



EFTA Court's 20th Anniversary Conference

20 June 2014

Carl Baudenbacher **President of the EFTA Court**

20 years EFTA Court

Excellencies, dignitaries, ladies and gentlemen,

a little more than 20 years ago, on 4 January 1994, the EFTA Court held its inaugural sitting in its original headquarters in Geneva. We are gathered here today to commemorate this event, to take stock and to celebrate.

I welcome you to the conference marking the Court's anniversary.

It is not possible to mention all the dignitaries who are present.

It is a special honour that the representative of His Royal Highness Henri Grand-Duke of Luxembourg, Maréchal de la Cour *Pierre Bley*, and H.E. Prime Minister *Xavier Bettel* are present this morning.

Let me salute the Court's first President *Leif Sevón*;

Former Judges *Sven Norberg*, *Thorgeir Örlygsson* and *Henrik Bull*;

H.E. *Thomas Zwiefelhofer*, Vice Prime Minister of the Principality of Liechtenstein;

Chief Justices *Markús Sigurbjörnsson* of Iceland and *Tore Schei* of Norway;

President of the Administrative Court of Liechtenstein *Andreas Batliner*;

President of the Administrative Court of Luxembourg *Georges Ravarani*;

EFTA Surveillance Authority President *Oda Helen Sletnes* and Former President *Knut Almestad*;

Vice-President *Koen Lenaerts* from the Court of Justice of the European Union;

President *Marc Jaeger* from the General Court of the European Union;

Vice-President *Ulrich Meyer* from the Federal Supreme Court and

President *Jean-Luc Baechler* from the Federal Administrative Tribunal of the Swiss Confederation;

and *Peter Freeman*, Chairman of the UK Competition Appeal Tribunal.

Later in the day, H.E. *Sigmundur Davíð Gunnlaugsson*, Prime Minister of Iceland will join us. Some friends have come from countries outside of the EEA.

I welcome the Director of the Institute of International Law of Moscow State University, Professor *Alexei Ispolinov*.

Professor *Clifford Jones* from the University of Florida.

And I pay a special salute to the members of the North East Asian Free Trade Law Project which is supported by the Government of Japan, Professors *Takao Suami* from Waseda University, *Yoichi Ito* and *Koji Teraya* from Tokyo University, and *Shotaro Hamamoto* from Kyoto University.

The EFTA Court is

I. an example of judicialisation of international dispute resolution.

That is the first point I want to emphasise.

Diplomacy has been replaced by court adjudication.

Whereas diplomats are state agents, judges must be independent.

Whereas diplomatic conflict resolution can only succeed if there is consent among the parties, courts decide by majority.

And whereas diplomatic bodies are acting behind closed doors, the forum of a court is open to criticism by scholars and the public.

II. Second point: It has worked.

1. The Court registered over 200 cases since it started.

The curve is pointing upward.

And generally speaking, acceptance has been good.

That the Court would have to deal with alcohol and tobacco monopolies, transfrontier television broadcasts or all sorts of nationality and residence requirements was to be expected.

What could not be predicted was that we would be the first court in the EEA which had to rule on the precautionary principle in food law,¹ on the discriminatory taxation of outbound dividends,² on the scope of the bid price rules in the Takeover Directive,³ on a display ban for tobacco products at the point of sale,⁴ on the legal nature of a website,⁵ on the question of whether a trust may invoke the fundamental freedoms,⁶ or on whether the Deposit Guarantee Directive obliges a State to stand in if the respective guarantee scheme is unable to compensate depositors in a systemic crisis.⁷ These are just a few examples.

Looking back, one may also be surprised about the role the Court has given to the case law of the European Court of Human Rights.⁸

2. Some said that the EEA Agreement works in practice, but not in theory.

This may sound funny, but nothing could be further from the truth.

If you see that something has worked in practice, that it has benefitted citizens and economic operators and the economies of the Member States at large, your theoretical assumptions must be revised.

Theory can never be a goal in itself, it has to serve practical purposes.

One of the problems of the past 20 years was, however, that the Court had to deal with some who believed that something might be wrong with the EEA's theoretical foundations.

I think that we have mastered this challenge.

Having said that, I would frankly agree that if you measure the EEA Agreement against the yardstick of classical public international law, it is

3. a hybrid, a mixed breed.

In fact, the Court has characterised the Agreement in its landmark judgment in *Sveinbjörnsdóttir* - the Icelanders call it the *Erla María* judgment - as an international treaty *sui generis*.⁹

¹ E-3/00 *ESA v Norway* ("Kellogg's"), 2000-2001 EFTA Court Report, 73; E-4/04 *Pedicel*, 2005 EFTA Court Report, 1

² E-1/04 *Fokus Bank*, 2004 EFTA Court Report, 1.

³ E-1/10 *Periscopos*, 2009-2010 EFTA Court Report, 198.

⁴ E-16/10 *Philip Morris*, 2010 EFTA Court Report, 330.

⁵ E-4/09 *Inconsult*, 2009-2010 EFTA Court Report, 86.

⁶ Joined Cases E-3/13 and E-20/13 *Olsen* (pending).

⁷ E-16/11 *ESA v Iceland* ("Icesave"), 2013 EFTA Court Report, 13.

⁸ See, for example, E-8/97 **TV 1000**, 1998 **EFTA Court** Report, 68; E-2/03 *Ásgeirsson*, 2003 EFTA Court Report, 185. E-15/10 *Posten Norge*, 2012 EFTA Court Report, 246.

⁹ E-9/97 *Erla María Sveinbjörnsdóttir*, 1998 EFTA Court Report, 95, paragraph 59.

ECJ Advocate-General *Mengozzi* concurred with this categorization in his recent opinion in the *Fonship* case.¹⁰

Based on this, the Court has recognised state liability, but not direct effect and primacy of EEA law.

But then I ask you: What's wrong with being of a *sui generis* nature?

As we know from the animal kingdom, mixed breeds are often particularly tough and resistant. Which also means that they are often long-lived.

4. That it has worked, does not mean that everything is perfect.

Improvements are in particular possible in the field of preliminary references.

In my short remarks today, I limit myself to pointing to the duty of loyalty which also binds the national supreme courts and to the principle of reciprocity.

IV. Third point: What are the key concepts?

The key concepts of EEA law are homogeneity and - indeed - reciprocity.

Homogeneity at the judicial level means that the case law in both EEA pillars shall develop in a uniform way.

Here, the EEA's most significant feature becomes apparent: For a single market to function, there must be a level playing field. Competition must be lead by price, quality, customer service and the like, and not by regulation.

Overall, I think that homogeneity has been preserved.

I may quote here from the 2012-2013 EEA White Paper of the Norwegian Ministry of Foreign Affairs:

“The EU generally appears to have great confidence that the EFTA Surveillance Authority and the EFTA Court function as intended and are able to ensure compliance with the provisions of the EEA Agreement.”¹¹

This leads me to another important issue: No matter what is written in the EEA Agreement, our relationship with the ECJ is largely characterized by judicial dialogue.

¹⁰ Opinion of 1 April 2014 in Case 83/13, footnote 54.

¹¹ The EEA Agreement and Norway's other agreements with the EU, Meld. St. 5 (2012–2013) Report to the Storting (White Paper), http://www.eu-norway.org/Global/SiteFolders/webeu/MeldSt5_UD_ENG.PDF, 55).

As far as the law on the books is concerned, this dialogue is, as ECJ Judge *Allan Rosas* has stated, “vertical or at least semi-vertical”. But with regard to the law in action, he goes on by saying that

“the EFTA Court seems to offer the best example of a court with which the ECJ is engaged in a relationship of horizontal dialogue.”¹²

In fact, we loyally follow relevant ECJ (and GC) case law as far as it is available and as far as the facts are identical. But in most cases we face novel legal questions, which means that we have to go first. And here, it has become routine that Advocates General would take into account our case law. But we also reference their opinions.¹³ The ECJ and the GC too have on many occasions cited the EFTA Court. This dialogue was opened by the then Court of First Instance in 1997 in its seminal *Opel Austria* judgment.¹⁴

Nobody has summarized the situation better than ECJ President *Skouris* who stated in the book marking the EFTA Court’s Tenth Anniversary:

“[I]gnoring EFTA Court precedents would simply be incompatible with the overriding objective of the EEA agreement which is homogeneity.”¹⁵

This cooperation which manifests itself in almost 150 citations by the Courts and Advocates General of the European Union is proof that the EFTA pillar is not only profiting from the EEA, but is also making a contribution to the development of the law in the EU.

The dialogue with our sister courts has several functions. It is not only that citing another court means paying respect to it, although it is clear that we all are not free from vanity.

In particular the *Sveinbjörnsdóttir* case has shown that another function of dialogue may be important. By holding that State liability is part of EEA law, the EFTA Court ruled against the recommendations of the Governments of Iceland, Norway and Sweden and also against the view of the European Commission.

That the ECJ made reference to our judgment 6 months later in *Rechberger*¹⁶ gave us support in a politically sensitive case. And this was crucial, as the Common Market Law Review noted in Editorial Comments shortly after.¹⁷ Let me quote my predecessor *Thór Vilhjálmsson* here who used to say:

¹² *Allan Rosas*, The European Court of Justice in Context: Forms und Patterns of Judicial Dialogue, Vol. 1 EJLS No. 2, 1, 13 f.

¹³ See *Carl Baudenbacher*, The EFTA Court’s Relationship with the Advocates General of the European Court of Justice, *Mélanges en l’honneur de Paolo Mengozzi*, Brussels 2013, 341 ff.

¹⁴ T-115/94 *Opel Austria* [1997] ECR, II-39, paragraph 108.

¹⁵ *Vassilios Skouris*, The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions, in: *Carl Baudenbacher/Per Tresselt/Thorgeir Örlygsson*, eds., *The EFTA Court Ten Years On*, 123, 125.

¹⁶ C-140/97, 1999 I-3499, paragraph 39.

¹⁷ Editorial comments: European Economic Area and European Community: Homogeneity of legal orders?, *CMLRev* 1999, 697 ff.

“Without State liability the EEA Agreement would not have taken off.”

In the meantime, *Sveinbjörnsdóttir* is settled case law.

The EEA's other backbone, reciprocity, means that access to justice for citizens and economic operators must essentially be identical in both EEA pillars. Reciprocity becomes relevant, as *Leif Sevón*, *Martin Johansson* and *Sven Norberg* have rightly pointed out, in the area of internal effect of EEA law, but also with regard to the question whether the right cases come before the EFTA Court.¹⁸

It must be noted that both the ECJ and the EFTA Court have in their recent case law put emphasis on reciprocity.¹⁹

V. Fourth point: Why do the EFTA States need their own court with own Judges?

I would give 4 answers:

- 1) Only an own Judge will be able to explain the historic, political, legal, economic, social and cultural features of a country.
- 2) Integration is less far-reaching under the EEA Agreement than under the Treaties of the EU. An own court will be particularly aware of this.
- 3) Judging is not an exact science.

In that respect let me quote the famous saying from the Hanseatic Court of Appeal in Bremen where my wife comes from:

“Before the courts and on the high seas, we are in the hands of God.”

This means that not only norms matter, people matter too.

- 4) To have an own court facilitates the acceptance of the judgments. To be subject to a court without having a judge there might have a smell of judicial colonialism.

I have spoken about homogeneity. That the case law has developed in a homogeneous way is also due to

VI. soft factors.

¹⁸ *Sevón/Johansson*, The protection of the rights of individuals under the EEA Agreement, 24 *European Law Review*, 373, 384 (1999); *Norberg*, Perspectives on the Future Development of the EEA Agreement, *Afmælisrit Thór Vilhjálmsson*, Reykjavík 2002, 367 ff., 374.

¹⁹ See E-18/11 *Irish Bank* [2012] EFTA Court Report, 592, paragraphs 57 and 58; E-14/11 *DB Schenker I*, [2012] EFTA Court Report, 1178; paragraph 118; E-3/12 *Jonsson* [2013 EFTA Court Report, 135, paragraph 60; AG Kokott in C-431/11 *UK v Council* paragraph 42; ECJ C-431/11 *UK v Council* paragraph 55; E-12/13 *ESA v Iceland*, paragraph 68.

Lawyers, and in particular those who adhere to positivism, tend to overlook that.

The most important soft factor has without any doubt been the move of the Court's seat from Geneva to Luxembourg in September 1996.

Although the move was controversial at the time and some did not want to miss Lake Geneva and the Mont Blanc, the fact that we are located across the street of our slightly larger sister court, the Court of Justice of the European Union, has proven to be beneficial.

It is not that we would talk about cases every day. But over the years, you get to know each other, our legal secretaries are members of the *Amicale des Référéndaires*, we take part in our sister court's official functions and they take part in ours. And we also see each other at private events.

Our presence here has not only facilitated the dialogue with the EU courts.

We have also become part of Luxembourg public life and of the Luxembourg civil society.

We have the feeling that we have been accepted here.

We from the EFTA States, too, want to remain what were are. In that respect, the Luxembourg national motto

"Mir wölle bleiwe wat mir sin."

also applies to us.

And yet Luxembourg is a shining example for all of us when it comes to internationality and open-mindedness.

It is a special honour for the Court that H.E. Prime Minister *Xavier Bettel* will give the keynote speech.

I hand over to the first President of the EFTA Surveillance Authority, Ambassador *Knut Almestad*, and ask him to introduce the Prime Minister.