matter of EU law. As the latter case is still pending before the EFTA Court (Case E-4/19), it will not be dealt with here, but for two remarks: The referral confirms that the Supreme Court takes its obligation under Norwegian law to assess for itself whether to follow an advisory opinion or not, seriously. It also suggests, however, that where a possible deviation is based on legal material not previously considered by the EFTA Court (in this case a number of new decisions from the CJEU), the EFTA Court will be given the opportunity to clarify its view. This is a clear improvement if compared with the (in)famous *STX* case from 2013, where the Supreme Court deviated from an advisory opinion obtained by the Court of Appeal, without giving the EFTA Court the opportunity to express its view on the at least partially new arguments and approaches that the Supreme Court found to be convincing.

3. The *Fosen-Linjen* saga

Turning to the *Fosen-Linjen* case, the new referral from the Supreme Court allowed the EFTA Court to defuse an otherwise imminent judicial conflict. The EFTA Court's first advisory opinion in the case (*Fosen-Linjen I*) was interpreted by most (but not all) commentators as effectively overruling the Supreme Court's long held view that public authorities may only be held liable for an aggrieved tenderer's loss of profit ('positive contract interest') in cases of material breaches of the EU/EEA public procurement rules. In the opinion, the EFTA Court briefly mentioned the Supreme Court's case law, but did not engage with it in its own reasoning.

Two circumstances allowed the Supreme Court, 'in the interests of dialogue between the EFTA Court and the national courts', to ask for 'clarification and amplification, or possibly even reconsideration' of the first opinion.

Firstly, the operative part of the first advisory opinion did not state that the strict liability read into the Remedies Directive applied also to claims for loss of profits. A contextual reading of the opinion suggested an affirmative answer, but it was possible to argue, as indeed the EU Commission later did in the second round, that the question of which heads of damage were to be subsumed under the strict liability was left for the EEA States to decide.

Secondly, some of the legal material brought before the Supreme Court appeared not to have been considered by the EFTA Court. The list included an Explanatory Memorandum from the Commission that revealed that it, anno 1990, certainly did not intend to harmonise contracting authorities' liability for loss of profits (COM(90)297); two recent judgments from the Supreme Courts of the UK and Sweden, respectively, that supported the established case law of the Norwegian Supreme Court; and a recent judgment from the CJEU that confirmed the nature of the Remedies Directive as a minimum harmonisation instrument (Case C-300/17).

Unfortunately, the analysis of the Supreme Court's decision to send the case back to the EFTA Court is complicated by coincidental changes of the EFTA Court's composition. At the time of *Fosen-Linjen I*, the Icelandic judge of the EFTA Court was ill and thus replaced by an ad hoc judge. Then, just weeks after the opinion in *Fosen-Linjen I,* the court's then president (and judge-rapporteur in the case) abruptly decided to step down. For a court with only three members, two new judges is a lot. In addition, the only member of the *Fosen-Linjen I* court that was expected to take part in a potential *Fosen-Linjen II*, the Norwegian judge, was reported by the press to have told the Chief Justice of Norway that the EFTA Court would not be 'offended' if the Supreme Court decided to make a new referral. Interpretations of this comment varied greatly, from a mere statement of the obvious (the EFTA Court has no business getting 'offended' just because a national court find it difficult to understand an advisory opinion) to an invitation of a rematch and even an indirect disclosure of disagreement with *Fosen-Linjen I*.

Given these events, it is to be stressed that no trace of them is to be found in the Supreme Court's decision to refer the case back to the EFTA Court and, furthermore, that the grounds given in that decision themselves fully substantiate the action taken. In light of the new legal material presented by the Supreme Court, and its stated interest in a judicial dialogue with the EFTA Court, it is actually somewhat unfortunate that it was not the '*Fosen-Linjen I* court' that was given the opportunity to clarify the first advisory opinion. As this was not an alternative, however, perhaps it was a blessing in disguise that *Fosen-Linjen II* ended up being decided by three new judges (as the Norwegian judge unfortunately fell ill shortly before the oral hearing and therefore had to be replaced by an ad hoc judge).

Before the EFTA Court anew, two important contributions facilitated the reconsideration of the first opinion. Firstly, the EFTA Surveillance Authority stood its ground from the first round and maintained its view that the Remedies Directive does not entail strict liability for loss of profits caused by a breach of the EEA rules governing public procurement. Secondly, in a remarkable development from its observations in the first round, the EU Commission offered a thorough textual, contextual, historical and purpose-oriented interpretation of the Directive that caused it to conclude that it was 'inconceivable' that the EU-legislator had intended to harmonise national contracting authorities' liability for loss of profits. Unlike the EFTA Surveillance Authority, the Commission stopped short of stating that *Fosen-Linjen I* should be reconsidered, but its view that the Remedies Directive leaves it to the Member States to decide which heads of damage that fall under the strict liability advocated in that case, came very close to the same result.

Given the different interpretations of *Fosen-Linjen I* that had revealed themselves in the proceedings in *Fosen-Linjen II*, the EFTA Court had little difficulty rejecting the view that the second reference should be held to be inadmissible or, in the alternative, that the EFTA Court should simply reaffirm the first opinion by a reasoned order referring to *Fosen-Linjen I*. Still, in the context of judicial cooperation in the EFTA-pillar, it is noteworthy that the EFTA Court tacitly welcomed the new referral by reiterating that it is 'important that questions on the interpretation of the EEA Agreement are referred to the Court under the procedure provided for in Article 34 SCA if the legal situation lacks clarity', and reaffirming that all it takes for a second request to be admissible is for the national court to submit 'new considerations which might lead to a different answer to a question submitted earlier'.

The EFTA Court then proceeded to clarify that the Remedies Directive is indeed an instrument of minimum harmonisation and, based on that finding, that it does not entail strict liability for loss of profits caused by a breach of the EEA rules governing public procurement.

The EFTA Court's answer in *Fosen-Linjen II* made the job for the Norwegian Supreme Court a lot easier than it would if *Fosen-Linjen I* had been reaffirmed. Strikingly, before the Supreme Court neither Fosen-Linjen nor its supporter the Confederation of Norwegian Enterprise even attempted to rely on *Fosen-Linjen I*, arguing instead that the 'sufficiently serious breach'-threshold should not be considered particularly high. The Supreme Court itself simply noted that *Fosen-Linjen I* 'appeared' to advocate for a strict liability, but that this had been 'nuanced' by *Fosen-Linjen II*, and then held that the liability of public authorities can be limited to cases of a sufficiently serious breach of the EEA rules governing public procurement. The Supreme Court proceeded to set out in greater detail the liability threshold, through reasoning distinguished by multiple references to both the EFTA Court and the CJEU. In replacing its own previous 'material error'-test by the common EU/EEA 'sufficiently serious'-test, the Supreme Court also confirmed its willingness to reconsider its case law in light of developments of EU/EEA law. As the government's view of that test was rejected, and the breach in the case at hand found to be sufficiently serious, the judgment also confirms the Supreme Court's standing as far from 'State-friendly' in cases concerning public authorities' liability for breaches of EEA law.

4. The credibility of the judicial set-up of the EEA

It is difficult to assess the impact of the *Fosen-Linjen* saga on the EFTA Court's standing, both within the EFTA-pillar and in the EU. In general, willingness to enter into a proper judicial dialogue, and to reconsider previous positions in light of new legal material and novel arguments presented to it, ought to strengthen rather than weaken a court's standing, at least as long as the need for reconsiderations do not become too frequent.

However, if one wishes the relationship between the EFTA Court and the highest courts of the EEA/EFTA States to develop towards the hierarchical relationship that exists between the CJEU and the highest courts of the EU Member States, one may criticize the EFTA Court for reconsidering *Fosen-Linjen I* without any reasoning related to any threshold for overturning precedent. Tacitly, *Fosen-Linjen II* confirms the approach established in *L'Oréal* (Case E-9/07) that in cases concerning interpretation of common EU/EEA rules, all it takes for the EFTA Court to justify a change of course is for the court itself to be convinced that a previous advisory opinion is wrong, in the sense that it is unlikely to be followed by the final arbiter of EU law – the CJEU. The alternative, the development of some kind of internal EFTA-pillar *stare decisis*-doctrine, would not only renounce the partner-like relationship between the EFTA Court and the national courts as well as the status of the EFTA Court's opinions under Article 34 SCA as advisory; it would also, as explained in *L'Oréal*, be at odds with the fundamental objective of uniform ('homogeneous') interpretation of common EU/EEA rules throughout the EEA. It is also doubtful if it would strengthen the standing of the EFTA Court, as this essentially presupposes that the national courts would accept such a profound change in their relationship to the EFTA Court. If the EFTA Court in *Fosen-Linjen II* had reaffirmed *Fosen-Linjen I* without providing any reasons for doing so except the mere existence of the first opinion, it is submitted that the Supreme Court would have followed the Court of Appeal's example and refused to follow the EFTA Court's advice. Furthermore, the recent increase in the use of Article 34 would probably have been short-lived.

Still, from the EU's perspective, the more partner-like relationship between the courts in the EFTA-pillar would indeed be a source of concern if it were to lead to a specific 'State friendly' version of EEA law in all or some of the EEA/EFTA States. Importantly, the *Fosen-Linjen* saga lends no support to any such fear. Even if neither the EFTA Court nor the Norwegian Supreme Court fully adopted the path proposed by the Commission, both courts ended up interpreting the Remedies Directive in a way that produces essentially the same effect as the interpretation favoured by the Commission in *Fosen-Linjen II*. It is thus very difficult to see how this case in particular could possibly cause the EU to lose trust in the judicial set-up of the EEA.

Of course, this may be different in a future case, as the dialogue between the EFTA Court and national courts may result in an advisory opinion and thereafter a national judgment at odds with the interpretation advocated by the Commission. However, as long as the EFTA Court continues to interpret common EU/EEA rules in line with the CJEU's methodology and with reasoning believed to

persuade also the CJEU if it is asked to rule on the same matter in future, there is no reason to fear that a defeat or two will cause the Commission to lose faith the in the judicial set-up of the EEA. After all, not even the defeat in the high profile (and high-value) *Icesave* case (Case E-16/11) caused the Commission to question the credibility of the EFTA Court.

Even the best of judicial dialogues will not always guarantee agreement between the EFTA Court and the national courts of the EEA/EFTA States. If the cause of the disagreement lies in the national court adopting a distinct 'national' approach to EEA law, it is obvious that the credibility of the judicial set-up of the EEA depends on the EFTA Court standing its ground. Even in cases where both the EFTA Court and the national courts applies the same EU/EEA law methodology, however, it is inherent in their partner-like relationship that they may sometimes disagree as to the correct interpretation of the law. This is different from the EU, where the CJEU can rely on the binding force of its preliminary rulings and expect the national courts to comply. This difference is not a 'defect' in the judicial set-up of the EFTA-pillar, however, which ought to be 'remedied' by pretending that the EFTA Court's advisory opinions are binding judgments – it is simply the result of the EEA/EFTA States opting for a different solution in the EFTA-pillar, and of the EU accepting this.

Importantly, in a possible case of informed disagreement between the EFTA Court and the highest court of one of the EEA/EFTA States, the judicial set-up of the EFTA-pillar does not compel either court to fold. Quite to the contrary, it is important to the credibility of the EFTA Court that it stands its ground if it considers the reasoning of the national court unconvincing, even (of rather: in particular) if a request for an advisory opinion should phrased in a manner that suggests that only a given answer will be complied with by the national court. In such a case of judicial conflict within the EFTA-pillar, the ball is kicked over to the EFTA Surveillance Authority, which will have to assess the potential impact on the well-functioning of the EEA Agreement, and then decide whether to initiate infringement proceedings against the EFTA State concerned (Article 108 EEA/Article 31 SCA). Importantly, nothing in the EEA Agreement, nor in the SCA, obliges the EFTA Surveillance Authority to take on the role as a blind 'enforcer' of an advisory opinion from the EFTA Court in such a scenario, nor to agree in full with the interpretation of EEA law advocated by the EFTA Court (as demonstrated well by *Fosen-Linjen II*). The job of the EFTA Surveillance Authority is to make sure that the EEA/EFTA States live up to their EEA law obligations, based on the EFTA Surveillance Authority's independent assessment of what those obligations are. However, the EFTA Surveillance Authority is obliged to discuss the matter with the EU Commission (Article 109 EEA) and should indeed be expected to initiate infringement proceedings if the Commission considers this necessary to safeguard the well-functioning of the EEA Agreement. It is only if the EFTA Surveillance Authority refuse to do so, and the EEA/EFTA State involved also refuse to refer the matter to the CJEU (Article 111 EEA), that the EU-side may reasonably question the credibility of the judicial set-up of the EEA. It seems safe to suggest that this is a very hypothetical scenario indeed.

5. The case for a strengthened EFTA Court

As with all sagas, there are lessons to be learned from *Fosen-Linjen*. The EFTA Court's small size is a vulnerability, in particular in cases where unfortunate circumstances force it to rely on *ad hoc* judges to fill the bench. An obvious solution is to enlarge the court from three to five permanent judges, as indeed suggested by the court itself some years ago. However, it is submitted that the additional judges ought not to come from any of the three EEA/EFTA States. The added value to the EFTA Court will be far bigger if they come 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 highly esteemed 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 cannot match, which again may lead to even more requests for advisory opinions.

As part of such an enlargement of the EFTA Court, the EEA/EFTA States should 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 Article 255-panel, preferably also by including some of the members of the latter. This will both help keep the costs down and assure the credibility of the new panel.

A further cause of concern highlighted by the *Fosen-Linjen* saga is the fact that all too few of the EEA Contracting Parties make use of their right to take part in the proceedings before the EFTA Court. In *Fosen-Linjen I*, Norway was the only EEA Member State who found it worthwhile to submit written observations and take part in the oral hearing. Furthermore, the Commission sent only rather cursory observations that, at least if read together with its subsequent observations in *Fosen-Linjen II*, left one wondering if it had fully understood that the core of the case was whether liability for loss of profits is harmonised by the Remedies Directive or not. Despite all the attention the first opinion and the new referral in the case got in the small community of EEA lawyers, Finland was the only additional EEA State to send written observations in the second round. This lack of interest leaves the EFTA Court with far less input from the different EEA States than the CJEU in cases of comparable importance. As the EEA/EFTA States obviously cannot instruct the EU/EEA States to send observations to the EFTA Court, an alternative worth exploring lies in closer cooperation with the CJEU, in particular its Research and Documentation Directorate. As long as the EEA/EFTA States are prepared to shoulder a fair share of the costs, thus enabling the CJEU to offer even better support to its own judges and advocates general in future, the seems to be no compelling reason why CJEU should deny the EFTA Court access to this resource. In a case like *Fosen-Linjen*, an in-depth

comparative analysis from the CJEU's Research and Documentation Directorate of the approaches taken in the national legal systems of the 28 EU Member States would have been very valuable. The harsh reactions to *Fosen-Linjen* I in Norway were partially based on the view that Norwegian law already offered aggrieved tenderer better protection for losses of profit than most EEA States (and certainly much better than EU law offers in cases where the EU's own institutions or organs act as procurement authorities). The argument that the threshold for liability appears to be lower in certain other EEA States was dismissed as incomplete, or even misleading, as the effect of a low threshold can easily be more than offset by a stricter approach to other conditions ("certain loss", "direct causal link" etc.). Thus, as all comparative lawyers know, an assessment of the level of protection in different legal systems needs to be based on an analysis of the actual outcome of comparable cases, not on isolated elements of the national laws. The CJEU's Research and Documentation Directorate is one of very few entities in the entire EEA able to provide such an analysis.

Another amendment to the procedural framework of that ought to be considered, is for the EFTA Court to get access to the CJEU's pool of increasingly specialized Advocates General, at least in cases where the EFTA Court has jurisdiction to render binding judgments. An opinion from an Advocate General will not bind the EFTA Court, and it should therefore not be considered problematic either to the independence of the EFTA Court or 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. As long as the EEA/EFTA States are prepared to contribute to the CJEU's budget, there is no obvious reason why the CJEU should refuse to assist the EFTA Court in this way.

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. 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. Although hardly necessary, the EFTA Court could perhaps at the same time clarify that its advisory opinion are just advisory by giving up the curious practice of referring to them as 'judgments'. Or, perhaps even better, the EEA/EFTA States could add a paragraph to Article 34 SCA to the effect that national courts are to pay 'due account' to an advisory opinion, 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. For national courts with limited budgets, the possibility to leave difficult questions of EEA law to a strengthened EFTA Court ought to be an attractive option. If need be, the EEA/EFTA States should remind their courts of this, and make sure that internal measurements of courts' and individual judges' 'productivity' does not hinder a rational allocation of work between the national courts and

the EFTA Court. However, 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, such additional justification for funding of a strengthened EFTA Court should not really be necessary.

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