BAUDENBACHER LAW REPORTER
EUROPEAN & INTERNATIONAL LAW SERIES
SEPTEMBER 2021

The European Court of Human Rights' *Holship* Ruling – The End of Dockers' Monopolies in Europe?

Carl Baudenbacher♣ and Laura Melusine Baudenbacher♦

The ECtHR dismisses an application by Norway's dockworkers union against a judgment of the Supreme Court of Norway finding the dockworkers' monopoly in a Norwegian port to run counter to the right to freedom of establishment and the competition rules of the EEA Agreement.

The *Holship* judgment of the European Court of Human Rights' ("**ECtHR**") Fifth Section of 10 June 2021,[1] ends an eight-year saga involving three Norwegian courts, the EFTA Court, and the ECtHR. The decision confirms a judgment of the Supreme Court of Norway of 16 December 2016 that implemented an EFTA Court ruling of 19 April 2016.

Facts

The **Applicants**, the Norwegian Transport Workers' Union ("**NTF**")—a member of the Norwegian Confederation of Labour Unions ("**LO**")—and **LO** itself, had concluded a collective framework agreement ("**FA**") with the Confederation of Norwegian Enterprises ("**NHO**") regarding a fixed pay scheme for dockworkers at thirteen major ports in Norway, including the port of Drammen. The FA contained a clause obliging vessels of 50 deadweight tonnes and more sailing from a Norwegian to a foreign port and *vice versa* to have any loading and unloading ("stevedore") work performed by organized dockworkers. The FA established an administrative office for dock work in the port of Drammen ("AO"). All permanently employed dockworkers in the Drammen port were engaged by AO.

Holship Norge AS ("**Holship**"), a wholly owned Norwegian subsidiary of the global transport and shipping conglomerate Holship Holding A/S Denmark, was neither a member of NHO nor a party to the FA. In 2013, it employed four workers in the Drammen port for, *inter alia*, stevedore

♣ Prof. Dr. iur. Dr. rer. pol. h.c., Senior Partner, Baudenbacher Law Ltd., Zurich, Switzerland; Door Tenant Monckton Chambers, London, United Kingdom; Visiting Professor London School of Economics LSE; President of the EFTA Court 2003-2017. The author discloses that he was both the President of the EFTA Court and the Judge Rapporteur in Case E-14/15, *Holship*.

♦ Dr. iur., Managing Partner, Baudenbacher Law Ltd., Zurich, Switzerland; Lecturer at the University of Luxembourg.

[1] ECtHR, Fifth Section, Judgment of 10 June, 2021, *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v Norway*, application no. 45487/17 (available here).

operations. NTF asked Holship to accept the FA, which would have meant priority engagement for AO's workers under the conditions dictated by the agreement. By letter of 11 June 2013, NTF gave a notice of boycott with the aim of securing a collective agreement containing the principle of priority of engagement for Holship's stevedore activity. NTF relied on the Norwegian Supreme Court's decision in the *Port of Sola* case—a matter essentially identical to the *Holship* case.[2]

NTF took the case to the Drammen Municipal Court, which ruled that the announced boycott was lawful. This was confirmed by the Borgarting Court of Appeal.

The EFTA Court's Judgment

The Supreme Court of Norway granted leave to appeal and on 5 June 2015 referred two sets of questions to the EFTA Court for a preliminary ruling: a first set concerned the compatibility of the boycott with EEA competition rules; a second set related to the conformity with the freedom of establishment. EEA law is essentially identical in substance to EU single market law.

On 19 April 2016, the EFTA Court ruled that the exemption of collective agreements from EEA competition rules did not cover a clause that obliged a port user to give priority to another company's workers over its own employees, or the use of a boycott in order to procure acceptance of the collective agreement containing said clause.[3] A collective agreement falls outside the scope of EEA competition rules only if it was concluded following collective bargaining between employers and employees, and if it pursues the objective of improving work and employment conditions. The first requirement was fulfilled, but the second was not. The EFTA Court noted that the aggregate effect of two clauses of the FA—the priority clause and the clause establishing AO—was to guarantee AO's workers permanent employment and a certain wage. Thus, their aim was to protect only a limited group of workers employed by AO to the detriment of Holship's workers.

The EFTA Court found the provision of stevedore services to constitute an economic activity since it consisted in offering a service on a market where AO, actually or potentially, competed with other providers. It was for the Supreme Court to determine whether the conduct in question had an appreciable effect on trade between EEA Contracting Parties—the (at the time) 28 EU Member States and the 3 EEA/EFTA States.

The EFTA Court also noted that a single port may be regarded as a substantial part of EEA territory. In assessing this, the referring court would also have to consider identical or corresponding systems in other

[2] Supreme Court of Norway, *Port of Sola*, Rt. 1997, 334, 337.

[3] Case E-14/15, *Holship Norge AS v Norsk Transportarbeiderforbund* [2016] EFTA Ct. Rep. 242 (available here).

ports.

As for the question of abuse, the EFTA Court directed the referring court to assess whether **AO** (i) obliged customers to obtain all or most of their requirements for stevedore services from it, (ii) charged disproportionate prices, or (iii) refrained from using modern technology.

Regarding a possible infringement of the cartel prohibition, the EFTA Court held that it is was for the Supreme Court to assess whether the thirteen **AO**s were parties to an unlawful agreement or a concerted practice.

Importantly, the EFTA Court referred to the 2006 ECtHR's Grand Chamber judgment in *Sørensen and Rasmussen* v *Denmark*.[4] Here, the Strasbourg Court held that a closed shop arrangement where a specific employment was contingent on workers joining a union with which the employer had a special relationship infringed Article 11 of the European Convention on Human Rights ("**ECHR**"), which *inter alia* guarantees the negative freedom of association.

As regards the freedom of establishment, the EFTA Court found that the boycott constituted a restriction which might be justified either on the grounds laid down in Article 33 of the EEA Agreement (public policy, public security, or public health) or by overriding reasons of general interest, such as the protection of workers. These justifications should be interpreted in light of fundamental rights. There was nothing to indicate that the boycott aimed at improving working conditions of Holship's employees. It was for the referring court to determine whether a justification was possible in this case.[5]

The Norwegian Supreme Court's Judgment

On 16 December 2016, the Norwegian Supreme Court in a plenary decision with a 10-7 vote found the notified boycott to be unlawful.[6] Writing for the majority, Justice *Skoghøy* underlined that the right to priority of engagement provided relatively indirect protection of employment conditions in that jobs were protected by effectively shielding **AO** from competition.[7] He added that from a human rights perspective, it was hard to argue that the jobs generated within Holship carried less weight than those in the **AO**."[8]

The Supreme Court's majority found that the boycott was unlawful because it violated the freedom of establishment,

4 ECtHR, Grand Chamber *Sørensen & Rasmussen v. Denmark*, applications nos. 52562/99 and 52620/99 (available here); see EFTA Court, *Holship*, paragraphs 103 *et seq*. and 123, loc. cit.

5 EFTA Court, *Holship*, paragraphs 117 *et seqq*. and 123 *et seqq*., loc. cit.

6 Supreme Court of Norway, HR-2016-2554-P, (sak nr. 2014/2089) (available in Norwegian here).

7 Ibid., paragraph 103.

8 Ibid., paragraph 118; unofficial translation.

adding that there were no sufficient grounds to depart from the EFTA Court's conclusions regarding competition law.[9] Thereby, the Supreme Court made the EFTA Court's EEA competition law holdings an integral part of its judgment.

The outcome of the *Holship* case is particularly noteworthy since in its 1997 *Port of Sola* judgment, the Supreme Court had found that a boycott benefited from the exemption of collective bargaining and industrial action from competition law.[10]

The European Court of Human Rights' Judgment

The Bosphorus issue

From an economic operators' perspective, a decisive issue is whether the ECtHR's *Bosphorus* case law from 2005 applies to the EEA. Here, the Grand Chamber held that if an organisation to which a Contracting State has transferred jurisdiction is considered to protect fundamental rights in a manner at least "*equivalent*" to the ECHR, it is presumed that said State has not departed from the Convention's requirements when it merely implements legal obligations flowing from its membership in the organisation.[11]

In *KONKURRENTEN.NO*, the ECtHR's Second Section stated that the basis for the presumption established by *Bosphorus* is in principle lacking when it comes to the implementation of EEA law at domestic level. In contrast to EU law, direct effect and primacy were lacking within the framework of the EEA Agreement, and the EEA Agreement did not include the EU Charter of Fundamental Rights or any reference to other legal instruments having the same effect, such as the Convention.[12]

This approach overlooked that the EFTA Court not only recognised the existence of EEA fundamental rights,[13] but also acknowledged EEA state liability,[14] which implies a certain degree of direct effect.

In *Holship*, the ECtHR's Fifth Section has departed from this case law by finding that fundamental rights form part of the unwritten principles of EEA law. Thus, the absence of a codified fundamental rights instrument in the EEA Agreement was irrelevant to deciding whether the *Bosphorus* case law applied to the

9 Ibid., paragraph 118.

10 Supreme Court of Norway, *Port of Sola*, loc. cit.

11 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, application no. 45036/98, paragraphs 152 *et seq.* and 155 *et seq.*

12 *KONKURRENTEN.NO AS v Norway*, application no. 47341/15, paragraph 106.

13 Case E-2/03, *Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson et al.*, [2003] EFTA Ct. Rep. 185, paragraph 23 and case law cited (available here).

14 Case E-9/97, *Erla María Sveinbjörnsdóttir v Iceland*, [1998] EFTA Ct. Rep. 95 (available here).

implementation of the EEA Agreement.[15]

Necessity of the Restriction of the Unions' Rights under Article 11 ECHR

The Supreme Court's judgment was somewhat mute on the issue of whether a "closed shop" existed. The ECtHR therefore limited its analysis to determining whether the restriction of the unions' rights through the qualification of the boycott as unlawful was necessary for the purposes of Article 11 ECHR. It found that the Norwegian Supreme Court had broadly assessed the conflicting fundamental right to industrial action and the EEA law freedom of establishment and that a fair balance had been struck in the particular case. The fact that the announced boycott targeted a third party had also been considered. Based on the doctrine of margin of appreciation, the ECtHR found no sufficiently strong reasons to substitute its assessment for that of the Norwegian Supreme Court.[16] It thus concluded that no violation of Article 11 ECHR had occurred.

Conclusions

The ECtHR's ruling has sealed the fate of the organised dockworkers' monopoly on stevedore work in Norway. According to both the monopoly's opponents and defenders, the EFTA Court's *Holship* judgment was the decisive factor. Belgian lawyer and professor *Eric van Hooydonk*, a renowned practitioner of port law, characterised the ruling as "*crystal-clear*" and remarked that it could impact EU ports.[17] Even critics *John Hendy* QC and *Tonia Novitz* described the EFTA Court's *Holship* judgment as "*one of the most significant cases in European labour law so far this century*".[18]

The EFTA Court's ruling differs from judgments of EU courts on collective bargaining in that it is based both on competition law and the right to freedom of establishment, and that it also extensively discusses Article 11 ECHR-implications. In its *Landsorganisasjonen i Norge*[19] decision, the EFTA Court did not follow the ECJ's *Albany*[20] ruling, which had failed to examine the limits of the competition law immunity of collective bargaining. Rather, it adopted a more nuanced approach proposed by Advocate General *Franics Jacobs* in *Albany* who—following a seminal comparative analysis—concluded that while in all the systems examined (including US law) collective agreements

15 ECtHR, *Holship*, paragraph 107.

16 Ibid., paragraph 115.

17 *Eric van Hooydonk*, EFTA Court decision on Norway dockers could hit EU ports (available here).

18 The Holship Case, Industrial Law Journal, 47(2), 315-335 (2018).

19 Case E-8/00, *Landsorganisasjonen i Norge*, [2002] EFTA Ct. Rep. 95 (available here).

20 Case -67/96, *Albany International*, EU:C:1999:430 (available here).

were to some extent sheltered from competition law, such immunity was not unlimited.[21]

A special feature of the ECtHR's *Holship* judgment is certainly that the Court's Fifth Section deviated from the Second Section's view on the applicability of the *Bosphorus* doctrine to the EEA. In fact, any gaps in judicial protection in the EFTA pillar of the EEA arise less from the absence of an explicit recognition of direct effect and primacy, but more from the fact that the duty of loyalty laid down in Article 3 EEA is not sufficiently enforced by the EFTA Surveillance Authority.[22] Moreover, the EEA/EFTA States to this day reject the creation of an entity along the lines of the Article 255 TFEU-panel to review the suitability and independence of candidates for EFTA Court judgeship. Its absence increases the risk of delegation of political appointees to Luxembourg—a fact which may prove relevant in future ECtHR cases.

While the ECtHR's judgment has terminated the dockworker monopoly in Norway, it will be interesting to see whether courts in other European jurisdictions will follow. Although the ECJ's case law on the unlawfulness of dockworker monopolies has been clear since the 1991 *Porto di Genova* judgment,[23] such monopolies continue to exist throughout Europe, as two recent cases from Belgium have shown.[24] Dockworkers are well organised through a global network, they have good connections to civil servants and politicians and may not give up without a fight.[25]

[21] Opinion of AG *Francis Jacobs* in Case C-67/96, *Albany International*, EU:C:1999:28 (available here).

[22] See in this regard *Carl Baudenbacher*, Loyalty vs. Sovereignty. Some thoughts on the EFTA pillar of the EEA, *Verfassungsblog* of 25 June 2020, available here.

[23] Case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*., EU:C:1991:464 (available here); see also Case C-576/13, *Commission v Spain*, EU:C:2014:2430 (available here); *Tommaso Pavone*, From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa. Law & Society Review 53 (3): 851-888 (2019).

[24] Joined Cases C-407/19 and C-471/19, *Katoen Natie Bulk Terminals NV and General Services Antwerp NV v Belgische Staat*, and *Middlegate Europe NV v Ministerraad*, EU:C:2021:107 (available here).

[25] The dockers are globally connected through the International Dockworkers Council, whose website exists in no less than 18 languages; see here.