Academic Debate

Judicial Homogeneity in the European Economic Area and the Authority of the EFTA Court. Some Remarks on an Article by Halvard Haukeland Fredriksen

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1. “The Inconvenient Truth”

In his article, ‘One Market Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area’, Halvard Haukeland Fredriksen examines what he calls the “apparent incompatibility between the judicial architecture of the EEA and the overall goal of uniform interpretation and application of the common rules in all EEA States”. Fredriksen describes the EFTA Court’s approach to interpreting the EEA Agreement as being characterised by a strong inclination to preserve homogeneity with the case-law of the Court of Justice of the European Union (CJEU). This leads him to his main conclusion that the “supreme authority on the interpretation of EEA law rests firmly with the [CJEU and not with the EFTA Court], if not de jure then certainly de facto”. Although the result is a well-functioning EEA Agreement, he considers this may be an “inconvenient truth” for the EFTA States for whom it was a conditio sine qua non for accession to the Agreement that they would not “relinquish judicial sovereignty to the ‘foreign judges’ of the CJEU”.

2) Ibid., p. 483.
3) Ibid., p. 499. For completeness it should be recalled that the EFTA States had, in the draft EEA-Agreement of 1991, accepted the EEA Court which was to be composed of five (“foreign”) judges from the European Court of Justice and only three judges from the EFTA States. Hence, to state that it was a conditio sine qua non for the EFTA State that they would not relinquish judicial sovereignty to “foreign judges” might be considered somewhat an overstatement.
According to Fredriksen, the consequence of the EFTA Court's pursuit of homogeneity is, however, not only the exclusion of “any arguments derived from the legal traditions of the EFTA States” but the “devaluation of the authority of the Court’s own case-law”. This is, according to Fredriksen, the unavoidable consequence of a judicial approach to homogeneity and implies that the EFTA Court may be expected to overturn its own case-law following subsequent rulings of the CJEU in order to avoid divergences between the two courts. Therefore, Fredriksen asserts that the EFTA Court seems to take the view that its own judgments have only “provisional authority pending a decision of the [CJEU]”.^4^5

However, a more independent EFTA Court would in any case have been difficult to conceive, according to Fredriksen. The case for such a proposition would rest on the “dubious presumption that the national courts of the EFTA States would choose to follow such an [independent] approach by the EFTA Court”. In this respect Fredriksen states that “Norwegian courts have hitherto loyally accepted the authority of the EFTA Court, but it is not given that this would apply if it was to be seen as jeopardising the homogeneity objective”. Thus, according to Fredriksen, “leading commentators” have suggested that Norwegian courts should follow the CJEU in cases of diverging case-law, not the EFTA Court. ^7^8

Given this view on the function of the EFTA Court case-law, it is easy to understand why Fredriksen considers it “somewhat surprising” that the case-law of the Supreme Court of Norway “contains certain statements indicating apparent acceptance of the EFTA Court as the pre-eminent interpreter of EEA law in the EFTA–pillar”. Indeed in the model portrayed by Fredriksen, national courts of the EFTA States should exclusively look to the CJEU as the “pre-eminent interpreter of EEA law” and only rely on EFTA Court case law insofar it does not jeopardise the homogeneity objective in their opinion. This means that it will ultimately depend on the national court’s own assessment whether it accepts or not the interpretation of EEA law by the EFTA Court.

Fredriksen does not discuss specifically the implications of his view on the EFTA Court preliminary reference procedure. However, it goes without saying that if this view is accepted, the incentive for national courts to refer cases to the EFTA Court is reduced. Why go through the hassle of referring a question to the EFTA Court if the ruling delivered will not provide a final answer? Furthermore, in the (rather unlikely) situation that a national court had bothered to refer a case

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4) Ibid.
5) Cf. L’Oreal, joined cases E-9/07 and E-10/07, EFTA Court Reports [2008] 258.
7) Fredriksen, supra note 1, pp. 497–498.
8) Ibid., p. 488.