

## EFTA SURVEILLANCE AUTHORITY DECISION

of 17 December 2021

closing a complaint case regarding an alleged failure by the EEA EFTA States to establish an “Article 255 TFEU panel” in the EFTA pillar of the European Economic Area

### THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

On 22 March 2021, the EFTA Surveillance Authority (“the Authority”) received a complaint<sup>1</sup> concerning the absence of an independent assessment panel in the EFTA pillar of the European Economic Area similar to the panel established under Article 255 TFEU (an “Article 255 TFEU panel”).

The complainants asserted that by not creating an equivalent to the “Article 255 TFEU panel”, the EEA EFTA States are in breach of certain principles of EEA law, namely the principles of homogeneity, reciprocity and loyalty, as well as the protection of individual and fundamental rights.

In essence the complainants submitted that without an equivalent to the “Article 255 TFEU panel”, there is no guarantee that appointed EFTA Court Judges are sufficiently independent and possess the required professional qualifications to perform their roles as members of the EFTA Court.

Having considered the complaint and carried out its own assessment, the Authority has decided to close the case.

### 1 Correspondence

After an assessment of the complaint, the Authority’s Legal & Executive Affairs Department informed the complainants by letter dated 7 June 2021 that it had taken the preliminary view that the complaint was unfounded (the “pre-closure letter”).<sup>2</sup> In that same letter the complainants were given the opportunity to submit their observations on the assessment in the pre-closure letter and to present any new information by 21 June 2021. Following a request from the complainants, an extension of the deadline was granted until 15 July 2021.<sup>3</sup>

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<sup>1</sup> Document No 1189768.

<sup>2</sup> Document No 1203000.

<sup>3</sup> Document No 1207036.

By letter dated 1 July 2021, the complainants submitted a reply to the pre-closure letter.<sup>4</sup> The Authority does not consider that this reply alters the conclusions set out in its pre-closure letter of 7 June 2021.

## 2 Legal framework

### 2.1 EEA Law

Article 108(2) of the EEA Agreement states:

*“The EFTA States shall establish a court of justice (EFTA Court). The EFTA Court shall, in accordance with a separate agreement between the EFTA States, with regard to the application of this Agreement be competent, in particular, for:*

*(a) actions concerning the surveillance procedure regarding the EFTA States;*

*(b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority;*

*(c) the settlement of disputes between two or more EFTA States.”*

Article 2(2) of the Surveillance and Court Agreement (the “SCA”) states:

*“[The EFTA States] shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement”.*

Article 30 SCA reads in the relevant parts:

*“The Judges shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence. They shall be appointed by common accord of the Governments of the EFTA States for a term of six years.*

*[...]*

*In case one of the Judges, in the opinion of the two other Judges, is disqualified from acting in a particular case, the two other Judges shall agree on a person to replace him chosen from a list established by common accord by the Governments of the EFTA States. [...].”*

### 2.2 EU Law

Article 253(1) TFEU states:

*“The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.”*

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<sup>4</sup> Documents No 1211561, 1211562, 1211563 and 1211564.

Article 255 TFEU reads:

*“A panel shall be set up in order to give an opinion on candidates’ suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.*

*The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel’s operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.”*

### **3 Assessment of whether there is a breach of a provision of EEA law**

#### **3.1 Applicable rules**

Article 255 TFEU became part of EU law following the adoption of the Lisbon Treaty, which was signed on 13 December 2007 and became effective on 1 December 2009. The judicial review panel was created thereafter and began its work on 1 March 2010.<sup>5</sup>

It is apparent that the EU Member States saw the necessity of creating an entirely new, specific legal basis for the “Article 255 TFEU panel”. This legal basis was established by Article 255 TFEU itself, and by the addition of the words “...*after consultation of the panel provided for in Article 255*” to the text of Article 223 TEC when it became Article 253 TFEU.

Conversely, it can be concluded that the legal basis for that panel could *not* be derived from Article 253 TFEU’s predecessor, Article 223 TEC.

As this new body (which the Authority notes in any event only provides non-binding opinions), required a new legal basis, it was therefore for the EU Member States to create that legal basis. Accordingly, the Authority takes the view that it must likewise be for the Contracting Parties to the SCA to create a legal basis for the establishment of an equivalent to the “Article 255 TFEU panel” in the EFTA pillar.

As the first paragraph of Article 30 SCA reflects the wording of Article 223 TEC, rather than Article 253 TFEU, and does not contain the words which were added to Article 253 TFEU “...*after consultation of the panel provided for in Article 255*”, it is clear that no legal basis for establishing an “Article 255 TFEU panel” can be derived from Article 30 SCA as it stands.

Article 108(2) of the EEA Agreement imposes on the EEA EFTA States the obligation to establish a Court of Justice, which is competent, in particular, for: (a) actions concerning the surveillance procedure regarding the EFTA States; (b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority; (c) the settlement of disputes between two or more EFTA States.

The EEA EFTA States have discharged this obligation by creating the EFTA Court and the respective proceedings, as required by Article 108(2) of the EEA Agreement. However, Article 108(2) of the EEA Agreement does not impose on the EEA EFTA States an obligation to create a Court of Justice which is institutionally identical to the Court of

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<sup>5</sup> See Decisions of the Council of the European Union [2010/124/EU](#) in which the panel’s operating rules were laid down, and [2010/125/EU](#) appointing the President and Members (OJ L 50, 27.2.2010, p.18-20).

Justice of the European Union (“CJEU”); indeed, there are significant institutional differences between the two courts, both as regards composition and functions.

### 3.2 Homogeneity requirements

The complainants have argued that the principle of dynamic homogeneity requires the EFTA States to create an “Article 255 TFEU panel”, notwithstanding the lack of a legal basis to do so.

In the landmark Case E-2/06 *ESA v Norway*, the EFTA Court held that:

*“The principle of homogeneity enshrined in the EEA Agreement leads to a presumption that provisions framed identically in the EEA Agreement and the EC Treaty are to be construed in the same way.”*

In Article 105(1) of the EEA Agreement it is stated that the Contracting Parties’ objective to arrive at a uniform interpretation relates to provisions in EU law which are substantially reproduced in the EEA Agreement.

In the present case there is no provision framed in an identical manner or which is substantially reproduced in both the EEA Agreement/SCA and the TFEU. Article 255 TFEU and the final phrase of Article 253(1) TFEU, referring to the “Article 255 TFEU panel”, have no equivalent in EEA law.

The EEA law principles highlighted in the complaint cannot of themselves impose a specific and positive obligation on the Contracting Parties to the SCA to create an “Article 255 TFEU panel”, or indeed change any of the existing differences in composition and function between the CJEU and the EFTA Court. The Authority considers that dynamic homogeneity cannot serve as a self-standing principle entailing the requirement for the Contracting Parties to the SCA to duplicate developments in the EU pillar regarding *institutional architecture* in the absence of any concrete legally binding obligations in EEA law to that effect.

The complainants, in their reply of 1 July 2021 to ESA’s letter of 7 June 2021, seek to draw generalisations regarding the Authority’s position on the principle of homogeneity. However, in both scenarios highlighted in the complaint - the cases of EEA State liability and “EEA fundamental rights” - the points of departure were violations of already existing and concrete individual rights under EEA law, where the principle of dynamic homogeneity served to interpret already existing individual rights under EEA law. Accordingly, the Authority considers that the reference in the complaint to established EFTA Court and ECJ case-law, as well as ESA’s own practice, concerning the principle of dynamic homogeneity, is not on point.

### 3.3 Conclusion: no breach of any specific or systemic EEA law obligation

In the absence of a specific obligation on EEA EFTA States to create an equivalent to the “Article 255 TFEU panel” in the EFTA pillar, the Authority cannot see any means to pursue action based on a breach of that obligation.

## 4 Assessment of mechanisms to ensure independence of judges

Notwithstanding the above, it is appropriate to address the arguments in the complaint to the effect that without an equivalent to the “Article 255 TFEU panel”, there is no guarantee that appointed EFTA Court Judges are sufficiently independent and possess the required professional qualifications to perform their roles as EFTA Court Judges.

The Authority notes that the current EEA legal framework contains a number of institutional safeguards to ensure that EFTA Court Judges are sufficiently independent and well-qualified for their office.

Article 30(1) SCA requires that EFTA Court Judges be appointed by common accord of the Governments of the EEA EFTA States, which provides for another check to ensure that appointed Judges possess the required independence and qualifications.

In this respect it may be noted that the Authority considers the independence of the judicial bench to be a fundamental prerequisite for a well-functioning EEA Agreement, and has accordingly intervened in a number of cases before the European Court of Justice where the independence of Judges was at stake.<sup>6</sup>

The obligation of EEA EFTA States to appoint independent and qualified Judges follows, *inter alia*, from Article 30(1) SCA. Any measures adopted by EEA EFTA States which jeopardise or put into doubt the independence of EFTA Court Judges or undermine their required professional qualifications, would constitute an infringement of Articles 2(2) and 30(1) SCA.

The Authority monitors that the EEA EFTA States act in compliance with their obligations under the EEA Agreement and SCA, including Article 30(1) SCA. If an infringement is detected, the Authority would be empowered to initiate the required proceedings against the respective EEA EFTA State(s).<sup>7</sup>

Finally, the EFTA Court itself has the powers, means and procedures to address the independence of its Judges by way of seeking replacements of disqualified Judges from acting in particular cases, as foreseen in Article 30 SCA. Equally, national courts may prompt the EFTA Court in Advisory Opinion proceedings to address and decide on its independence and lawful composition.<sup>8</sup>

For the sake of completeness, the Authority notes that in their reply to the Authority's letter of 7 June 2021, the complainants have sought to advance certain allegations concerning the independence/impartiality of an EFTA Court Judge. These allegations are addressed in Case 87243.

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<sup>6</sup> ESA intervened, for example, in Case C-522/18 *D.Š.*, Case C-537/18 *Y.V.*, Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Others* and Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others*.

<sup>7</sup> By way of example, on 1 December 2016, the ESA/Court Committee decided to reappoint Judge Per Christiansen for a non-renewable period of only three years, instead of the required six years under Article 30(1) SCA. Following a complaint, ESA sent an information request to all EEA EFTA States, seeking, *inter alia*, their comments on the compatibility of the Decision with Article 30 SCA. By letter of 16 January 2017, the Norwegian Government informed ESA that the Decision had been repealed by a Decision of the ESA/Court Committee of 13 January 2017, and that Judge Per Christiansen had been reappointed for a term of six years. Since the ESA/Court Committee Decision of 13 January 2017 was in line with the wording of Article 30(1) SCA, ESA decided to close the complaint case.

<sup>8</sup> For example, in Case E-21/16 *Pascal Nobile* the EFTA Court addressed the procedure in which Judge Per Christiansen was reappointed and held in its Decision of 14 February 2017, in paragraph 21: "*Irrespective of those considerations, the Court must take account of ESA/Court Committee Decision 2017 No 1 of 13 January 2017, which repealed the ESA/Court Committee Decision of 1 December 2016 and re-appointed Judge Per Christiansen for a term of six years. The new decision is unambiguous and provides for a term that is in accordance with Article 30 SCA. Consequently, there can be no doubt as to the lawfulness of the Court's composition from 17 January 2017.*"

## 5 Conclusion

In the light of the foregoing, there are no grounds for pursuing this case further.

### **HAS ADOPTED THIS DECISION:**

Complaint Case No 86579, regarding an alleged failure by the EEA EFTA States to establish an “Article 255 TFEU panel” in the EFTA pillar of the European Economic Area, is hereby closed.

For the EFTA Surveillance Authority

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