



The EFTA Court, Data Protection and the Charter

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Overview

This presentation covers:

1. Advisory opinions – EFTA Court
2. Data protection and the EEA
3. Charter and EEA law



Types of cases - I

DIRECT ACTIONS (DA)

- **Infringement actions vs. EFTA States:**

- Initiated by ESA (Art. 31 SCA)
- Initiated by another EFTA State (Art. 32 SCA)

- **Challenges against ESA:**

- Validity of ESA's decisions (Art. 36 SCA)
- ESA's failure to act (Art. 37 SCA)
- Liability of ESA (Art. 39 SCA)

- **Parties:** ESA, EFTA States; private entities (Arts. 36, 37, 39)



Types of cases - II

ADVISORY OPINIONS (AO)

- **Who can request?**

- “..any court or tribunal in an EFTA-State..” (Art 34(2) SCA)

- **When to request?**

- “Where... that court or tribunal considers it necessary to enable it to give judgment..” (Art 34(2) SCA)

- **Effect?**

- «Always» followed, but formally speaking not binding (≠ ECJ’s preliminary rulings)



Advisory opinions

- Article 34 SCA modelled on the preliminary ruling procedure in Article 267 TFEU
- Average case handling time 9-10 months
- However: advisory opinions are not preliminary rulings – does this matter in practice?
- See E-2/11 *STX* and E-16/16 *Fosen-Linjen*; E-7/18 *Fosen-Linjen II*
- No (explicit) duty on courts of last instance to refer questions to the EFTA Court – contrast with the situation under TFEU



Duty to refer

- E-18/11 *Irish Bank*: According to the wording of Article 34 SCA, **there is, in particular, no obligation on national courts** against whose decisions there is no judicial remedy under national law to make a reference to the Court.
- At the same time, courts against whose decisions there is no judicial remedy under national law will take due account of the fact that **they are bound to fulfil their duty of loyalty under Article 3 EEA**.



Recent Norwegian cases

- E-14/15 *Holship* legality of boycott
- E-3/16 *Ski Taxi* object restriction of competition
- E-4/19 *Campbell* citizenship directive and the EEA
- E-8/19 *Scanteam* extraterritorial application of procurement rules
- E-1/20 *Kerim* marriage of convenience
- E-4/20 *Haugland* recognition of qualification as psychologist
- E-8/20 *N Nav* – export of benefits
- E-13/20 *O Nav* – export of unemployment benefits



EEA – data protection

- GDPR – one of the most significant legislation for decades
- No substantive adaptations linked to its incorporation into the EEA
- EDPB entrusted with decision-making powers vis-à-vis the EU States data protection authorities
- The same goes for the EFTA authorities – no adaptation
- Significance of fundamental rights in the interpretation of the GDPR



EEA – data protection

- E-11-12/19 *Adpublisher* – so far only EFTA Court case exclusively on the GDPR
- Anonymous handling of complaint to be assessed under Article 5 and 6 GDPR
- Cannot be granted if it inhibits the performance of obligations under the Regulations or the right to an effective judicial remedy
- Right to lodge complaints free of charge extends to judicial proceedings which the complainant becomes a party to – irrespective of his will



EEA – data protection

- E-10/19 *Bergbahn* – principle of data minimization and the obligation to identify beneficial owner under AML directive
- Obtaining and holding information on beneficial ownership in accordance with the obligations set out in the Directive constitutes data processing for the purpose of fulfilling a legal obligation
- (AML Directive) is clear on the point that the processing of personal data on the basis of the (AML) Directive, for the purposes referred to in Article 1, shall be considered to be a matter of public interest under data protection rules



EEA – data protection

- The protection of natural persons in relation to the processing of personal data is a **fundamental right**. Article 8(1) of the Charter and Article 16(1) of the TFEU – everyone has the right to the protection of personal data concerning him or her – recital 1 of the GDPR
- *C-645/19 Facebook Ireland* – Article 1(2) GDPR requires EU institutions and Member States to ensure a high level of protection of these rights. Recital 4, GDPR respects all fundamental rights of the Charter
- Interpretation in light of the Charter increasingly prevalent in the case law of the Court of Justice



EEA – data protection

- C-439/19 *Article 10 of the GDPR is intended to ensure enhanced protection as regards processing... is liable to constitute a particularly serious interference with the fundamental rights ... guaranteed by Articles 7 and 8 of the Charter*
- Are these interpretative methods equally applicable to the GDPR in the context of EEA law?
- Important to note that the Charter is applicable to activities coming under the scope of the EEA Agreement **as a matter of EU law**, C-897/19 *Ruska Federacija*
- Rebuttable presumption – same interpretation in EEA and EU law



Fundamental rights

- No provision on fundamental rights - Recital 1 of the EEA: refers to contribution that the EEA will bring to the construction of a Europe based on peace, democracy and human rights;
- E-2/03 *Asgeirsson* EEA Agreement is to be interpreted in the light of fundamental rights *The provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights*



Fundamental rights

- Current practice, *e.g.* E-2/20 *L v Norway*
- *It is settled case law that fundamental rights form part of the general principles of EEA law*
- *the EEA States, in particular their courts, must not only interpret their national law in a manner consistent with EEA law but are also under an obligation to ensure that the interpretation and application of acts incorporated into the EEA Agreement does not result in a conflict with fundamental rights protected by EEA law*
- In *Holship* the ECtHR commented on the status of fundamental rights in the EEA:



Fundamental rights

- as clearly stated by the EFTA court in the *Holship* case, that fundamental rights form part of the unwritten principles of EEA law (...). The respondent Government provided several examples from the EFTA court in this regard. **Since this reflects the position which previously pertained under EU law, prior to successive EU Treaty amendments, according to which fundamental rights were first recognised as general principles of EU law**, the Court considers that the fact that the EEA agreement does not include the EU Charter is not determinative of the question whether the *Bosphorus* presumption could apply (...) to (...) EEA law
- *Bosphorus* presumption applicable to EU law not extended to the EEA due to absence of primacy and direct effect – another story



EFTA Court - Charter

- The Court has not given any general statement on this question
- The Court has dealt with this problem with a preference for a case-by-case approach
- E-10/14 *Deveci* *The Court finds no reason to address the question of Article 16 of the Charter. The EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union. The actors of a market are, inter alia, undertakings. The freedom to conduct a business lies therefore at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national law and practices.*



EFTA Court - Charter

- View of the Norwegian Government in *Deveci* automatic application of the Charter, which is not incorporated in the EEA Agreement, would challenge State sovereignty and the principle of consent as the source of international legal obligations, **In its view, the Charter provides, in some respects, for fundamental rights beyond those common to the EEA States**
- The key question: are the Charter rights corresponding to the ECHR?



Charter – data protection

- Article 8 of the Charter *Everyone has the right to the protection of personal data concerning him or her.*
- Closely related to the protection of private and family life under Article 7 of the Charter
- Article 8 ECHR – no explicit regulation of data protection
- However, case law clear in this respect originating in *Leander v Sweden*
- *S and Marper v UK* *The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article*



Charter – data protection

- *Big Brother Watch v UK*
- The ECtHR refers to EU data protection law in its judgments
- Safe to conclude that protection of personal data as a fundamental right is broadly corresponding under the ECHR and the Charter
- Fundamental rights under ECHR, general principles of EEA law
- Interpretation in light of data protection as a fundamental right **equally applicable** in both EU and EFTA pillar