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President of the EFTA Court

The EFTA Court in it's 24th Year



First Judicial Summit of the EFTA Pillar, 2 May 2017

A. Introduction

B. Structure and case load

C. Important cases

D. Backbones of the EEA Agreement

E. Judicial style and underlying philosophy



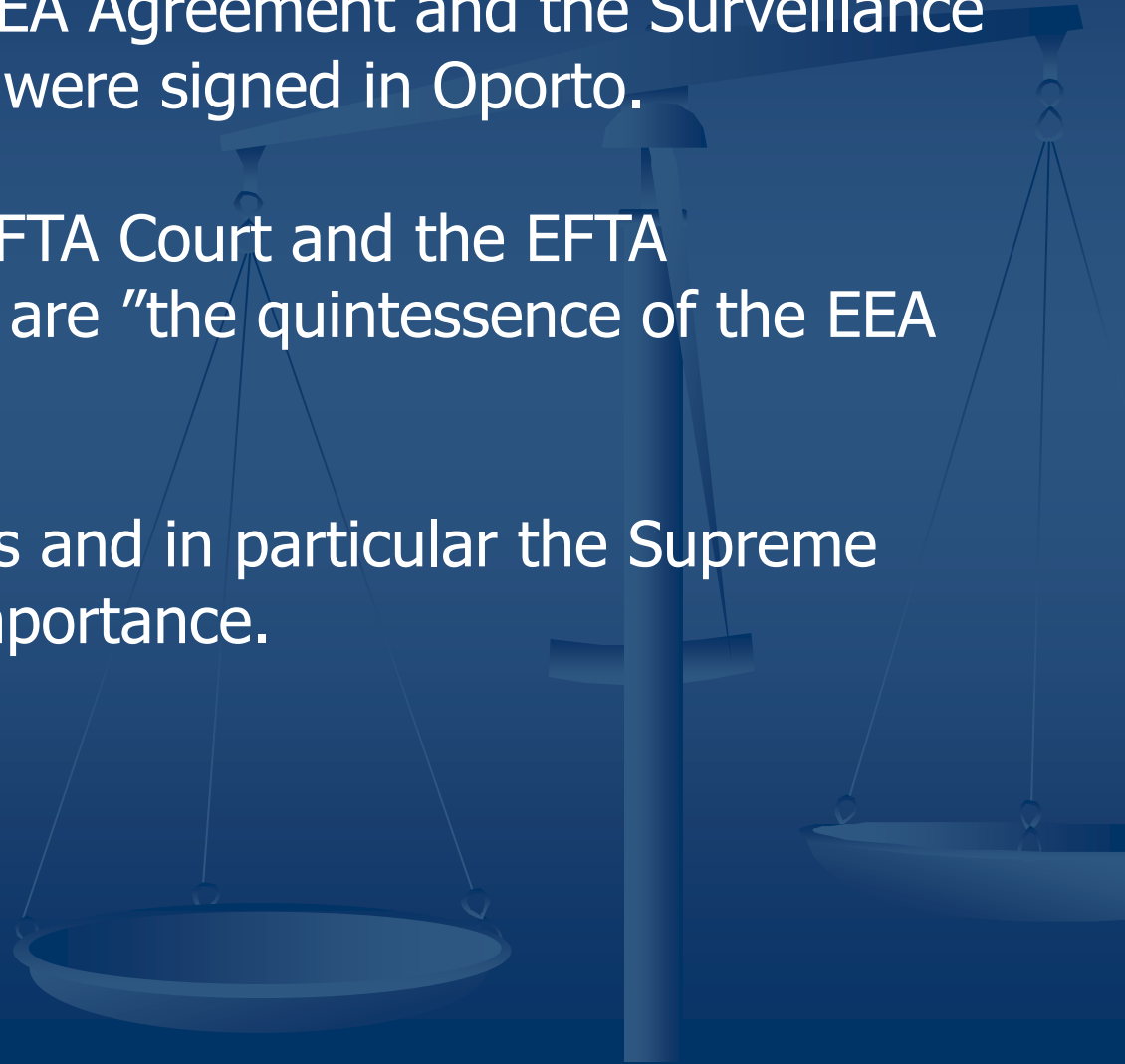
A. Introduction

Today is 2 May 2017.

On 2 May 1992, the EEA Agreement and the Surveillance and Court Agreement were signed in Oporto.

Knut Almestad: The EFTA Court and the EFTA Surveillance Authority are "the quintessence of the EEA Agreement."

But the national courts and in particular the Supreme Courts are of equal importance.



A. Introduction



A. Introduction

The past 25 years have seen:

Four American presidents.

The emergence of the internet.

Paul Krugman: The Internet's impact on the economy will be no greater than the fax machine's.

Jerzy Buzek, Polish Prime Minister (1997-2001) and President of the European Parliament (2009-12):

"In the 20th Century, each quarter-century – 1914, 1939, 1968, 1989 – brought Europe to an unpredictable turning point."

A. Introduction

Could anyone have imagined in 1992 that the EEA would still be there in 2017?



B. Structure and case load

From 7 to 5 to 3 Judges.

Since mid-1995 a court of three.

'Tres faciunt collegium.' (Digest of Justinian.)

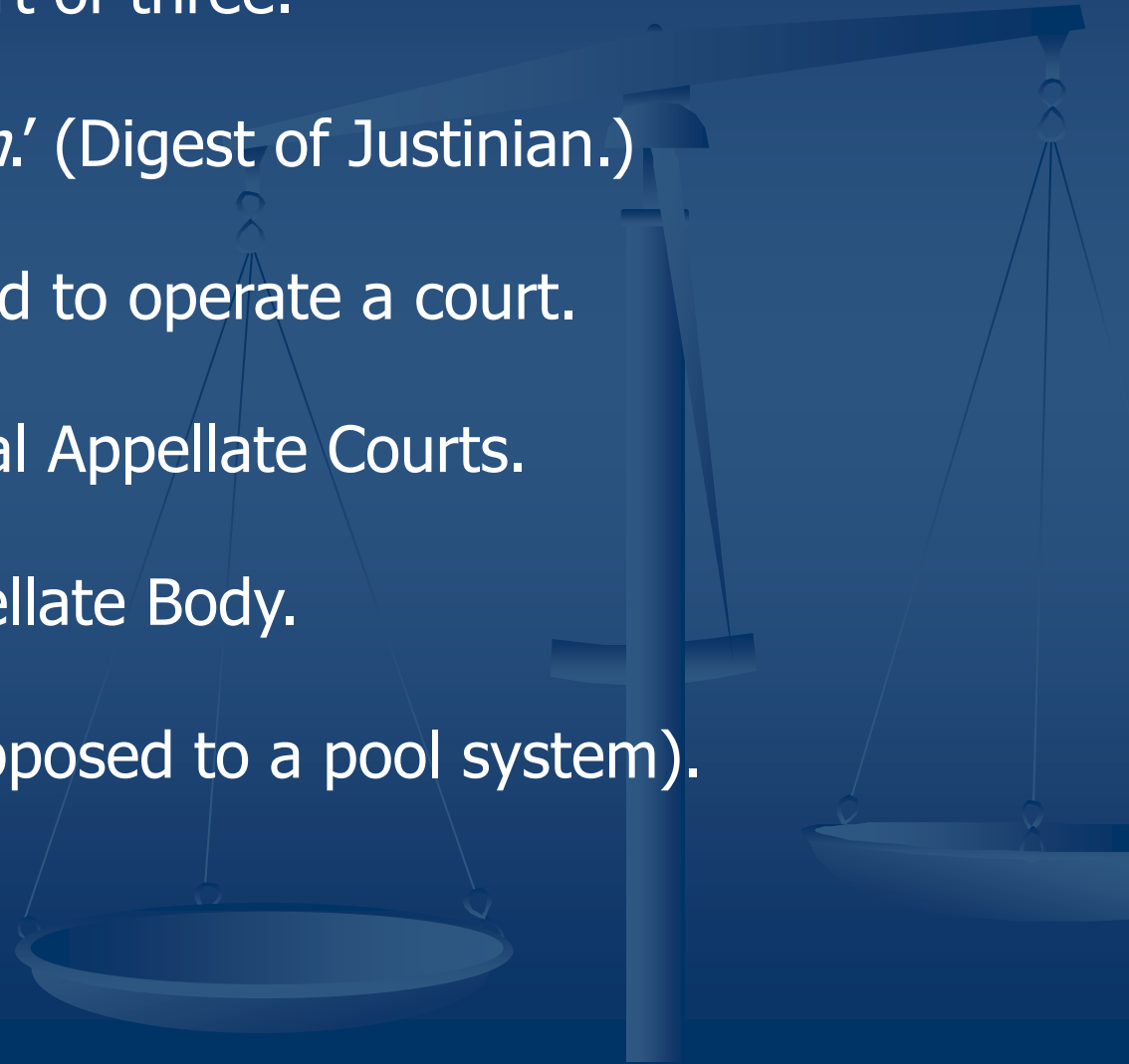
Minimum number need to operate a court.

* Compare U.S Federal Appellate Courts.

* Compare WTO Appellate Body.

Cabinet system (as opposed to a pool system).

Registry.



B. Structure and case load

285 cases so far.

Direct actions:

165

References by national courts:

120



B. Structure and case load

Uncontested infringement cases: 77

Contested infringement cases: 24

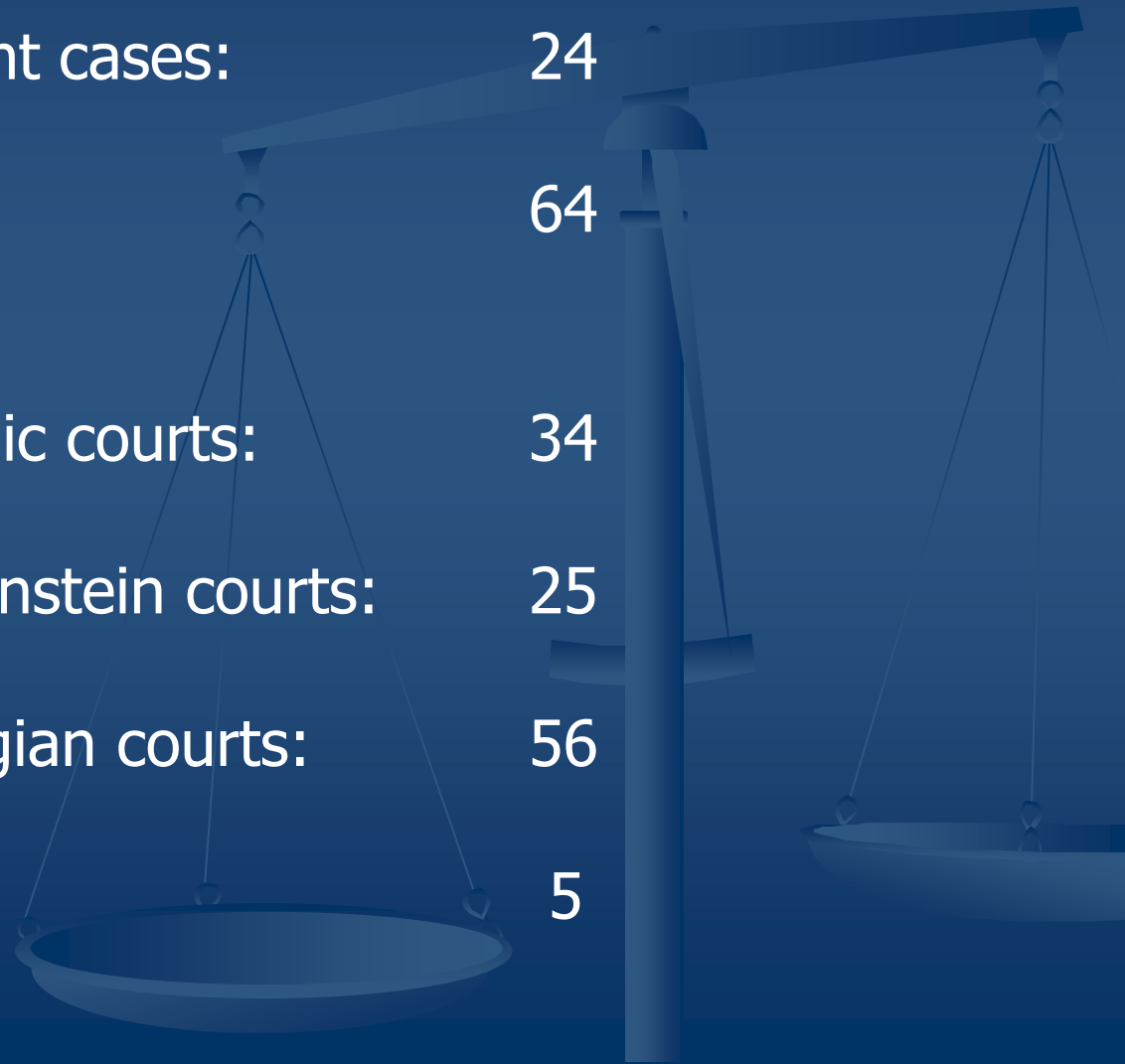
Other direct actions: 64

References by Icelandic courts: 34

References by Liechtenstein courts: 25

References by Norwegian courts: 56

Other: 5



C. Important cases

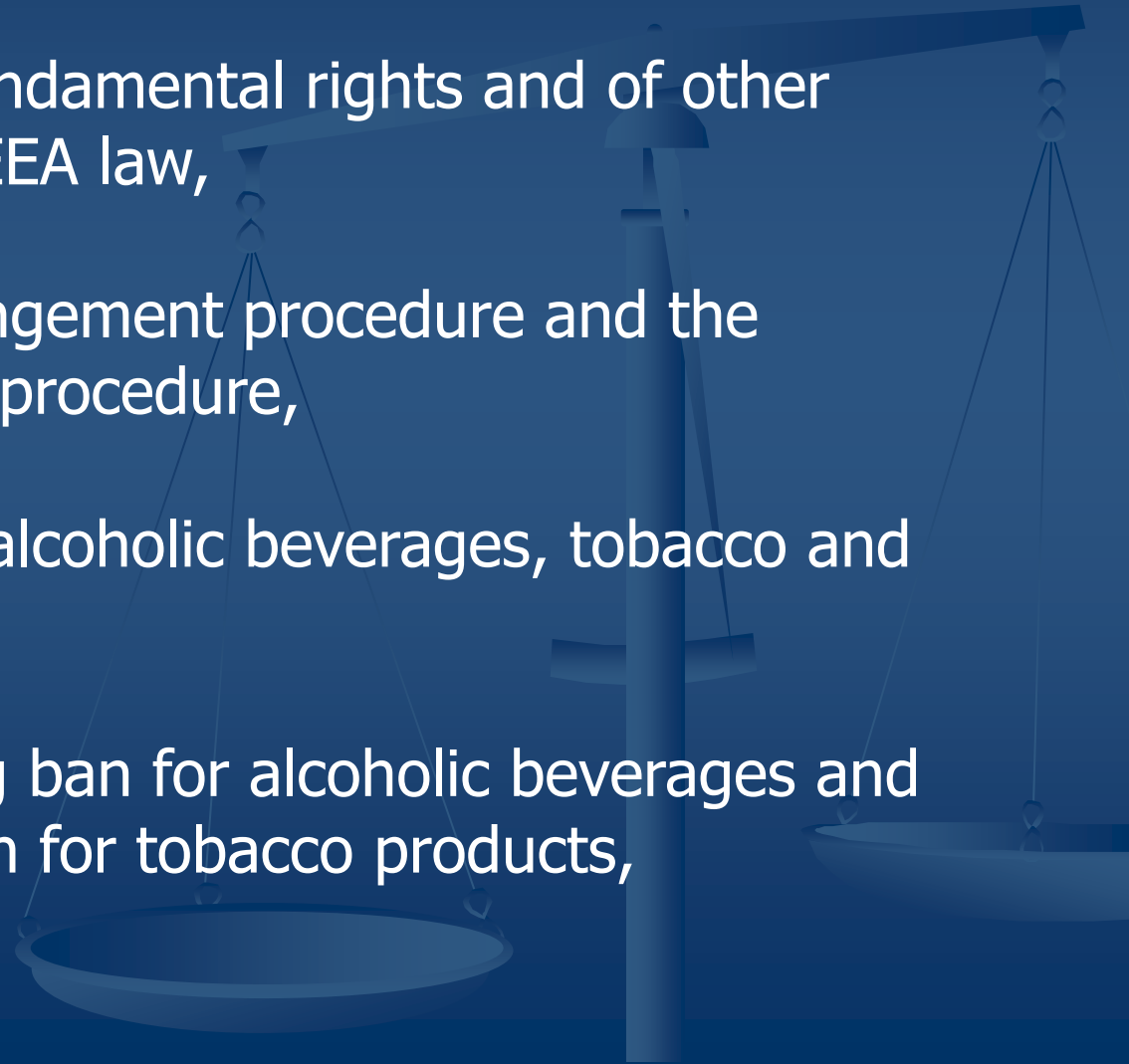
EFTA States' liability for legislative, administrative and judicial wrongdoing,

Recognition of EEA fundamental rights and of other general principles of EEA law,

Modalities of the infringement procedure and the preliminary reference procedure,

State monopolies for alcoholic beverages, tobacco and gambling,

Norwegian advertising ban for alcoholic beverages and Norwegian display ban for tobacco products,



C. Important cases

Liechtenstein residence requirements,

Norwegian reversion system for waterfalls,

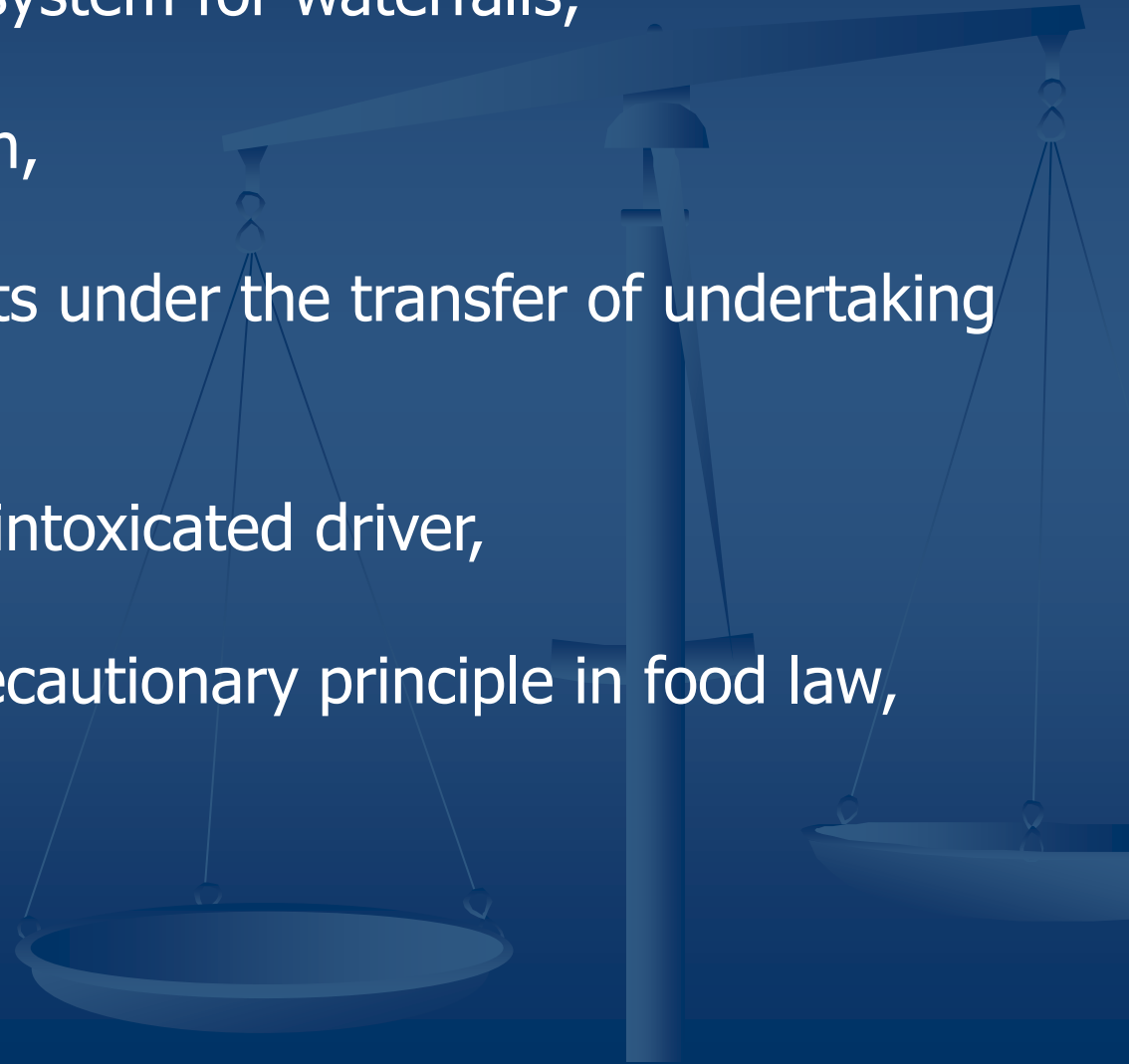
Transfrontier television,

Succession of contracts under the transfer of undertaking rules,

Taking a ride with an intoxicated driver,

Recognition of the precautionary principle in food law,

Taxation of dividends,



C. Important cases

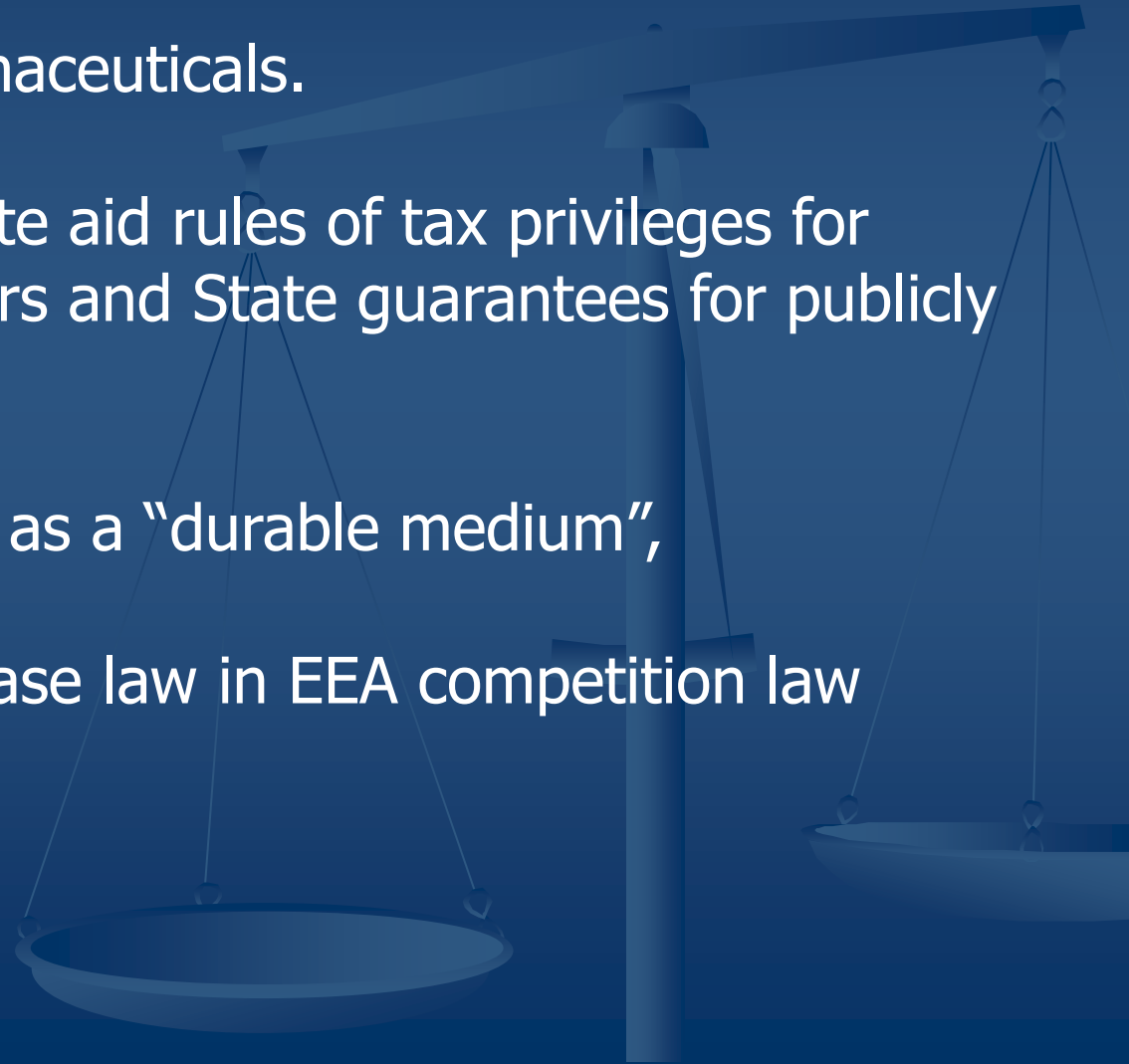
Relationship between competition law and collective bargaining/industrial action,

Repackaging of pharmaceuticals.

Compatibility with State aid rules of tax privileges for certain economic actors and State guarantees for publicly owned banks,

Sophisticated website as a “durable medium”,

Relevance of ECtHR case law in EEA competition law cases,



C. Important cases

Public access to documents of ESA (for private parties seeking damages),

Security of costs,

Legal consequences of the downfall of the Icelandic banks in 2008,

In particular *Icesave I*,

Right of residence and EU Citizenship Directive in an EEA law context,



C. Important cases

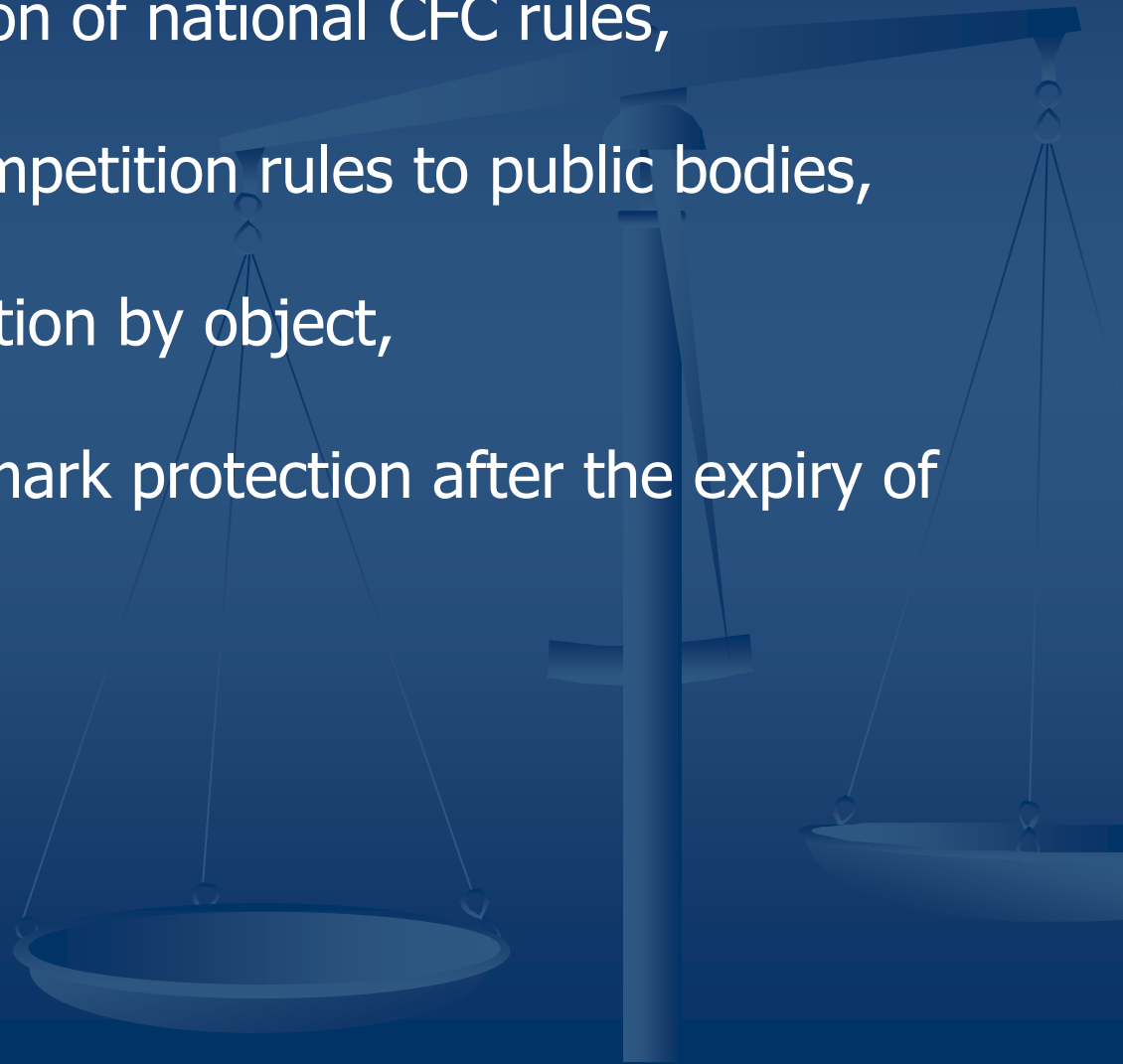
Trade in second-hand life insurance policies,

Limits of the application of national CFC rules,

Application of EEA competition rules to public bodies,

Restriction of competition by object,

Application for trade mark protection after the expiry of copyright.



D. Backbones of the EEA Agreement

I. Homogeneity

Law on the books: One way street (E-1/15 *Restamark*).

Law in action: Going first and judicial dialogue.

EEA Agreement as a “living instrument.”

Vassilios Skouris in 2014:

Symbiotic relationship marked by mutual respect and dialogue which has allowed the flow of information in both directions.

D. Backbones of the EEA Agreement

I. Homogeneity

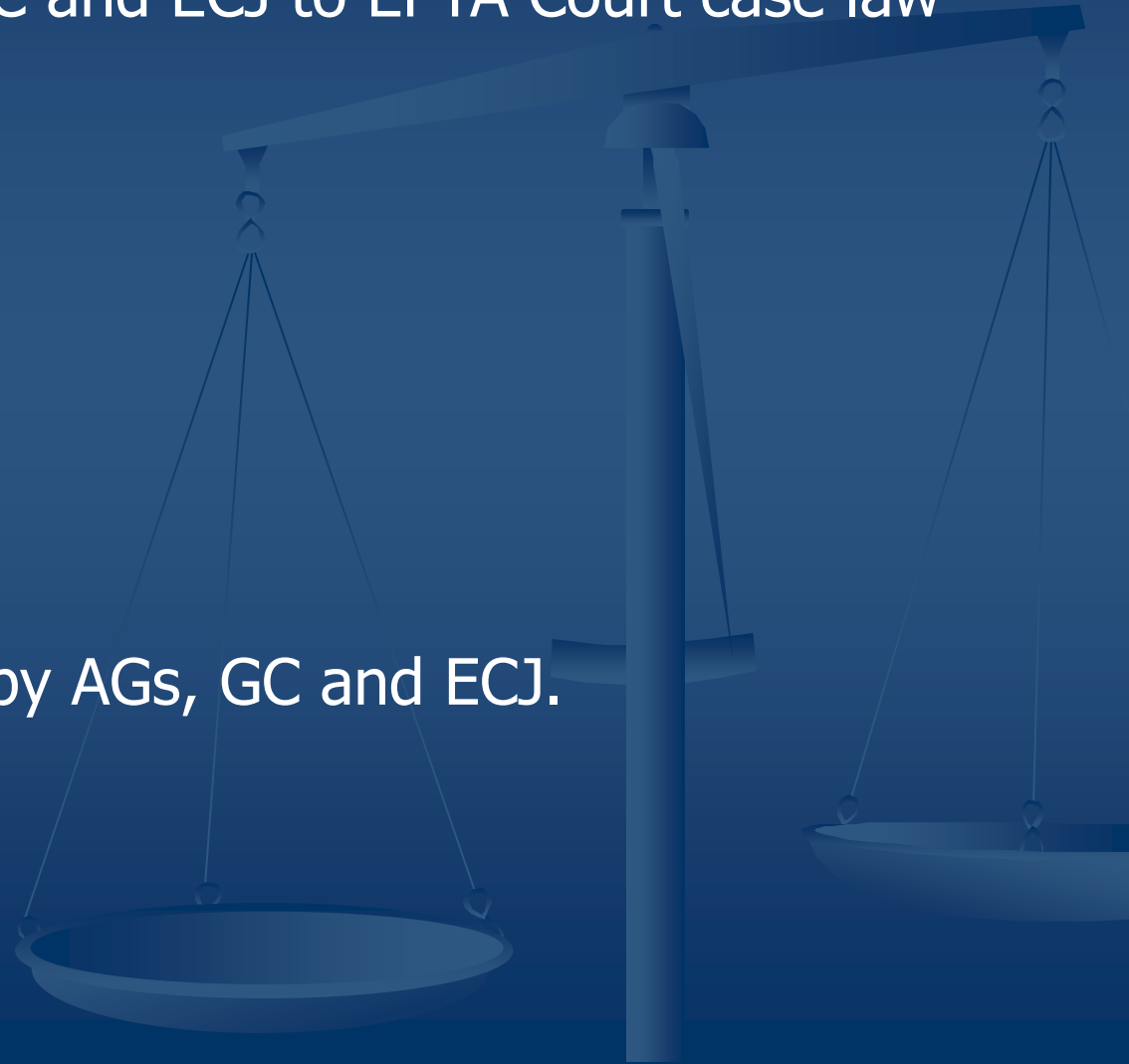
References by AGs, GC and ECJ to EFTA Court case law in 126 cases

In 75 cases AGs

In 28 cases ECJ

In 23 cases GC

In total 233 citations by AGs, GC and ECJ.



D. Backbones of the EEA Agreement

I. Homogeneity

In 32 cases reference to opinions of AGs by the Court.



D. Backbones of the EEA Agreement

I. Homogeneity

Only court of general jurisdiction whose case law is regularly cited by the ECJ in the context of EU law.

References by high courts in Germany, the UK, Sweden, the Netherlands, Switzerland, Austria.



D. Backbones of the EEA Agreement

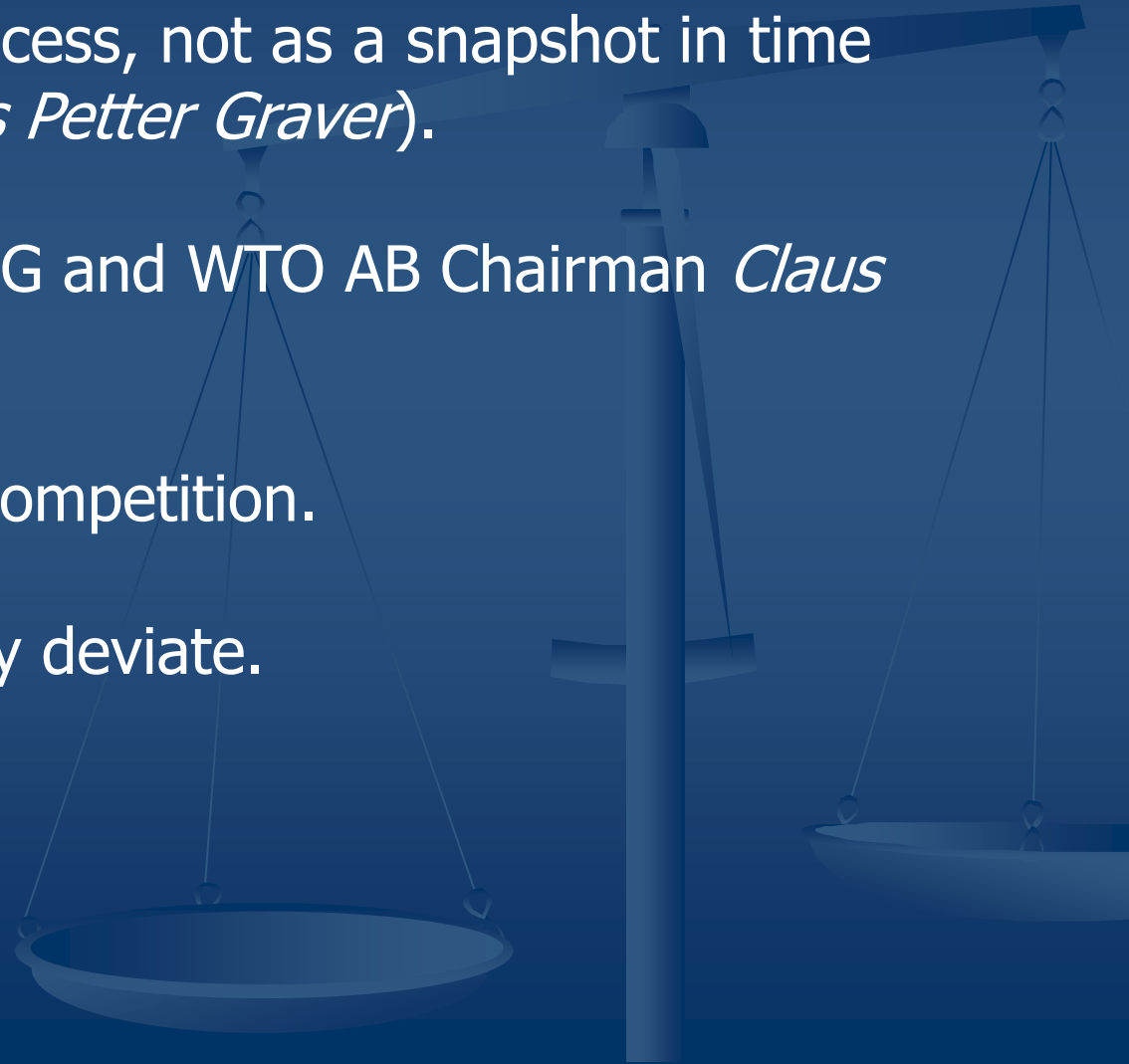
I. Homogeneity

Homogeneity as a process, not as a snapshot in time
(*Philipp Speitler, Hans Petter Graver*).

Former Commission DG and WTO AB Chairman *Claus Ehlermann*:

Healthy (regulatory) competition.

But: We do not wilfully deviate.



D. Backbones of the EEA Agreement

I. Homogeneity

The role of the ECHR and of the ECtHR.

In 11 cases the Court has referred to ECtHR case law (for the first time in 1998).

18 citations.

In one case the ECtHR has referred to the Court's case law (ALIŠIĆ AND OTHERS v. BOSNIA AND HERZEGOVINA, CROATIA, SERBIA, SLOVENIA AND THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA, Application no. [60642/08](#), paragraphs 70-73, 94, 118).

D. Backbones of the EEA Agreement

II. Reciprocity

Trade law concept, but that is not all.

Internal effect of EEA law (no direct effect and no primacy, but obligation of result; State liability, conform interpretation).

Access to justice (preliminary reference procedure).

Independence of judges (Article 30 SCA, Order of the President of 20/2/17 in E-21/16 *Nobile*).

Independence of ESA College Members.

E. Judicial style and underlying philosophy

I. General

EFTA Court is an own court of the EFTA States.

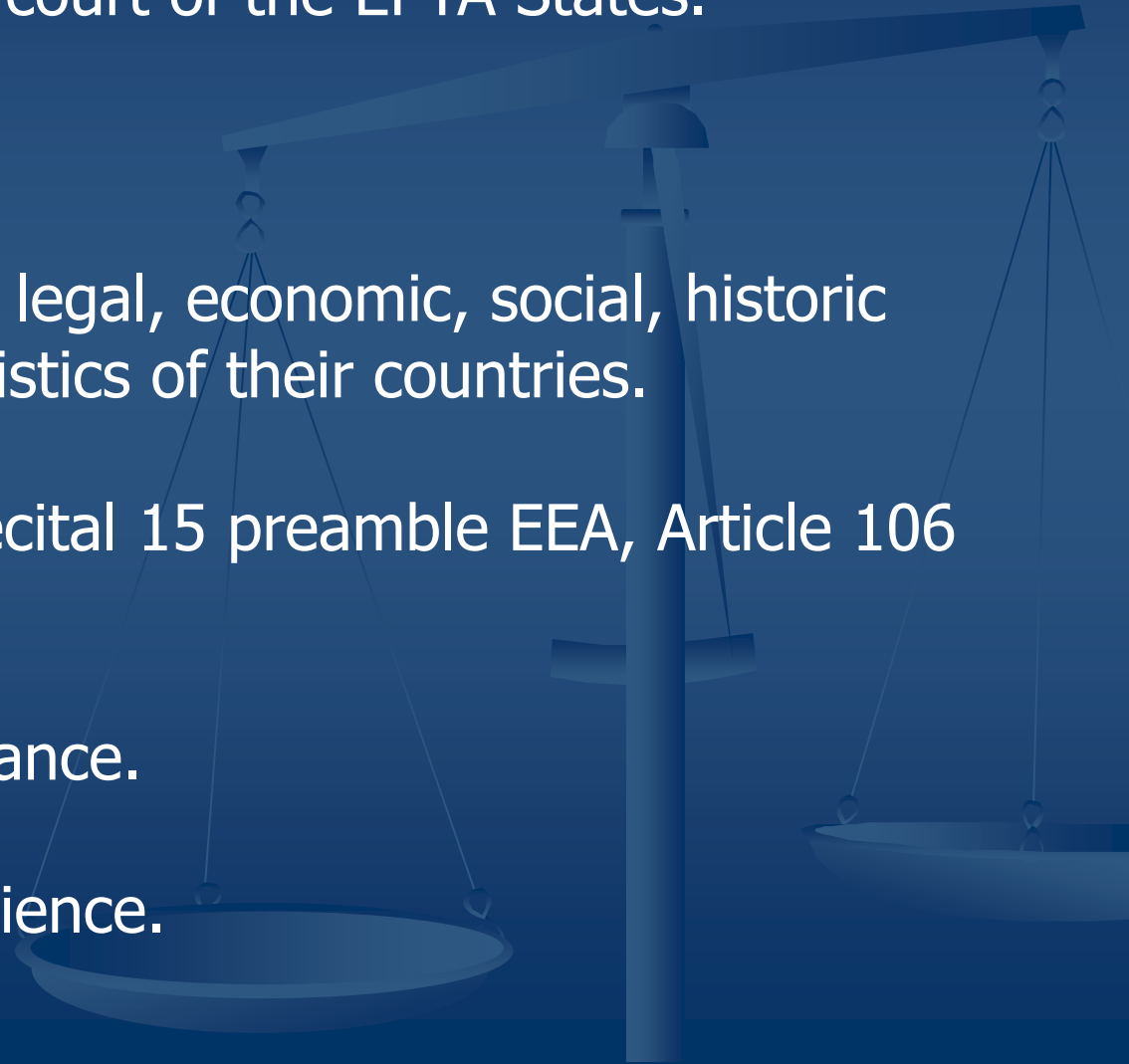
Matter of sovereignty.

Own judges know the legal, economic, social, historic and cultural characteristics of their countries.

Independent court (recital 15 preamble EEA, Article 106 EEA).

No court of lower instance.

Judging is no exact science.



E. Judicial style and underlying philosophy

II. Reasoning (i)

No “decreeing” (size, judicial constitution of the EFTA pillar).

No AG.

Fact-based approach, Court not driven by a grand vision.

Dealing with all the arguments.

Need to create acceptance.

Comprehensive, but succinct judgments is the goal.

E. Judicial style and underlying philosophy

II. Reasoning (ii)

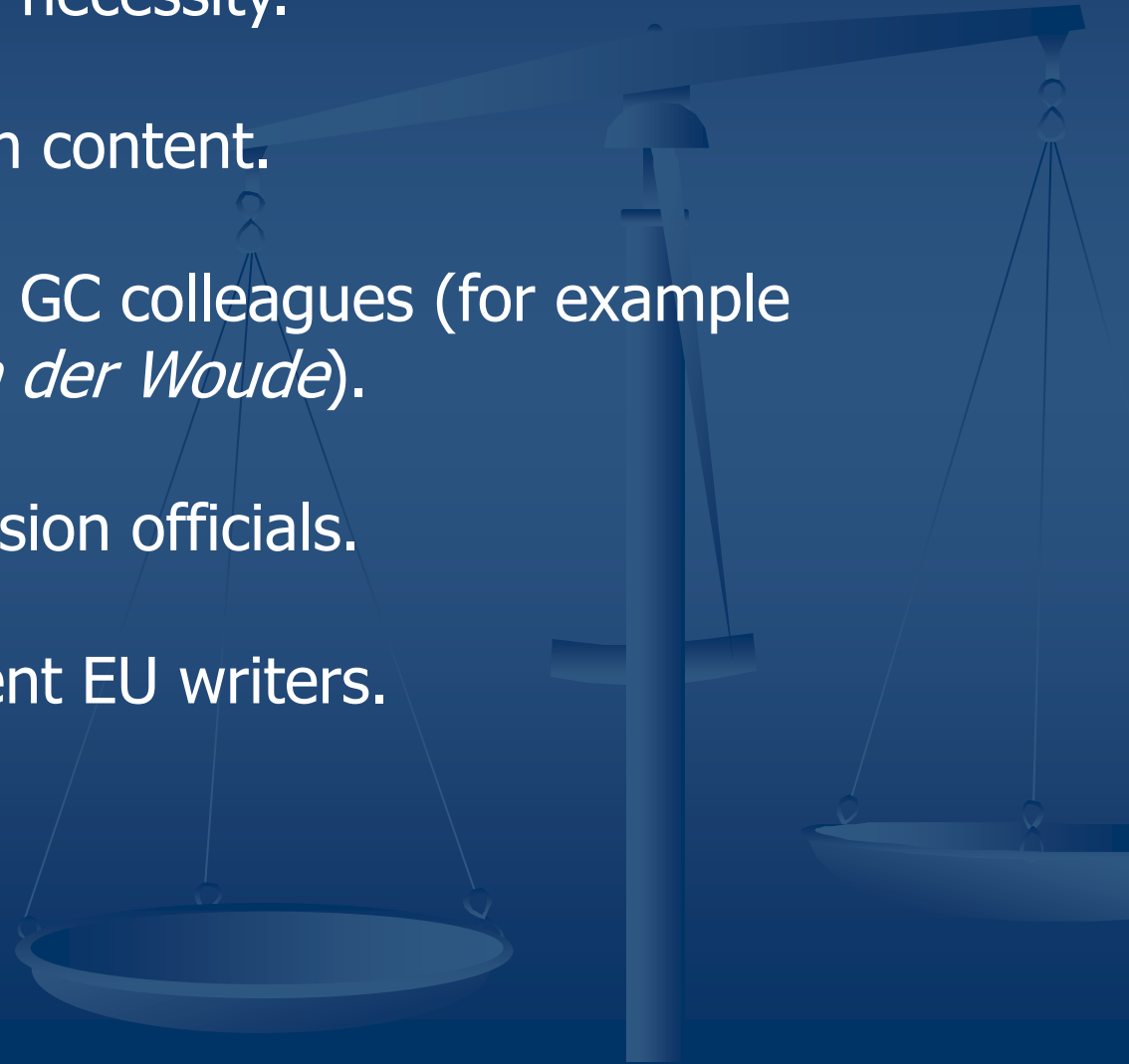
Making a virtue out of necessity.

Style has an impact on content.

Comments of ECJ and GC colleagues (for example *Gulmann, Jacobs, van der Woude*).

Comments of Commission officials.

Comments of prominent EU writers.



E. Judicial style and underlying philosophy

III. No French rucksack

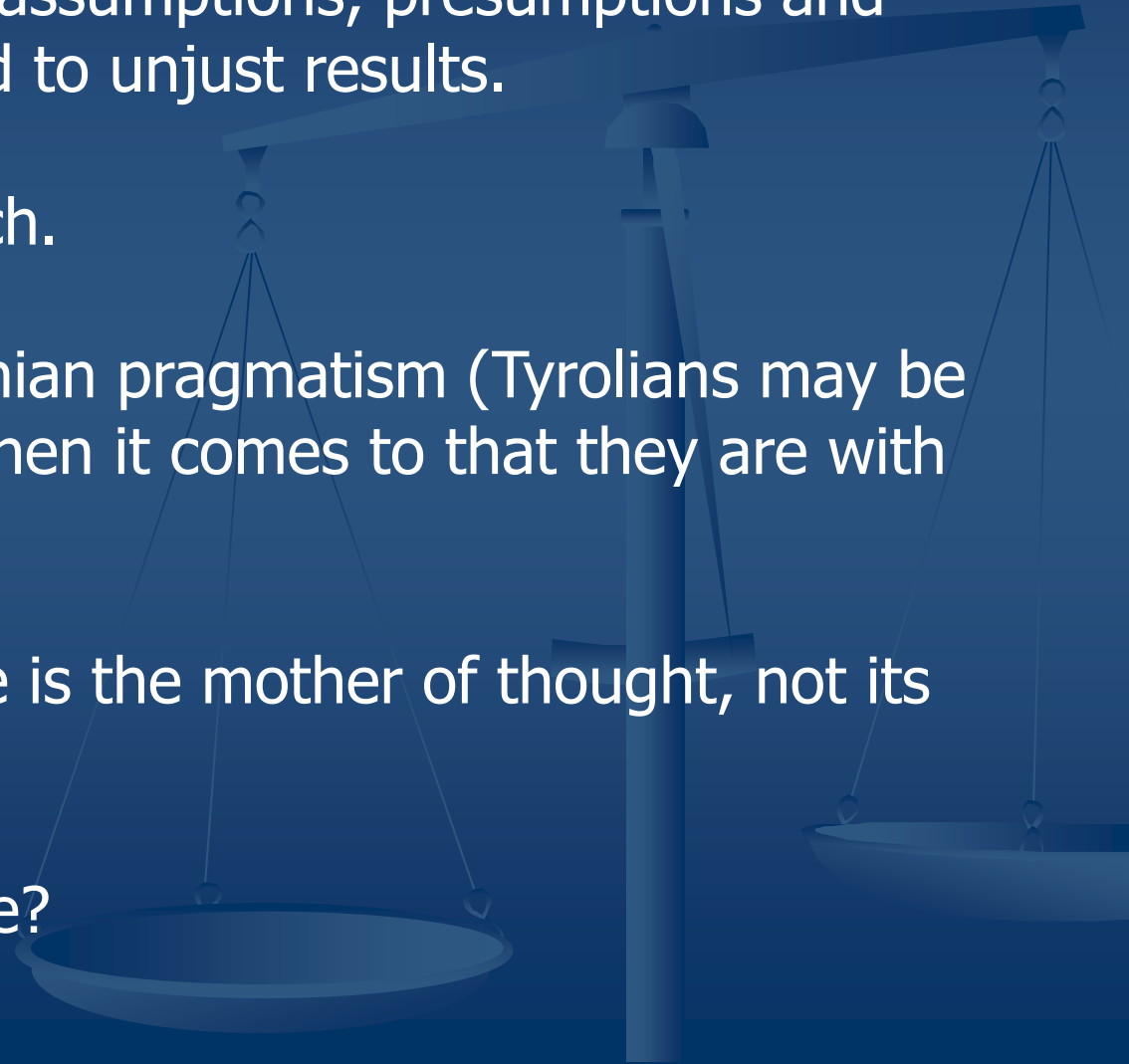
Reluctance to rely on assumptions, presumptions and fictions. They can lead to unjust results.

Effects-based approach.

Scandinavian-alemannian pragmatism (Tyrolians may be more romantic, but when it comes to that they are with us).

Karl Kraus: "Language is the mother of thought, not its handmaiden."

Common law influence?









E. Judicial style and underlying philosophy

IV. Economics and image of man

In competition law Harvard vs Chicago.

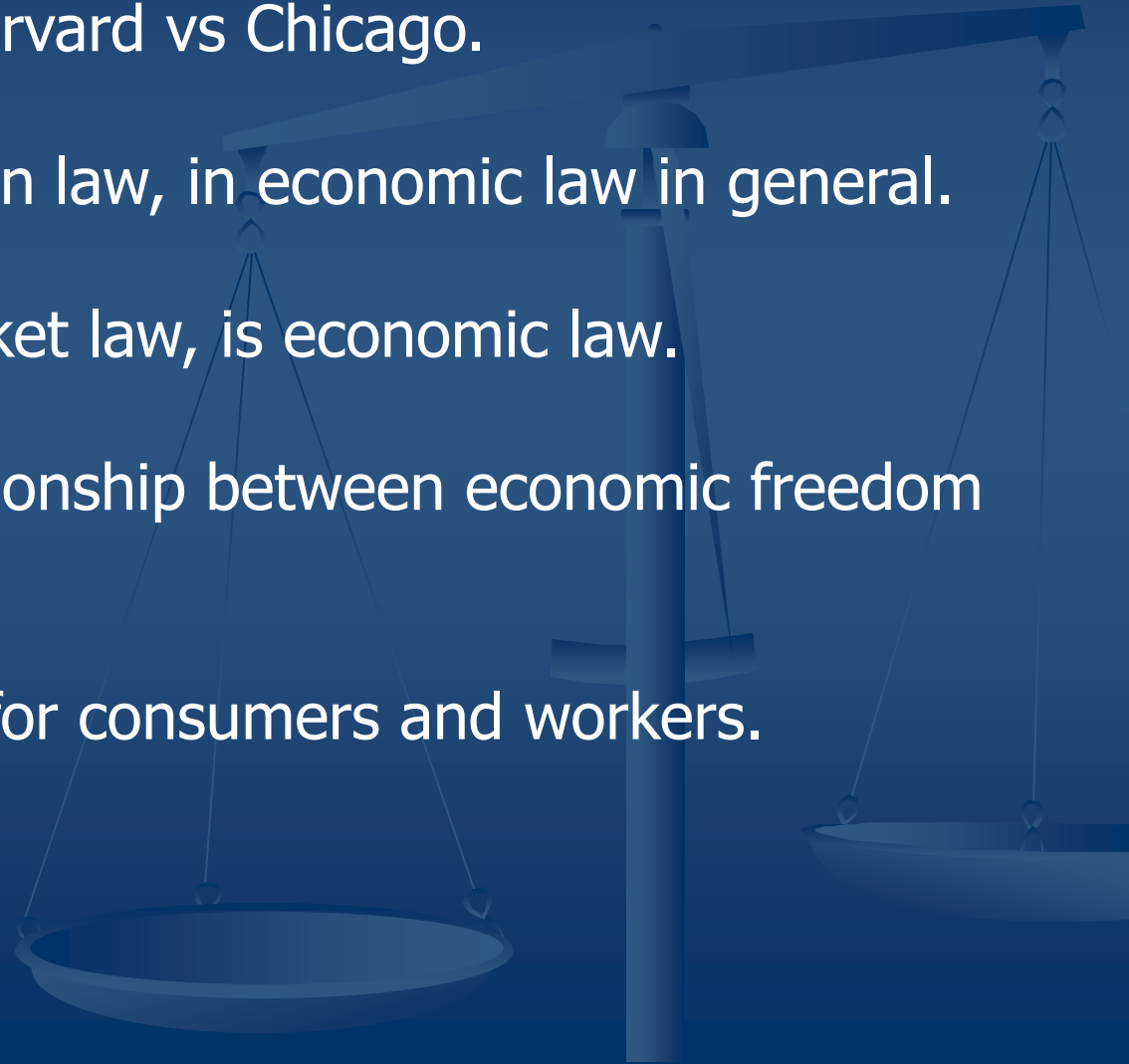
Not only in competition law, in economic law in general.

EEA law is single market law, is economic law.

It deals with the relationship between economic freedom and regulation.

Degree of protection for consumers and workers.

Principle of liability.



E. Judicial style and underlying philosophy

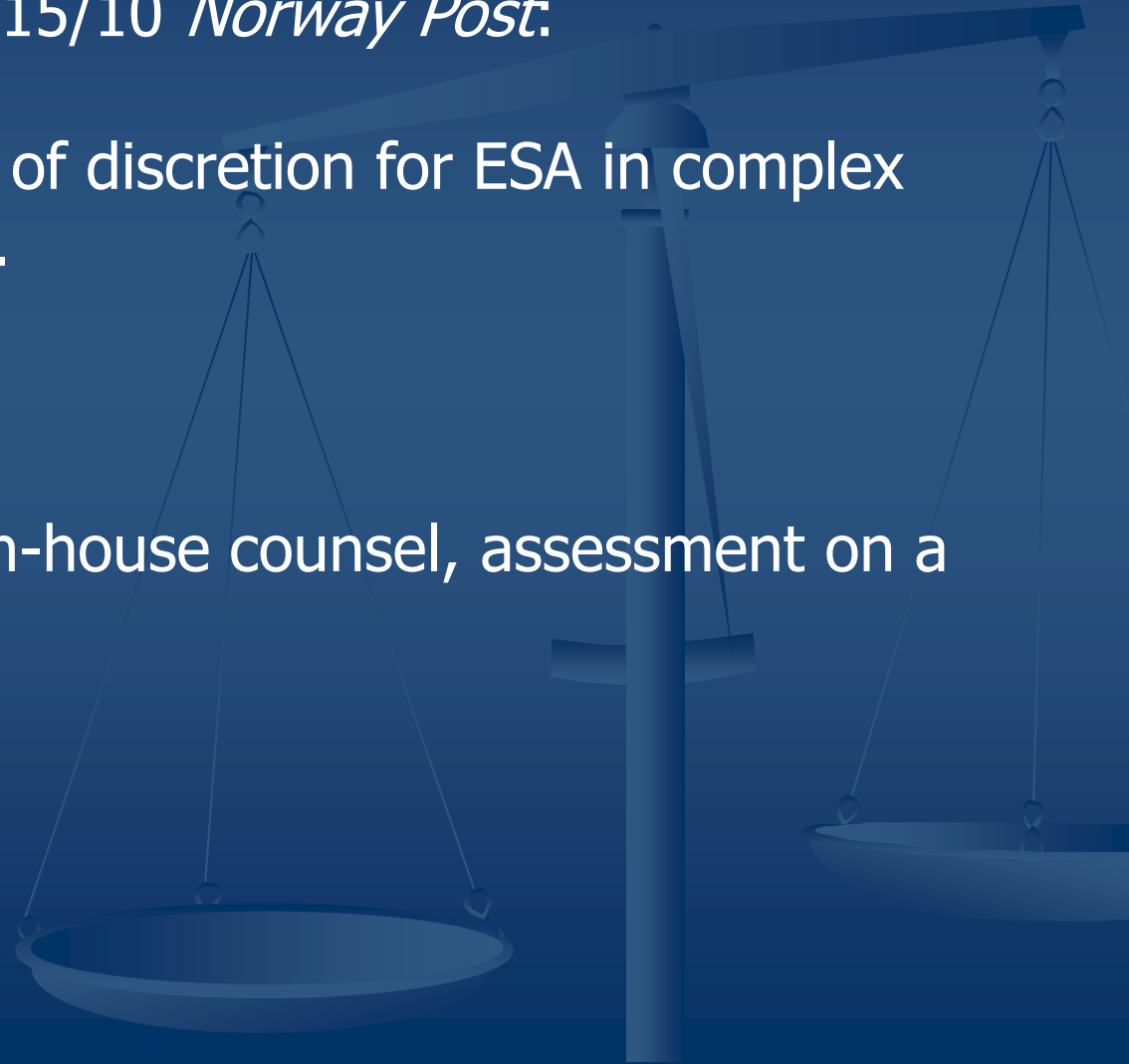
V. Examples

E-4/97 *Husbanken*, E-15/10 *Norway Post*:

No leeway, no margin of discretion for ESA in complex economic assessment.

E-8/13 *Abelia*:

Right of audience of in-house counsel, assessment on a case by case basis.



E. Judicial style and underlying philosophy

V. Examples

E-8/00 *LO* and E-14/15 *Holship*:

Aggregate effect of clauses in a collective agreement.

“[I]t is not sufficient that a measure of industrial action resorts to the legitimate aim of protection of workers in the abstract. It must rather be assessed if the measure at issue genuinely aims at the protection of workers.”

E-4/09 Inconsult:

In the internet age, a consumer can be expected to download or print out content from the website of a financial service provider.

E. Judicial style and underlying philosophy

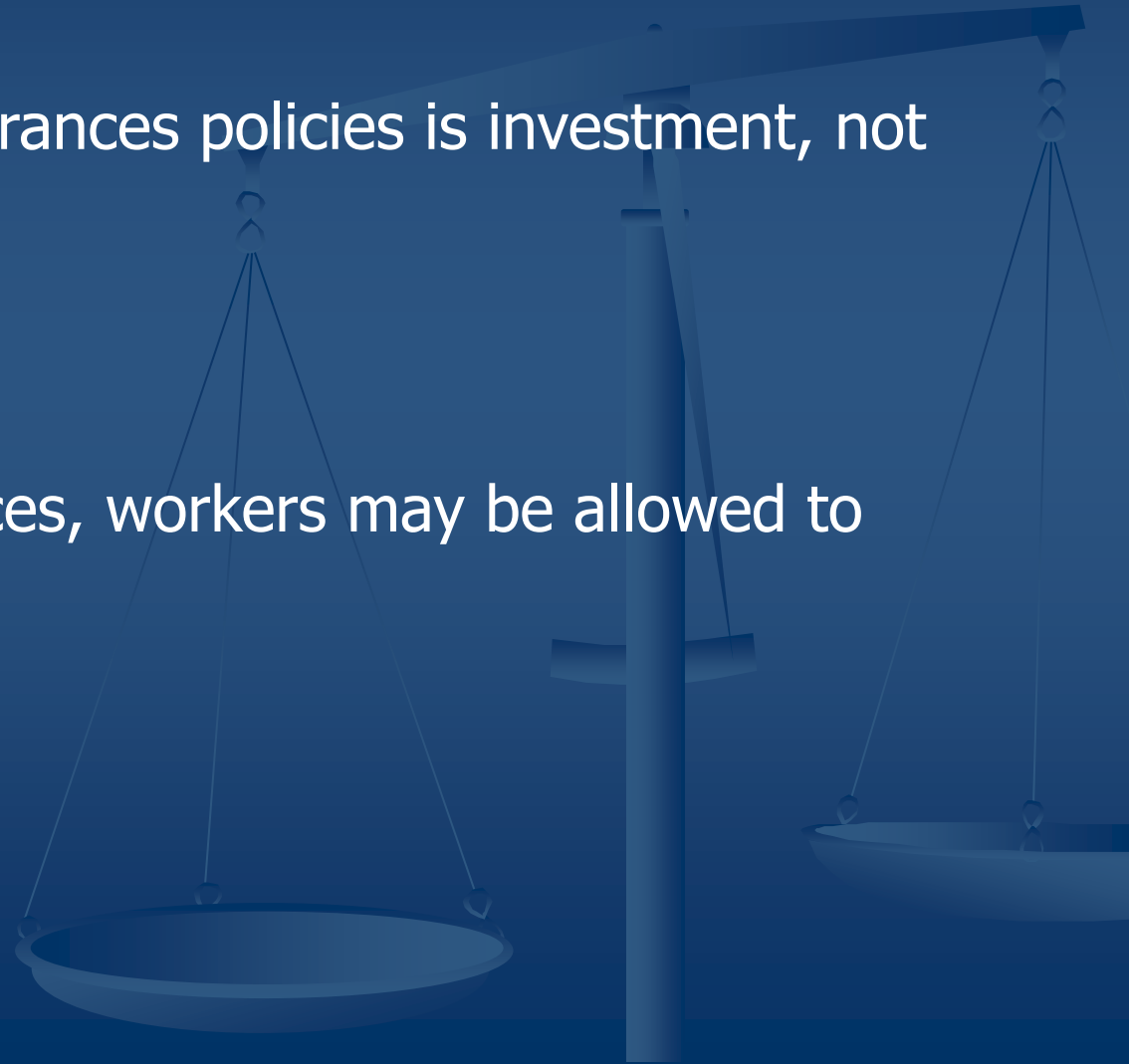
V. Examples

E-15/15 and 16/15 *Swiss Life* and *Vienna Life*:

Trade in used life insurances policies is investment, not consumer business.

E-5/15 Matja Kumba:

In special circumstances, workers may be allowed to work long hours.

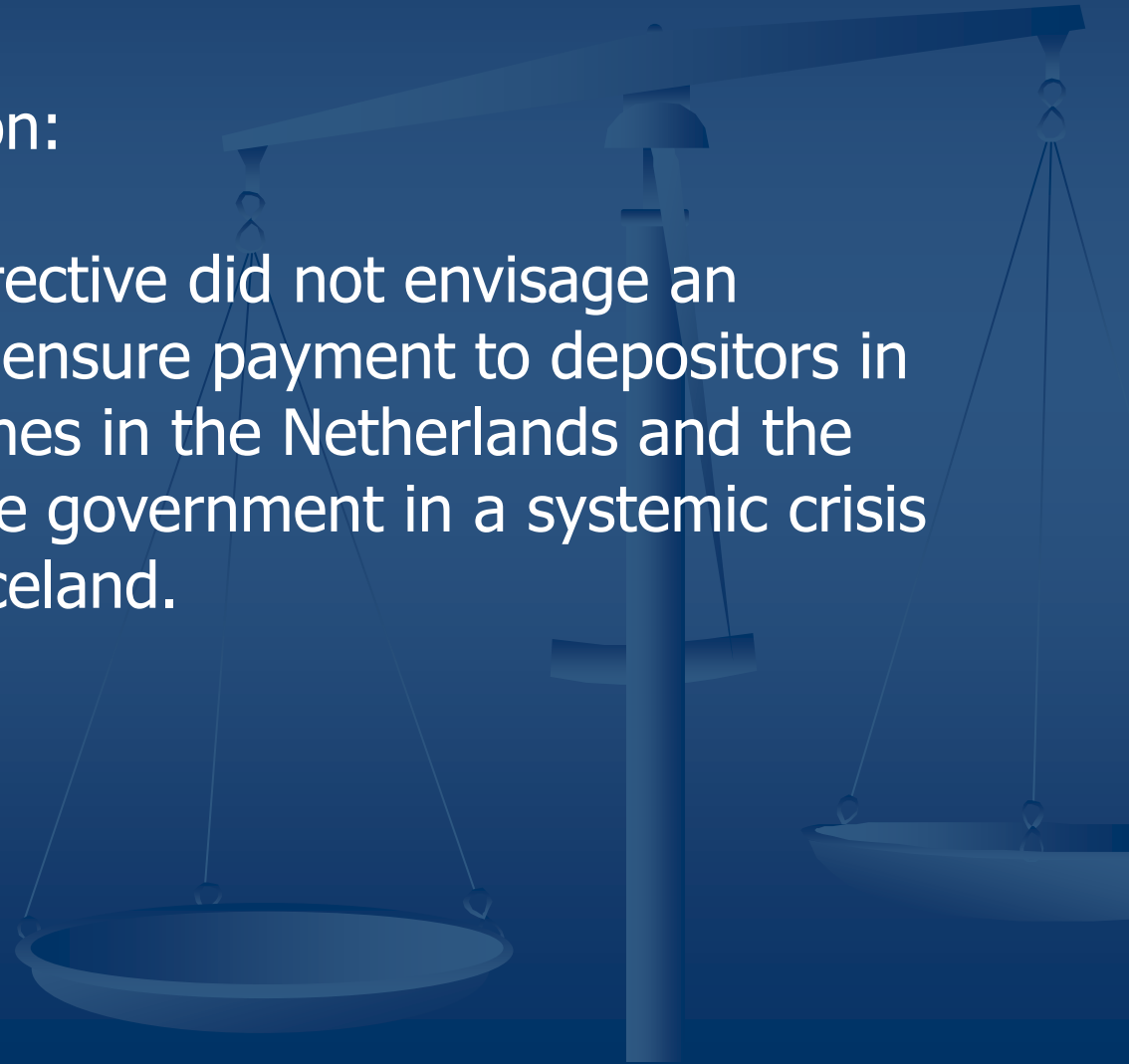


V. Examples

Icesave I:

Statutory interpretation:

Deposit Guarantee Directive did not envisage an obligation of result to ensure payment to depositors in the *Landsbanki* branches in the Netherlands and the United Kingdom by the government in a systemic crisis of the magnitude in Iceland.



E. Judicial style and underlying philosophy

V. Examples

Icesave I:

Economic considerations:

Recital 16 in the preamble to the Directive: No level of protection which might encourage unsound management of credit institutions.

This points to the concept of moral hazard.

Reference to Nobel laureate *Joseph Stiglitz*.

Later cited by AG's *Mengozzi* and *Wahl*.