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President of the EFTA Court



EFTA – EEA - Switzerland

Visit of the Swiss Federal Supreme Court, 5 July 2017

Introduction

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



Introduction

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.”

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.

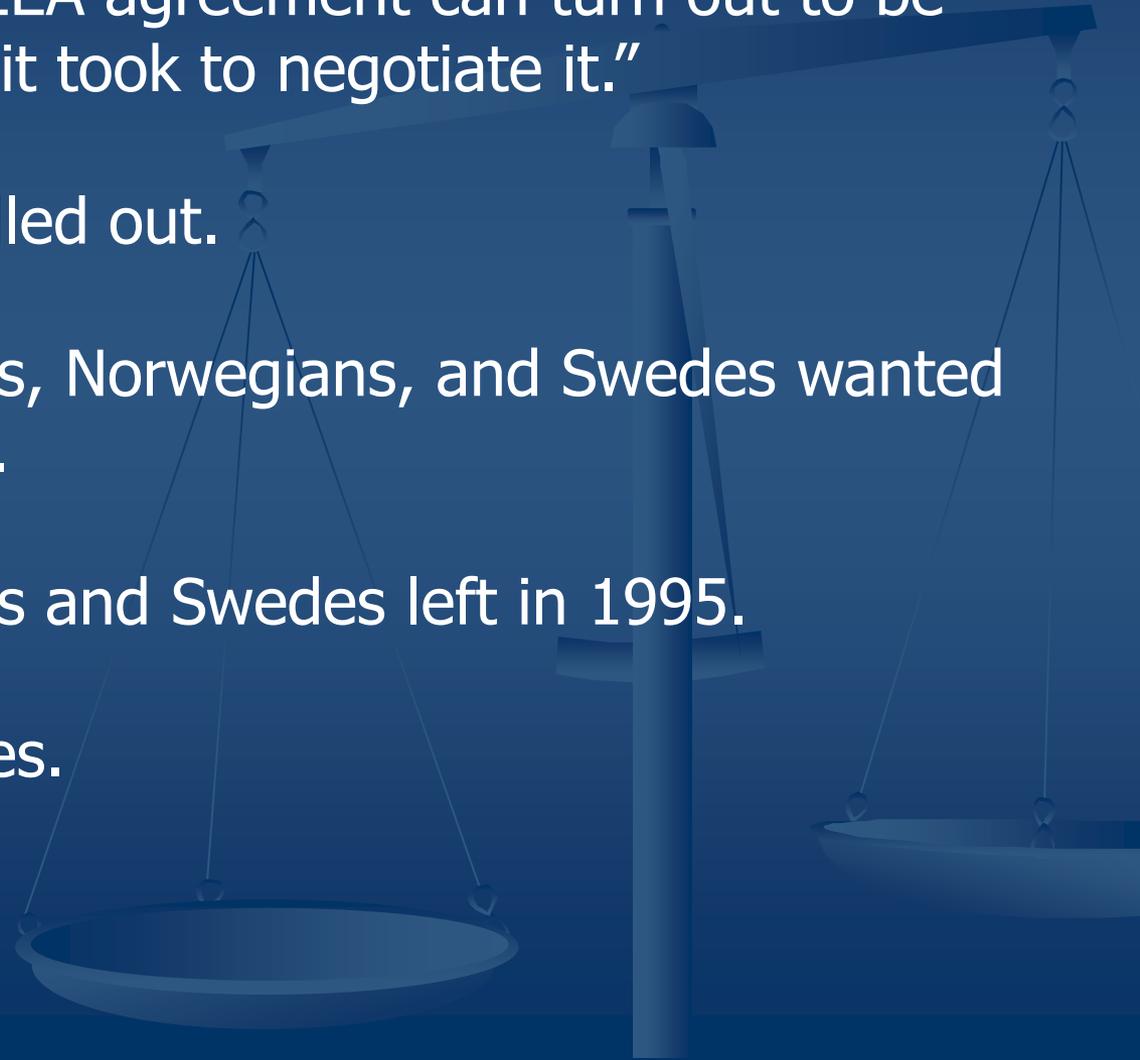
A. Introduction

Similarly, Norwegian news agency NTB 25 years ago:

“The life span of the EEA agreement can turn out to be shorter than the time it took to negotiate it.”

- Then, the Swiss pulled out.
- The Austrians, Finns, Norwegians, and Swedes wanted to join the EU asap.
- The Austrians, Finns and Swedes left in 1995.

And yet the EEA thrives.



I. EFTA

1. General (i)

EFTA founded in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the U.K.

Reaction to EEC.

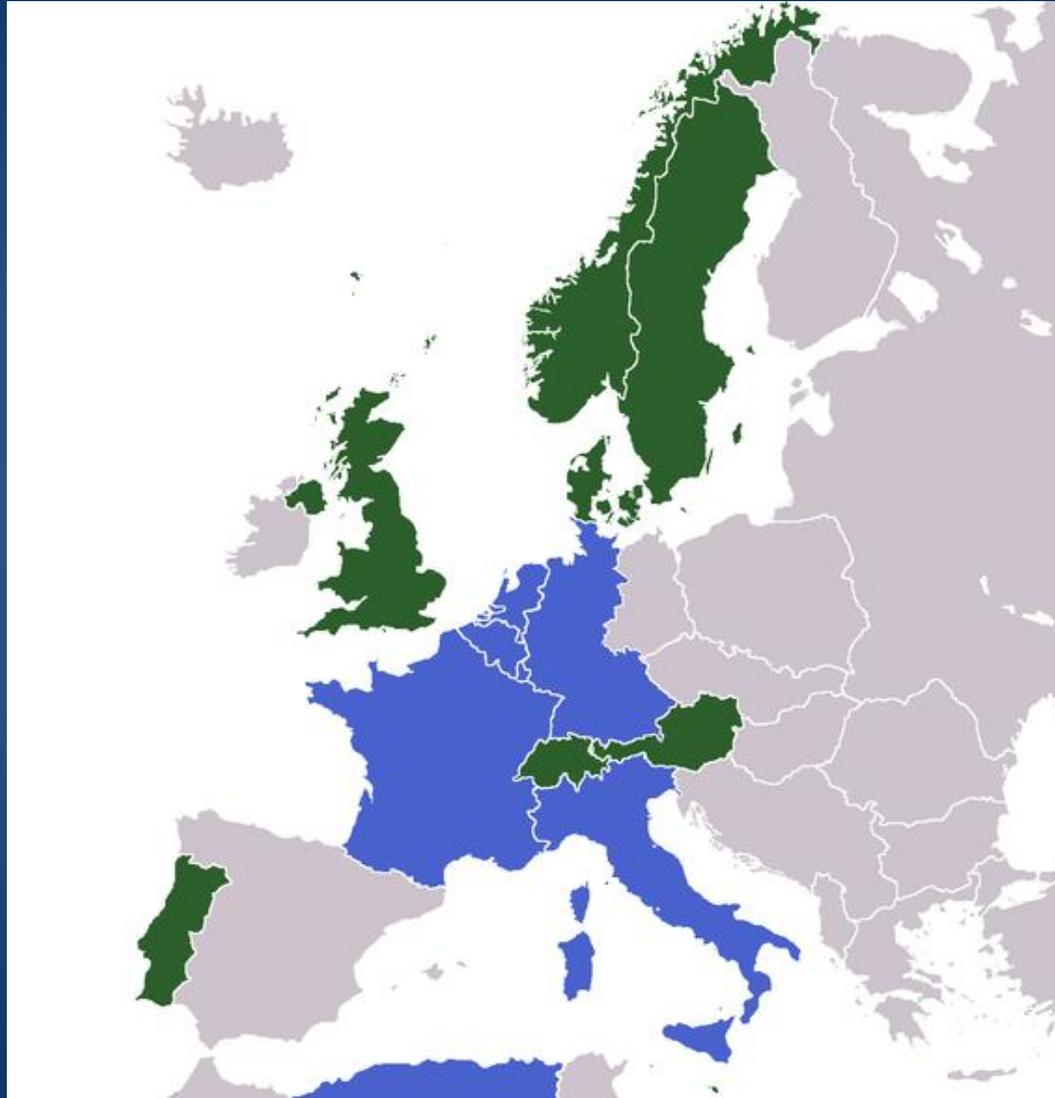
Finland joined in 1961, Iceland in 1970, Liechtenstein in 1991.

In 1973, U.K. and Denmark left EFTA to join EC.

Remaining EFTA States concluded FTAs with EEC.

Portugal joined EC in 1986; Austria, Finland and Sweden in 1995.

The Inner Six (EEC) and the Outer Seven (EFTA)



I. EFTA

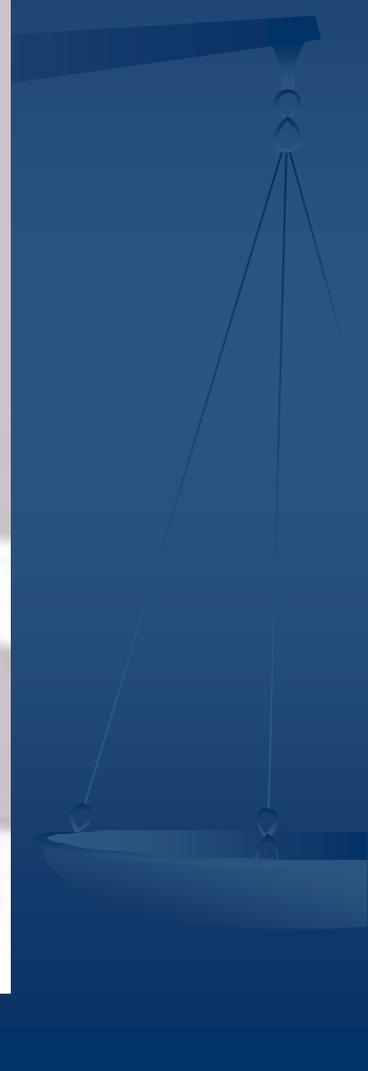
1. General (ii)

Today: Iceland, Liechtenstein, Norway and Switzerland.

Management of:

- EFTA Convention: Basis for free trade relations between EFTA States (intra-EFTA trade);
 - Worldwide network of free trade and partnership agreements (third-country trade);
 - EEA Agreement, gives Iceland, Liechtenstein and Norway access to the Single Market (EFTA-EU trade).
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EFTA at Four



I. EFTA

1. General (iii)

Overall goals:

Achieving growth and prosperity within EFTA; promoting economic cooperation between European countries; contributing to the expansion of trade globally.

EFTA Convention and EFTA FTAs managed by Geneva office.

EEA Agreement managed by Brussels office.

Intergovernmental organisation.

No institutions, no supranationality.

II. European Economic Area

1. Starting points and negotiations

Completion of the EC single market planned by the end of 1992.

EFTA States feared discrimination.

Unwillingness of the EC to accept new members.

During the negotiations Cold War ended.

Switzerland was isolated.

Federal Council tried the big leap forward (application for EU membership, EEA as a "training camp").

II. European Economic Area

2. Substance of the EEA Agreement

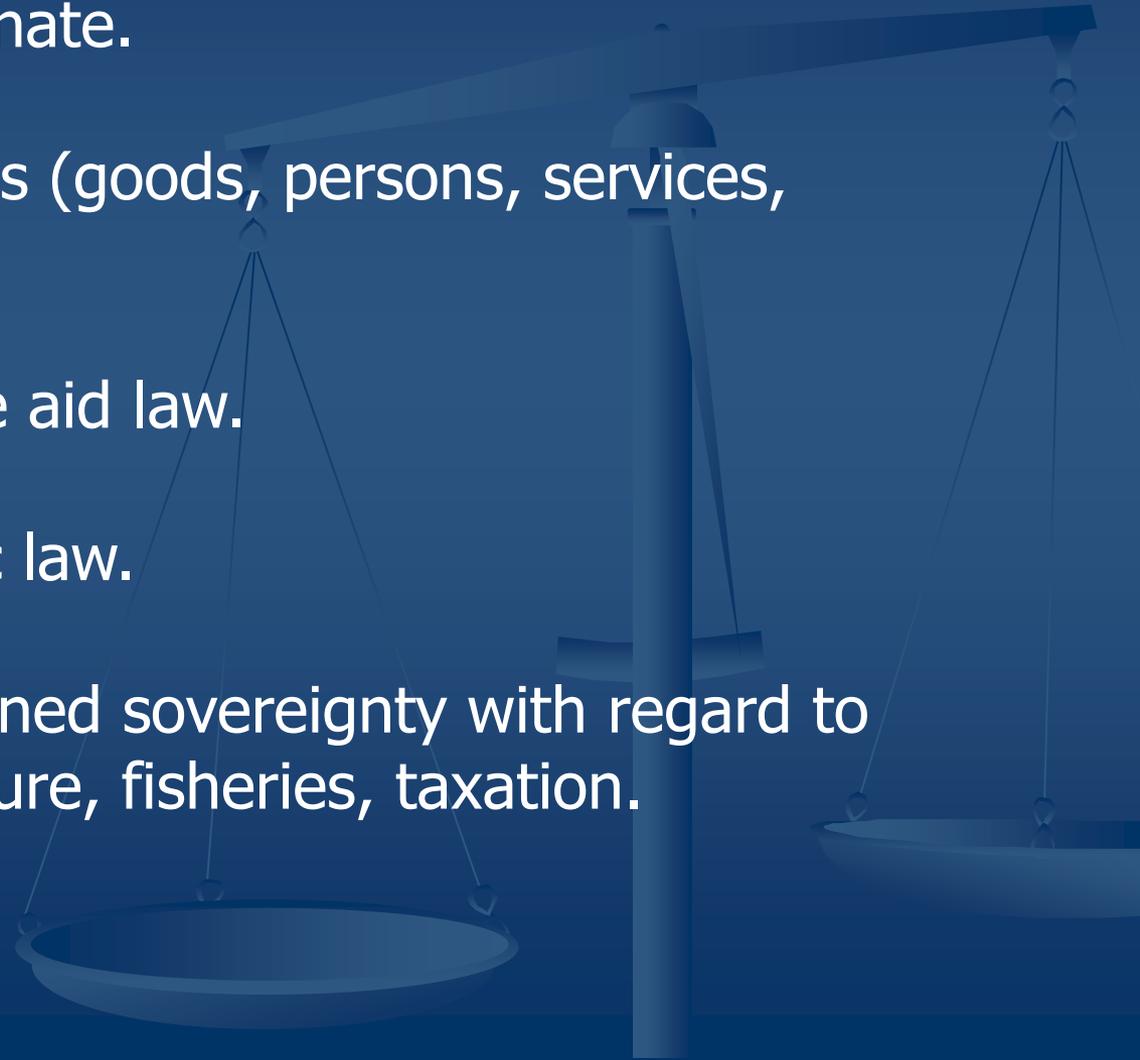
Prohibition to discriminate.

Fundamental freedoms (goods, persons, services, capital).

Competition and State aid law.

Harmonised economic law.

EEA/EFTA States retained sovereignty with regard to foreign trade, agriculture, fisheries, taxation.



II. European Economic Area

3. Two pillar model

Legislation.

Enforcement and judicial control (institutions).

Most important types of procedure:

- Infringement (ESA v Member State),
- Preliminary reference (national courts asking the EFTA Court),
- Nullity (Member State or private operator v ESA).

Homogeneity and reciprocity.

2017

EU (28)

EEA/EFTA (3)

Surveillance



Judicial control



III. Relations Switzerland - EU

Framed by a series of bilateral treaties.

Sectoral approach. In the sectors access to the single market (no service and no establishment agreement).

Classical public international law.

No institutions.

Joint Committees (unanimity required).

Since 2008, EU demanding surveillance and court mechanism.



III. Relations Switzerland - EU



IV. Development of Swiss EU policy

1. Failed attempt to join the EEA

- a. Signing of EEA Agreement (2 May 1992).
 - b. Application for EU membership (26 May 1992).
 - c. Rejection of EEA (6 December 1992)
 - Tactical mistake of the Federal Council.
 - Reservations of the Foreign Ministry (“EU turbos”).
 - Strong resistance by anti-Europeans.
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IV. Development of Swiss EU policy

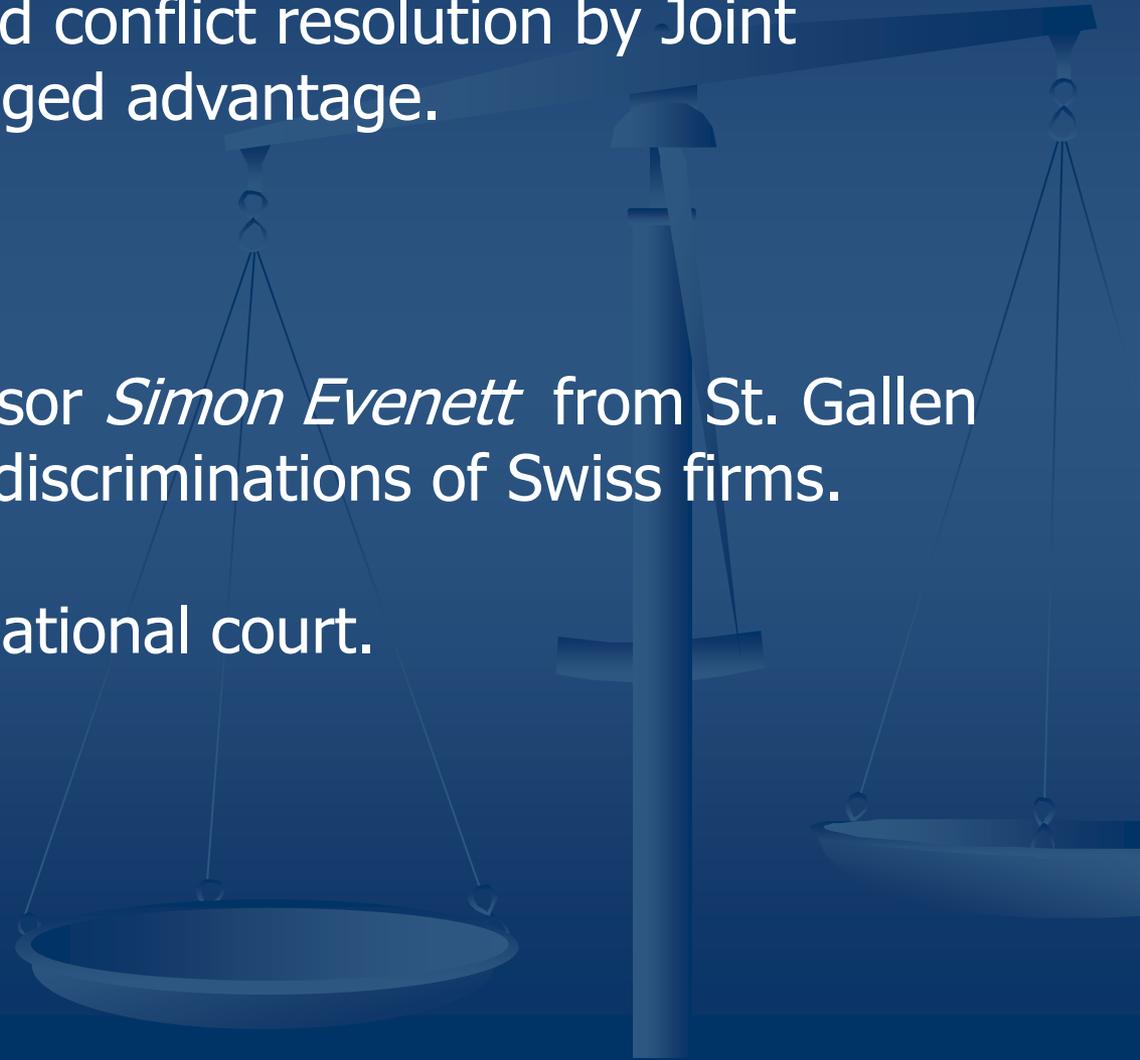
2. Sectoral bilateralism (from 2001 on)

Lack of institutions and conflict resolution by Joint Committees as an alleged advantage.

But:

2017 Report of Professor *Simon Evenett* from St. Gallen University: Countless discriminations of Swiss firms.

No access to a supranational court.



IV. Development of Swiss EU policy

3. EU's call for institutions (from 2008 on) (i)

a. Swiss pillar?

Letter of the Federal President of 15 June 2011

- “Independent” Swiss Surveillance Authority.
- Special Chamber of the Swiss Supreme Court.
- On a pilot basis for a future electricity agreement.

Rejected by the EU (no state can control itself).

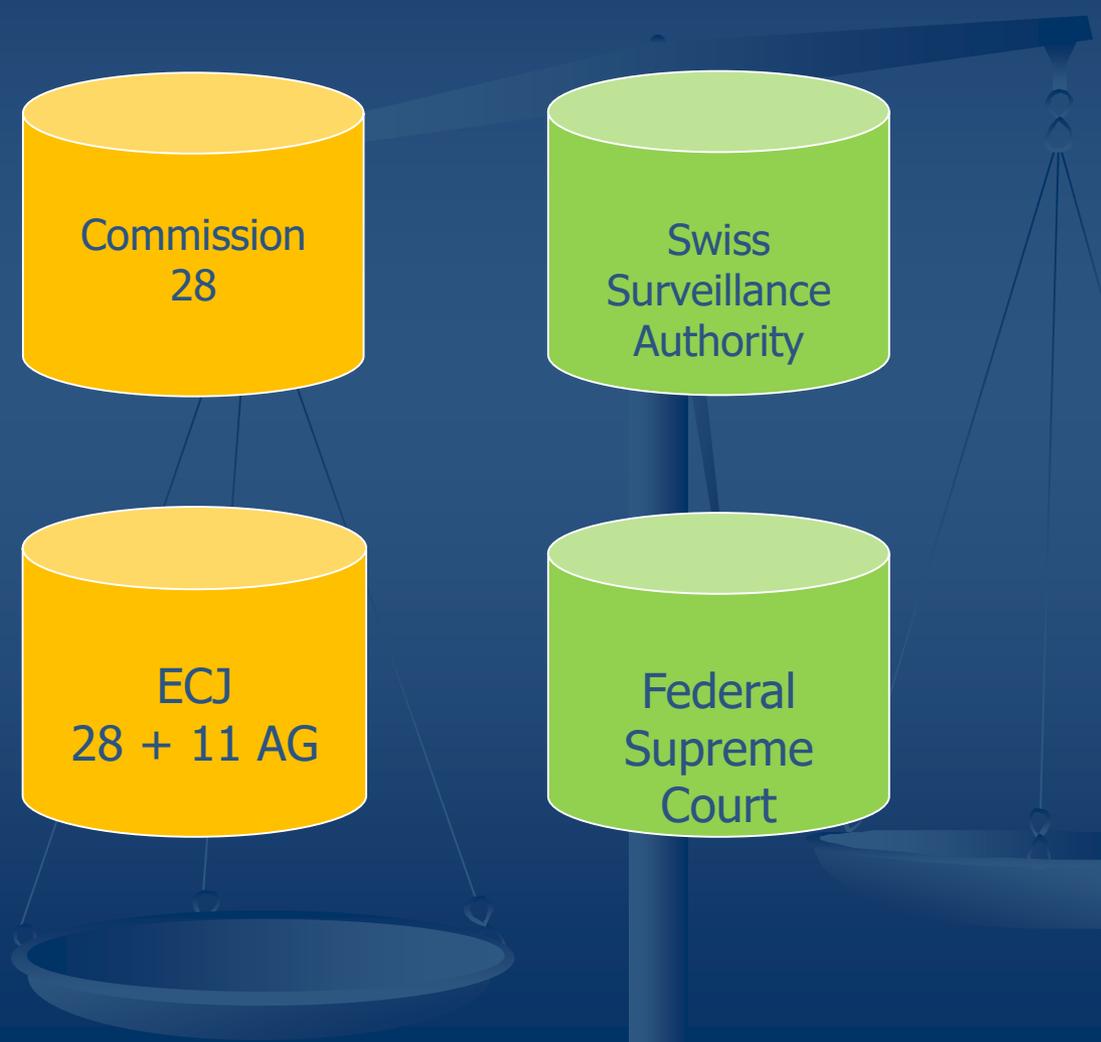
EU (28)

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Surveillance



Judicial control



IV. Development of Swiss EU policy

3. EU's call for institutions (from 2008 on) (ii)

b. EEA II or "docking" to the EEA/EFTA institutions?

EU proposals.

In both cases: Swiss ESA College Member and Swiss Judge in Swiss cases.

EEA II and docking rejected by the Swiss Government.

Untenable contentions about the functioning of the EEA (most appalling: EFTA Court cannot bind EU States).

Swiss Government voluntarily opts for ECJ model.

V. ECJ Model in Particular

1. Article 111(3) EEA as a source of inspiration

If a dispute concerns the interpretation of EEA law provisions, which are identical in substance to corresponding rules of EU law, “the Contracting Parties to the dispute may agree to request the Court of Justice of the European Communities to give a ruling on the interpretation of the relevant rules.” (Emphasis added.)

In EEA law: Ornamental provision.

But Federal Council believed that it could be the basis.

Out of context.

V. ECJ Model in Particular

2. In the case of Switzerland unilateral right of each Contracting Party to bring the matter before the ECJ

EU may bring the matter before its own court.

Commission is the *de facto* surveillance authority of Switzerland.

ECJ is the Court of the other side, lacks impartiality.

No Swiss judge.

Swiss Government: This doesn't matter because the ECJ does not decide the conflict, cannot "sentence" us.

V. ECJ Model in Particular

3. So-called three phase model

(1) Conflict in Joint Committee; ECJ invoked.

(2) ECJ gives authoritative (binding) interpretation.

(3) Decision is only taken in the Joint Committee.

4. What is an appropriate compensatory measure?

5. Two hurdles:

- Article 218(11) TFEU: ECJ in political proceedings?.
- Referendum in Switzerland: ECJ hardly acceptable.

VI. EFTA Court

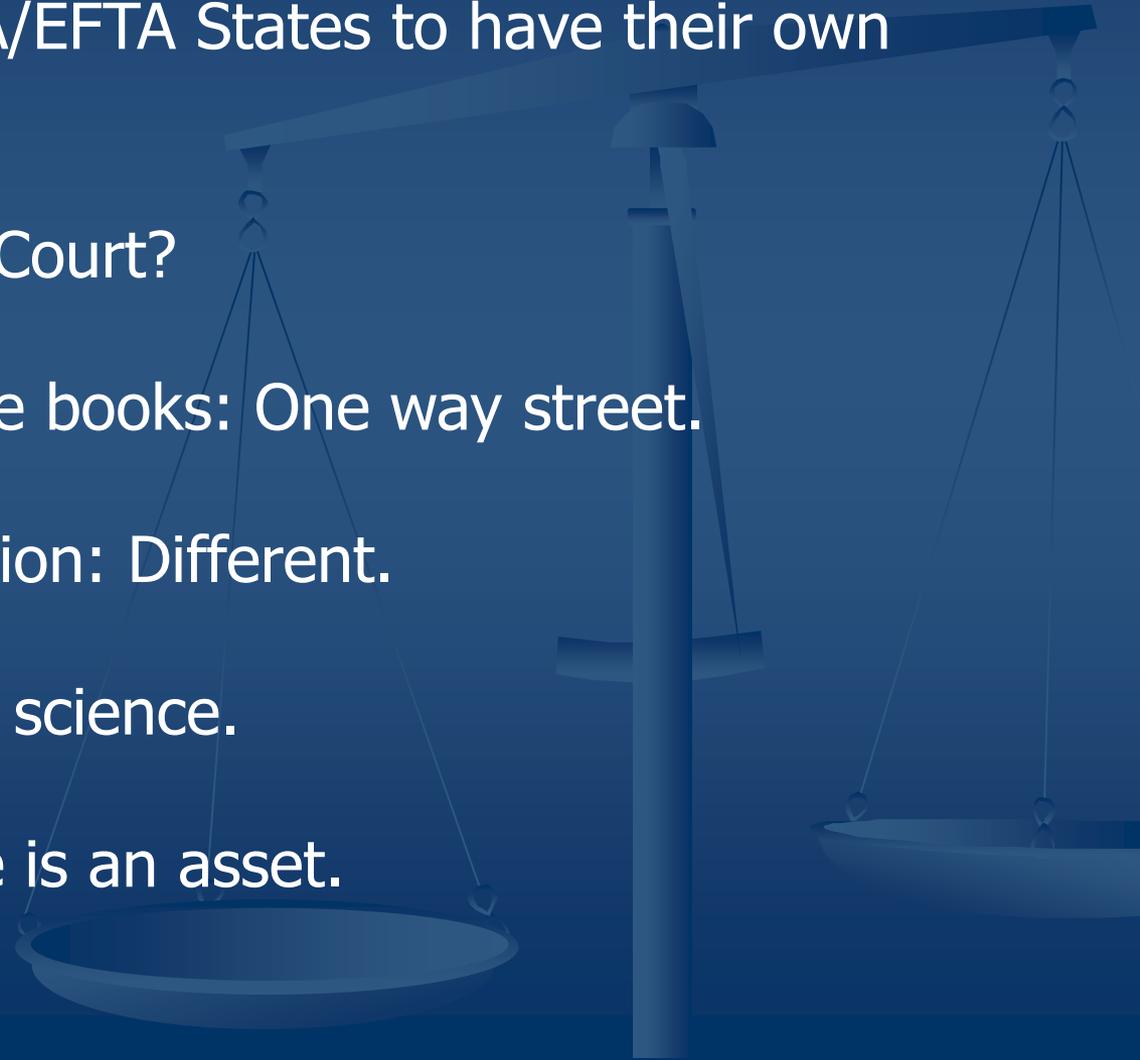
1. EFTA Court – ECJ (i)

Is it worth for the EEA/EFTA States to have their own court?

How free is the EFTA Court?

- Homogeneity on the books: One way street.
- Homogeneity in action: Different.
- Judging is no exact science.

To have an own judge is an asset.



VI. EFTA Court

1. EFTA Court – ECJ (ii)

(1) EFTA Court going first (i)

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

In total 233 citations by AGs, GC and ECJ.

ECJ President *Vassilios Skouris* in 2014:

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

VI. EFTA Court

1. EFTA Court – ECJ (iii)

(1) EFTA Court going first (ii)

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, Austria, Switzerland.

As regards Switzerland, see even Annual Report of the Federal Supreme Court 2012, 19.

VI. EFTA Court

1. EFTA Court – ECJ (iv)

(2) ECJ case law available

EFTA Court is no court of lower instance.

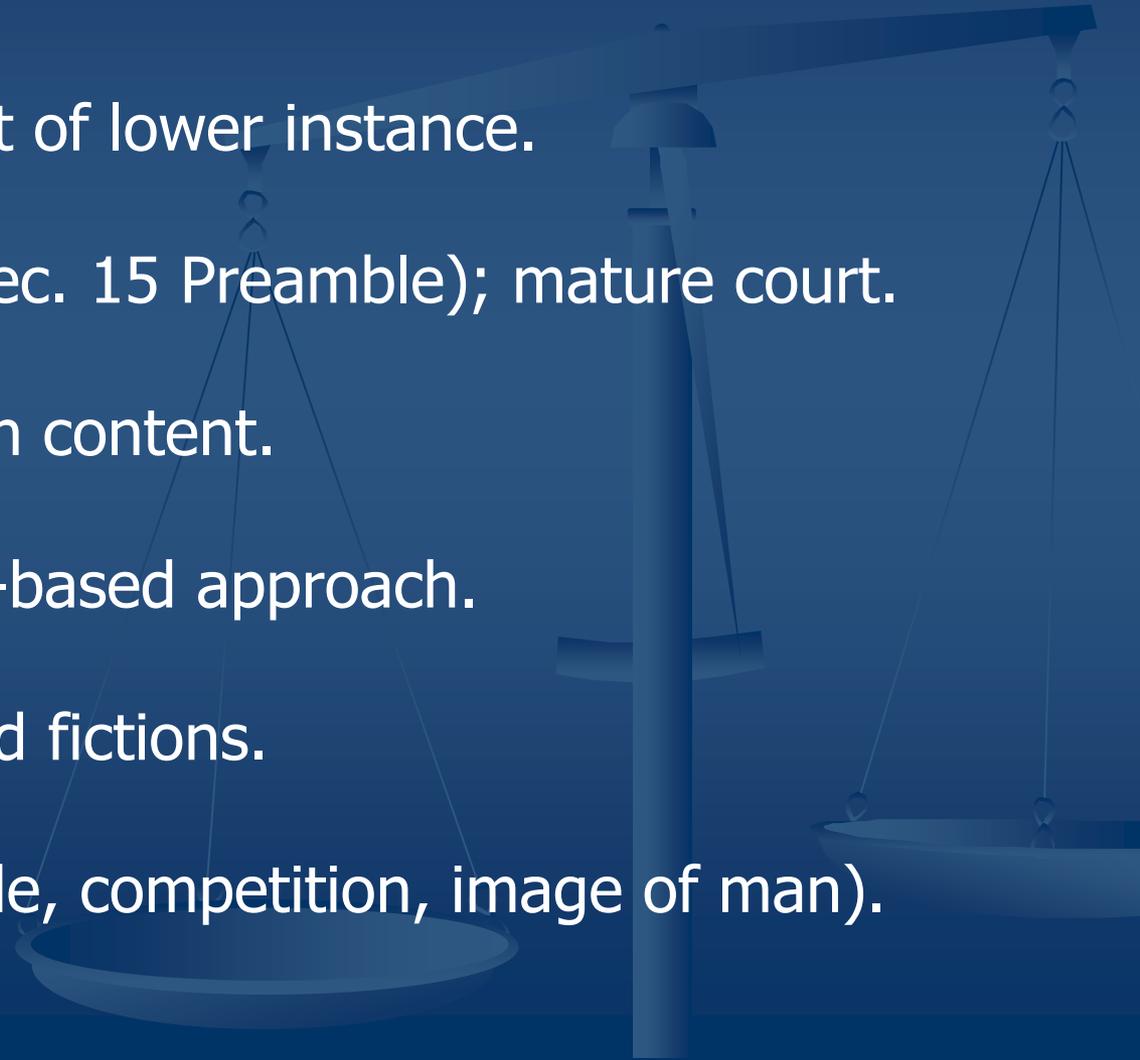
Independent court (Rec. 15 Preamble); mature court.

Style has an impact on content.

Fact-based and effect-based approach.

Less presumptions and fictions.

EFTA values (free trade, competition, image of man).



VI. EFTA Court

1. EFTA Court – ECJ (v)

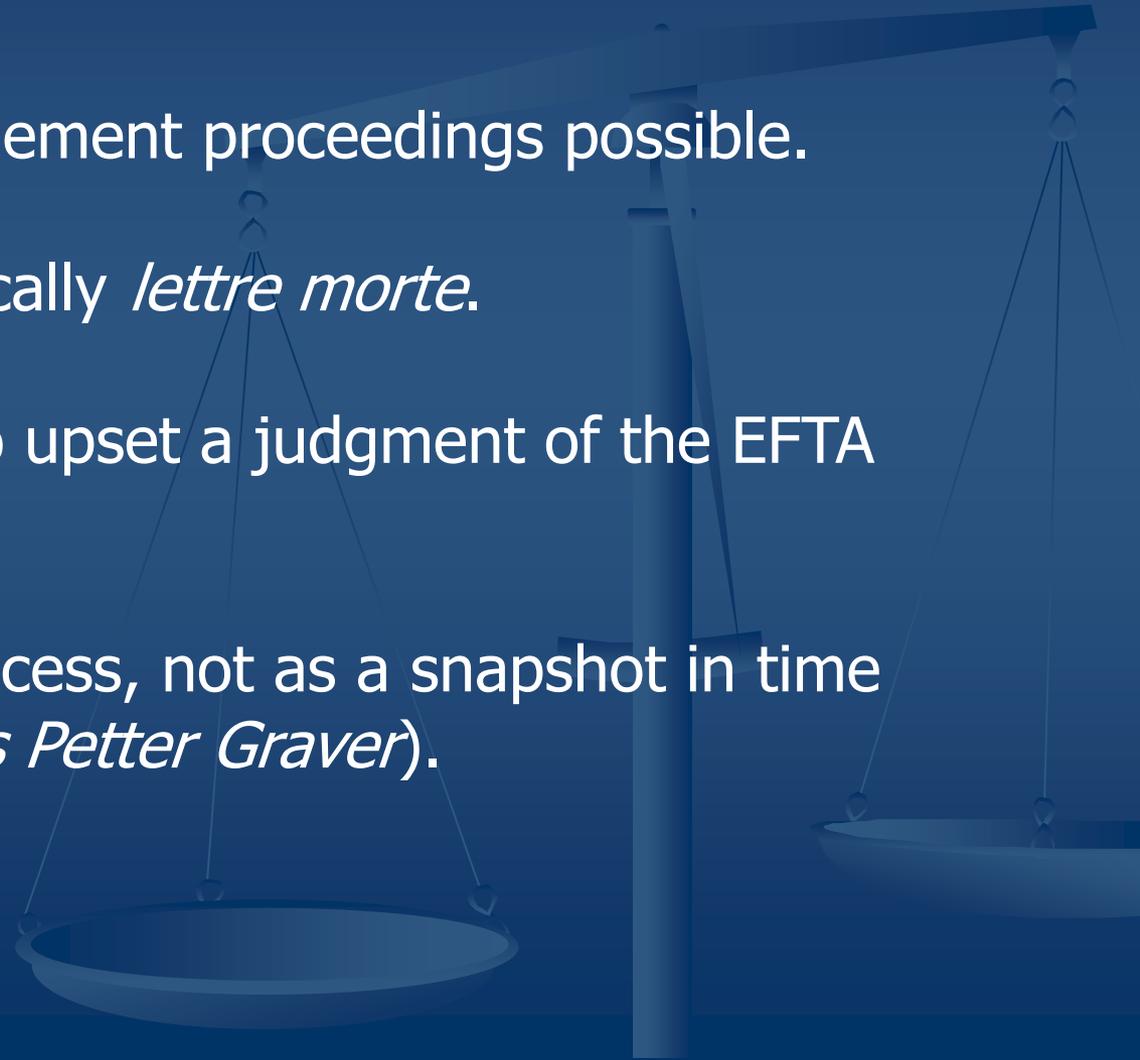
(3) Judicial conflict

In theory dispute settlement proceedings possible.

In the meantime basically *lettre morte*.

It would be difficult to upset a judgment of the EFTA Court.

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



VI. EFTA Court

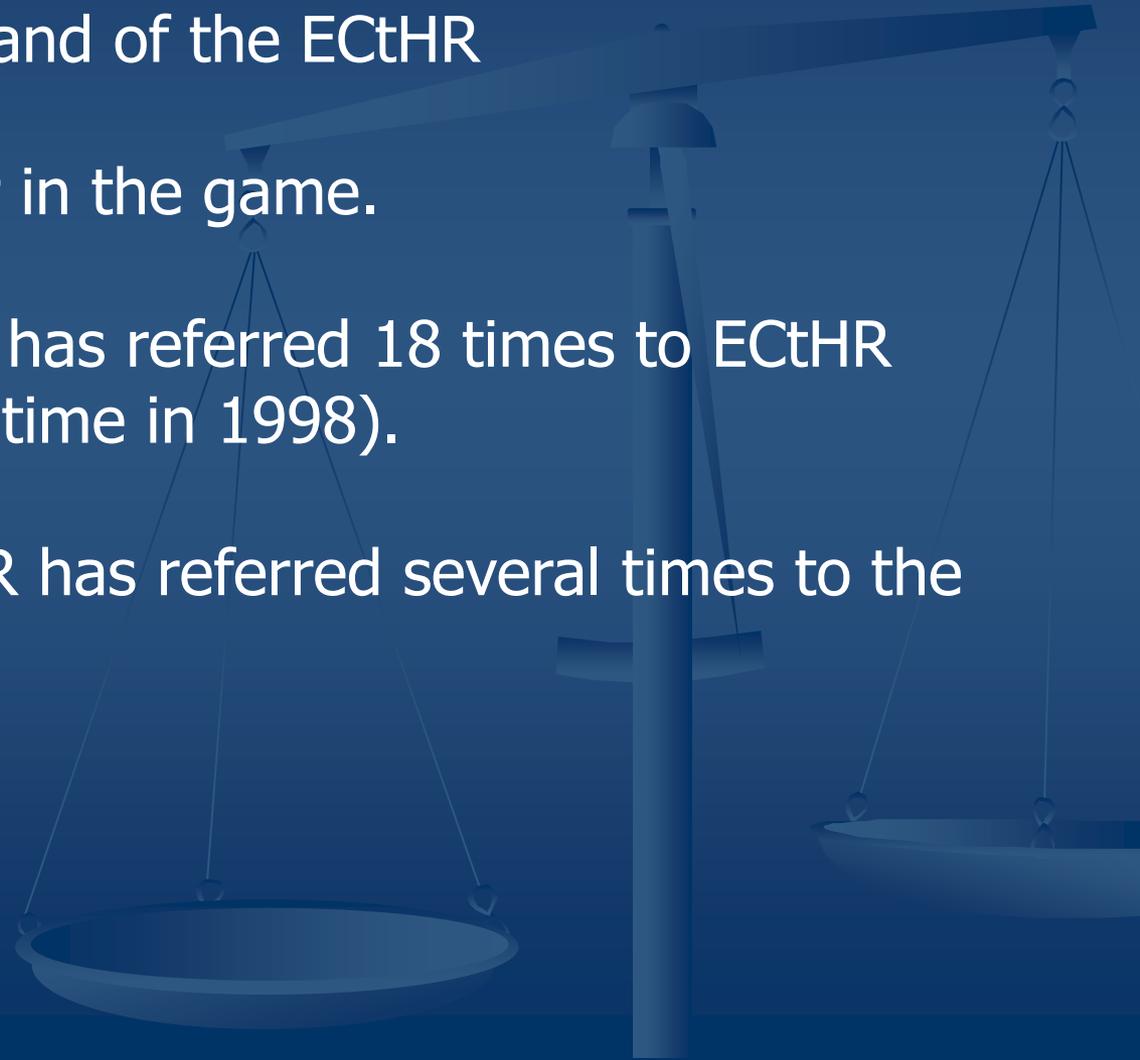
1. EFTA Court – ECJ (vi)

(4) Role of the ECHR and of the ECtHR

There is a third player in the game.

In 11 cases the Court has referred 18 times to ECtHR case law (for the first time in 1998).

In one case the ECtHR has referred several times to the Court's case law.



VI. EFTA Court

2. Structure

Since mid-1995 a court of three.

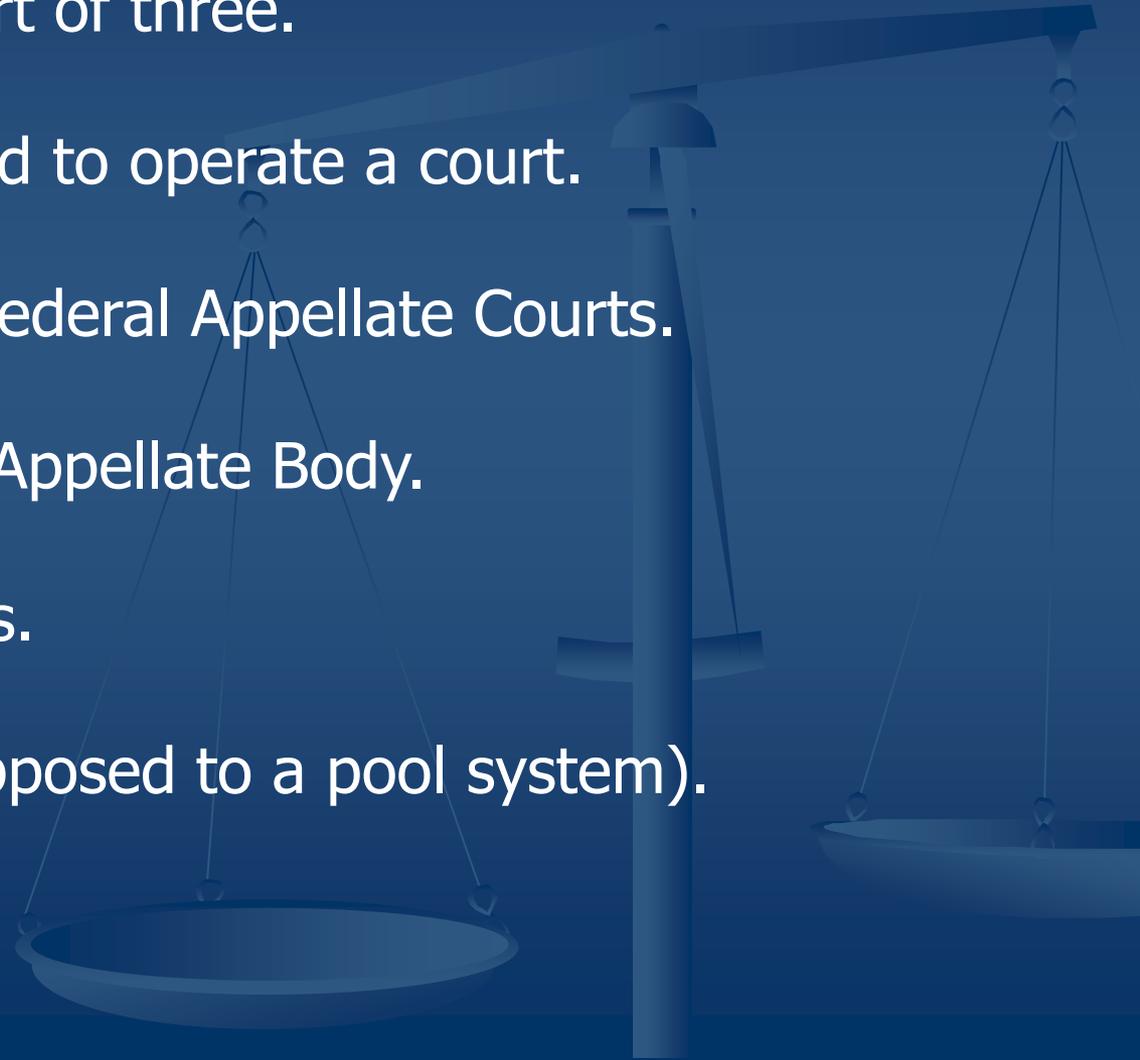
Minimum number need to operate a court.

- But compare U.S. Federal Appellate Courts.
- But compare WTO Appellate Body.

No dissenting opinions.

Cabinet system (as opposed to a pool system).

Registry.



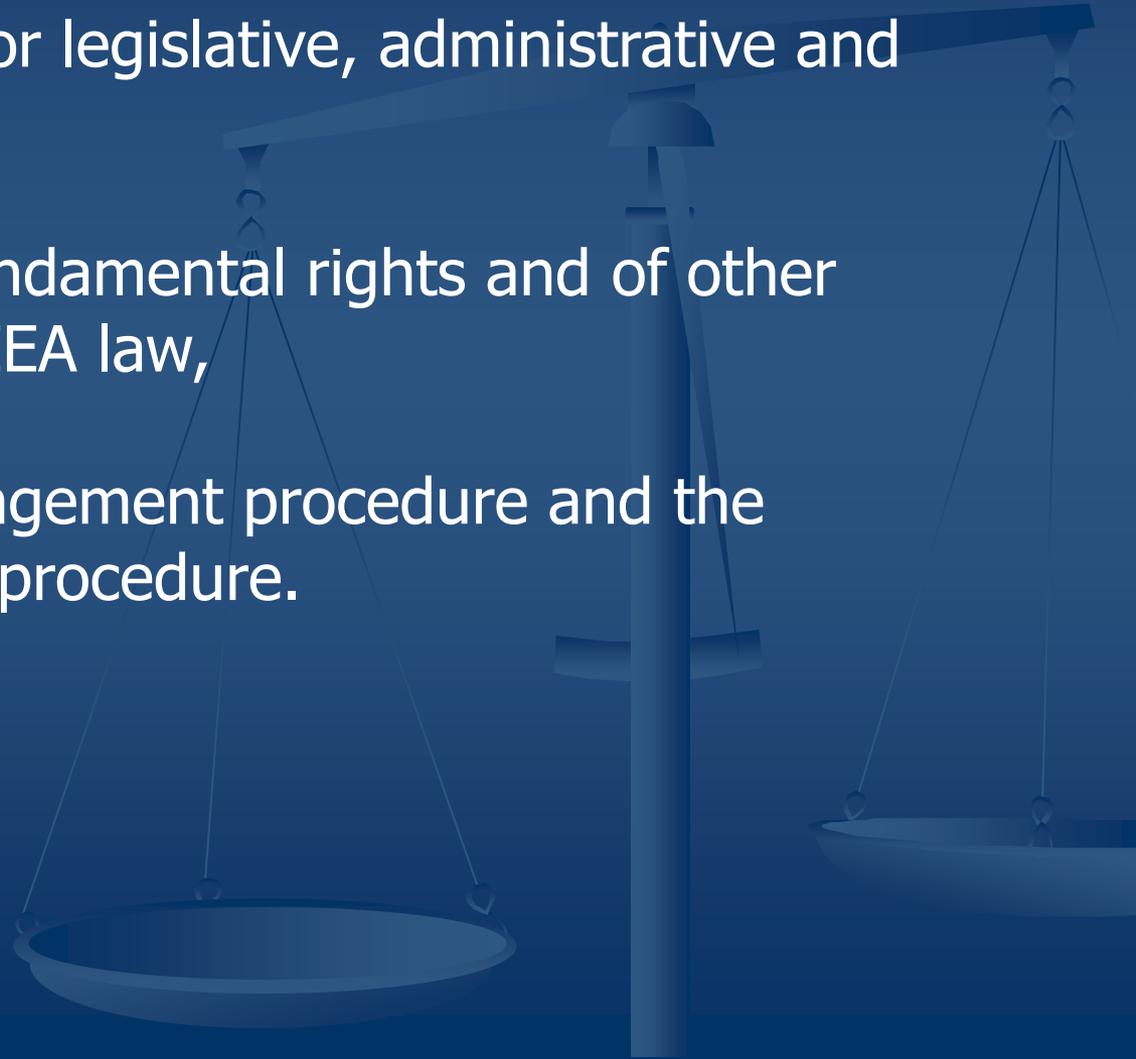
VII. Important cases

1. General principles and procedure

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.



VII. Important cases

2. Primary law

State monopolies for alcohol, tobacco and gambling,

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

Liechtenstein residence requirements,

Recognition of the precautionary principle in food law,

Taxation of dividends,

Norwegian reversion system for waterfalls,

Recognition of a Liechtenstein trust.

VII. Important cases

3. Secondary law (i)

Transfrontier television,

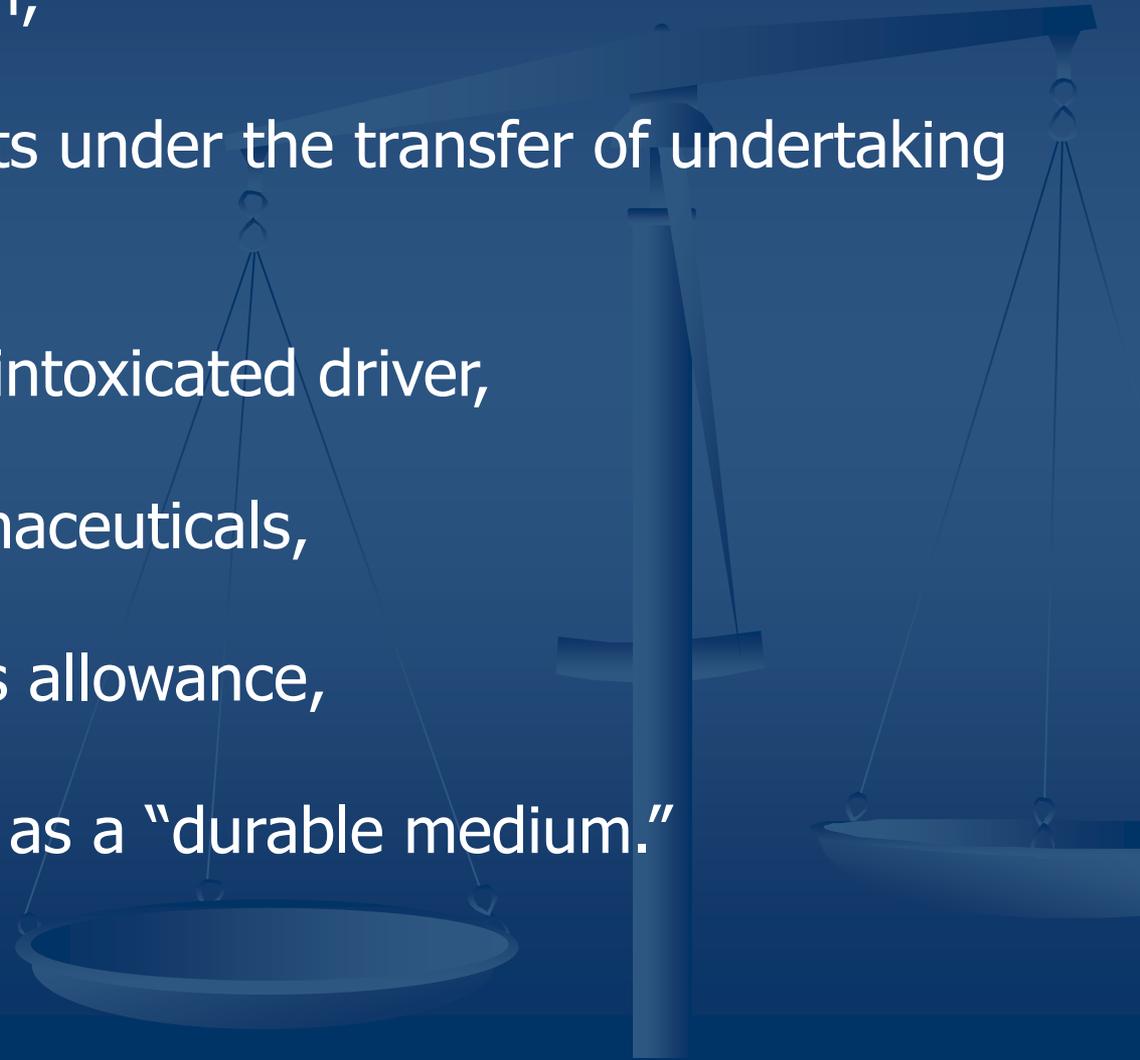
Succession of contracts under the transfer of undertaking rules,

Taking a ride with an intoxicated driver,

Repackaging of pharmaceuticals,

Export of helplessness allowance,

Sophisticated website as a "durable medium."



VII. Important cases

3. Secondary law (ii)

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,

Trade in second-hand life insurance policies,

Limits of the application of national CFC rules,

Application for trade mark protection after the expiry of copyright.

4. Competition law

Relationship between competition law and collective bargaining/industrial action,

Relevance of ECtHR case law,

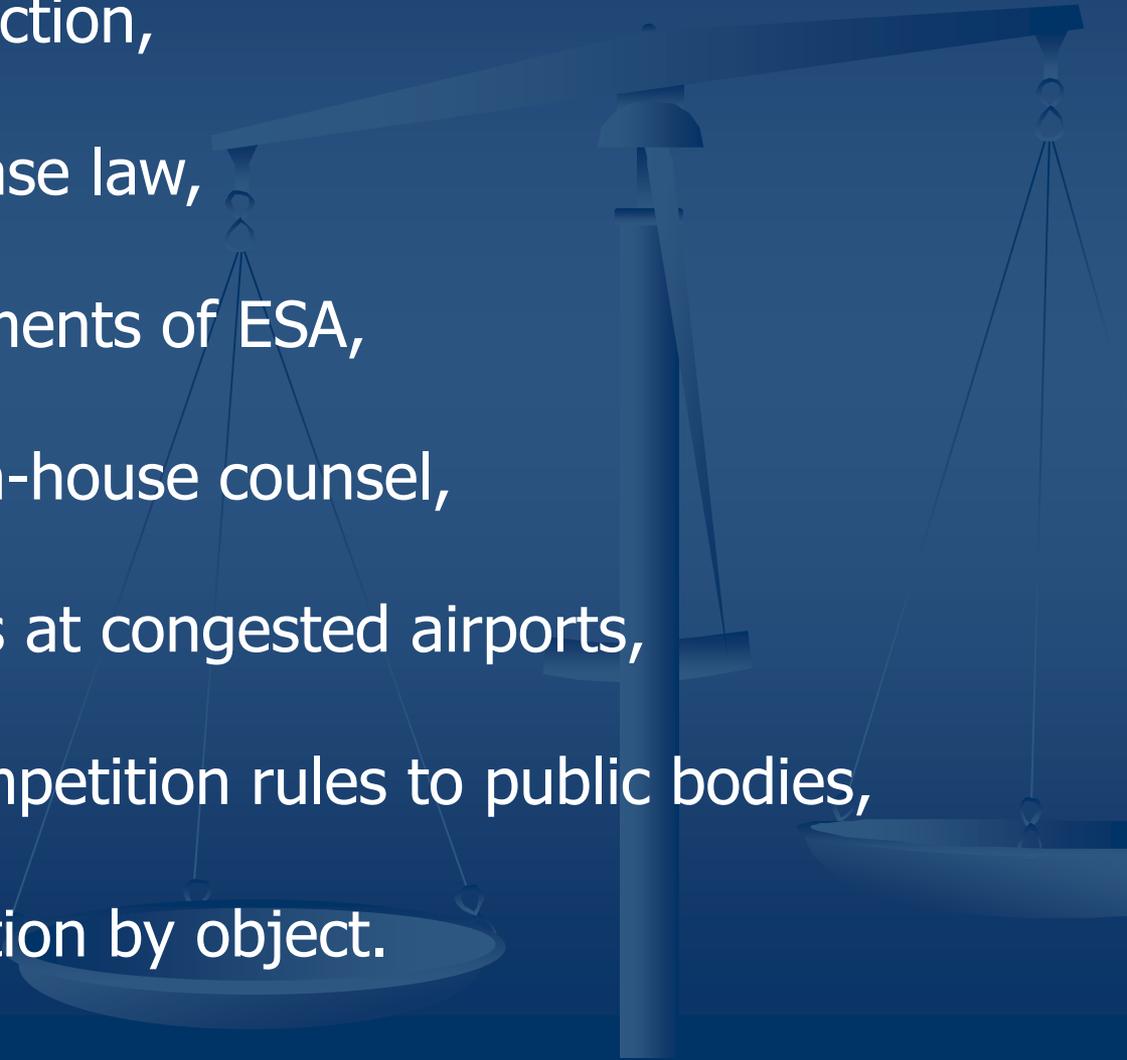
Public access to documents of ESA,

Right of audience of in-house counsel,

Allocation of time slots at congested airports,

Application of EEA competition rules to public bodies,

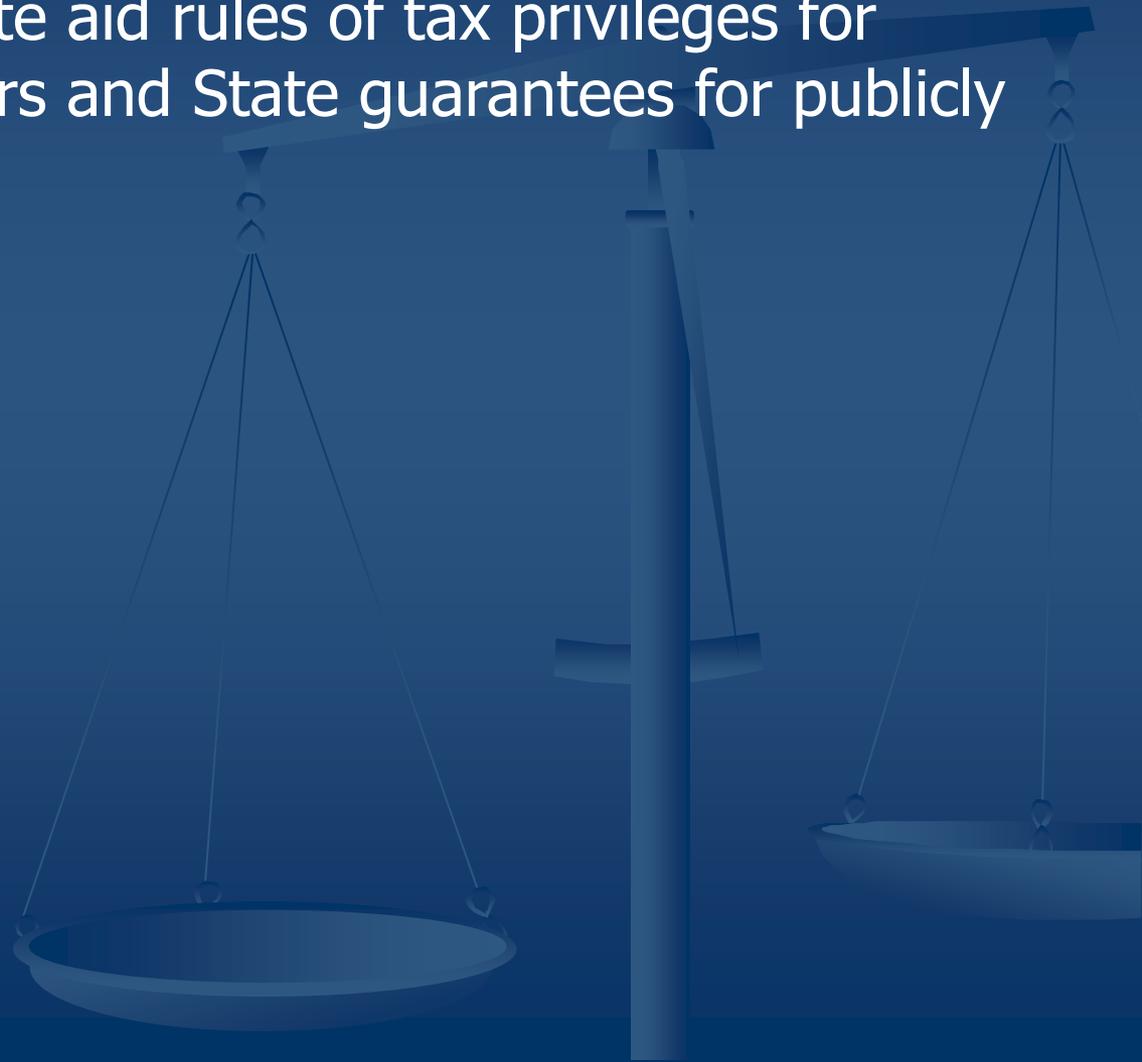
Restriction of competition by object.



VII. Important cases

5. State aid law

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



VIII. Judicial style and underlying philosophy

1. Reasoning (i)

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

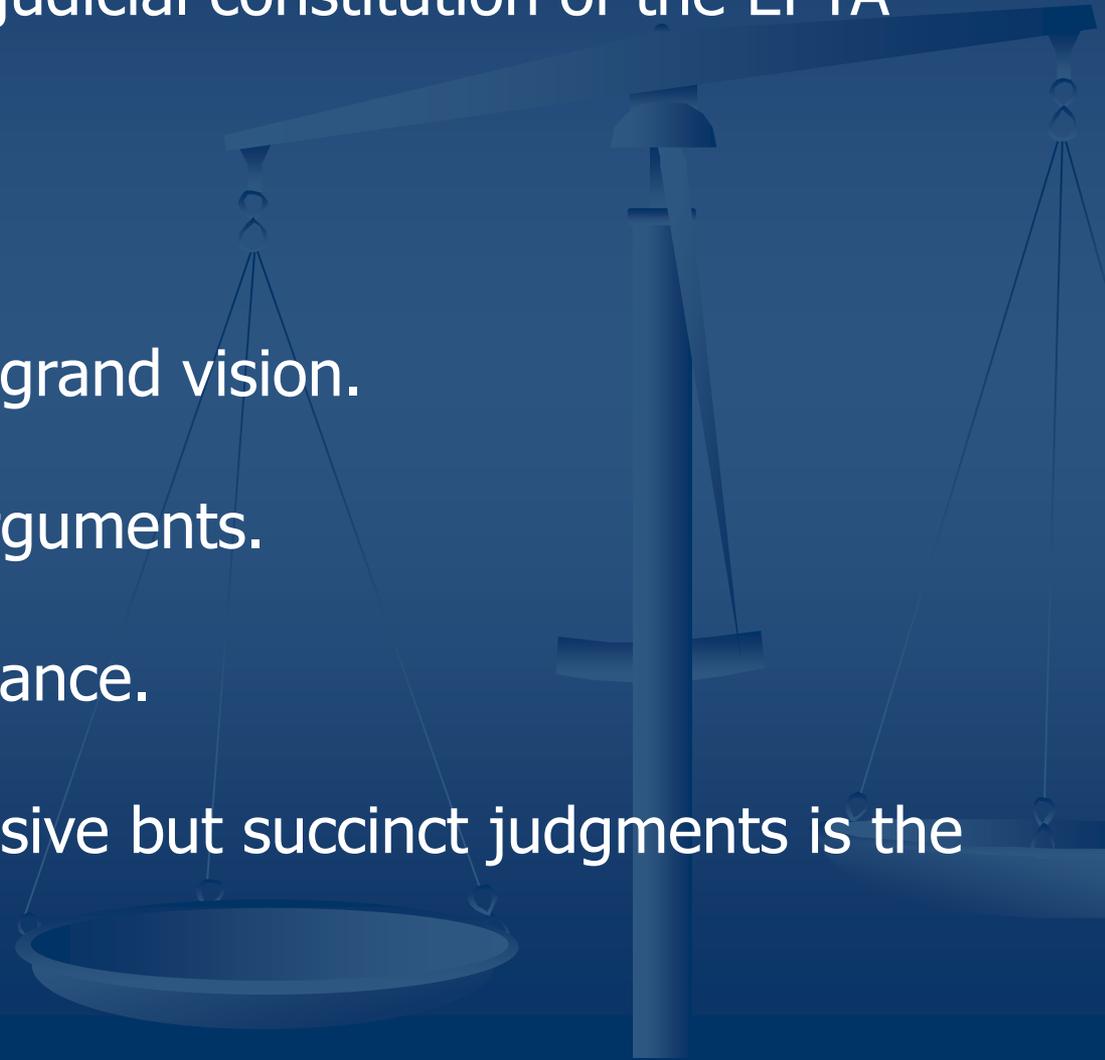
No AG.

Court not driven by a grand vision.

Dealing with all the arguments.

Need to create acceptance.

Rendering comprehensive but succinct judgments is the goal.



VIII. Judicial style and underlying philosophy

1. Reasoning (ii)

Making a virtue out of necessity.

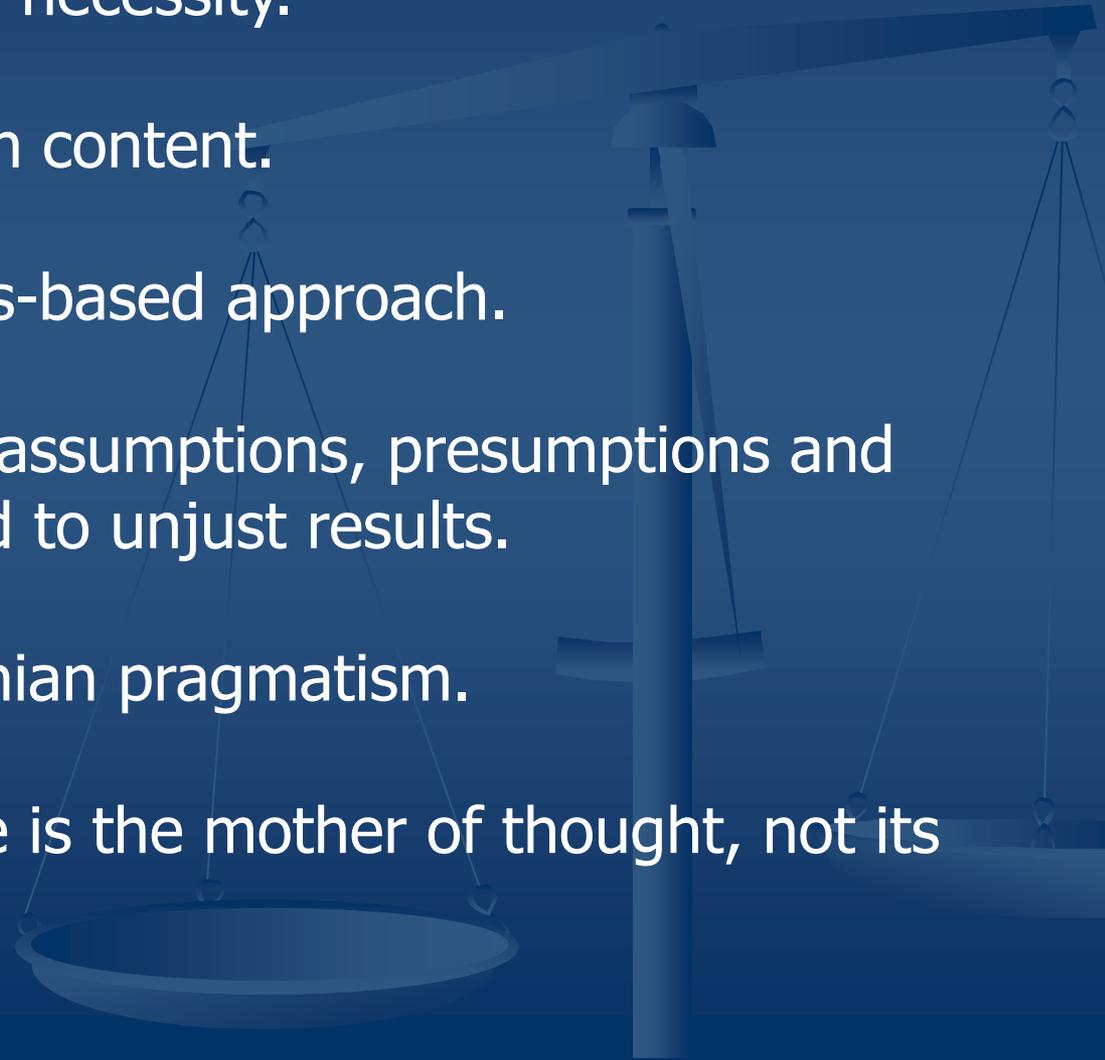
Style has an impact on content.

Fact-based and effects-based approach.

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

Scandinavian-alemannian pragmatism.

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



VIII. Judicial style and underlying philosophy

2. Economics and image of man

In competition law Harvard vs Chicago.

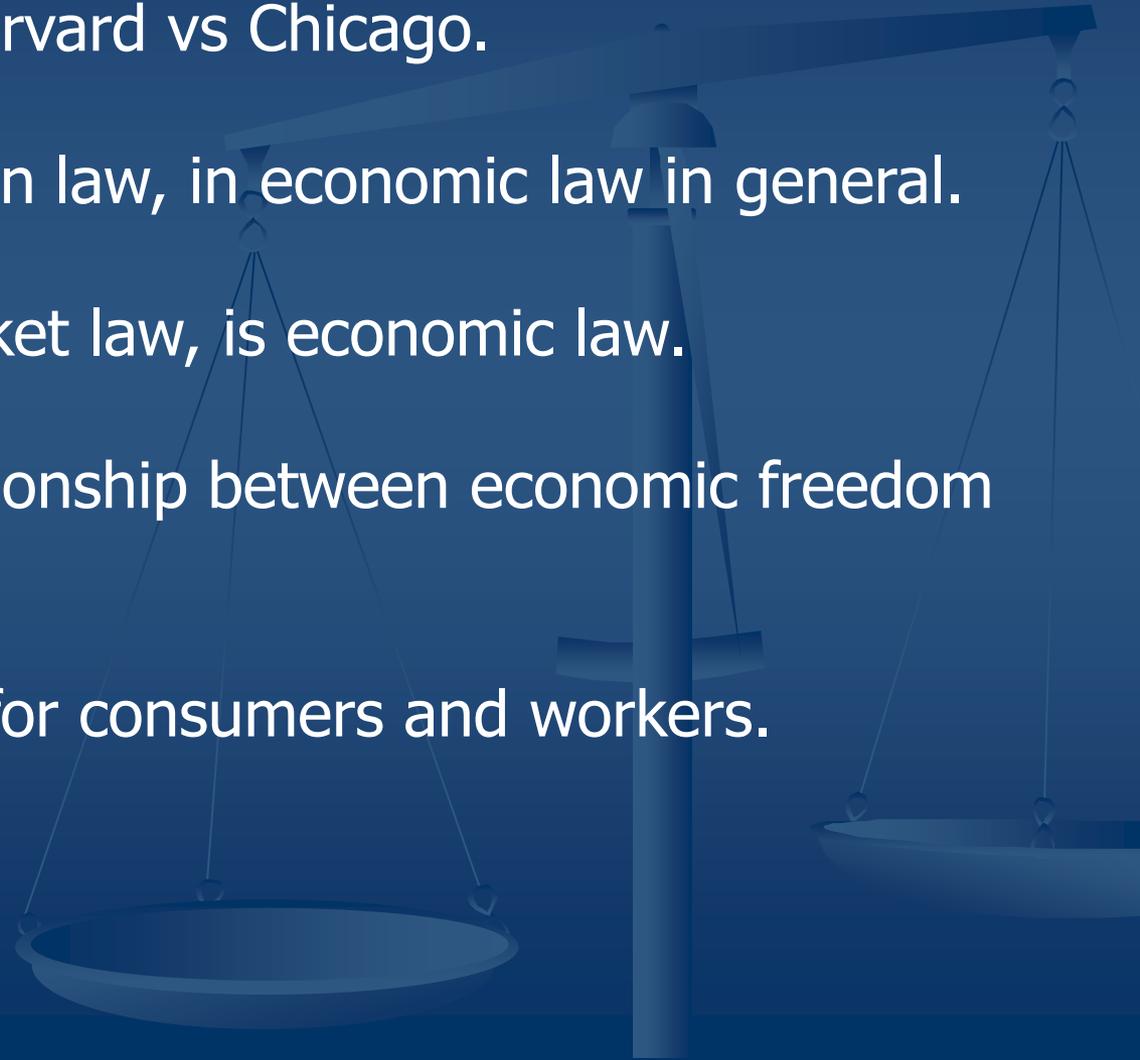
Not only in competition law, in economic law in general.

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.



VIII. Judicial style and underlying philosophy

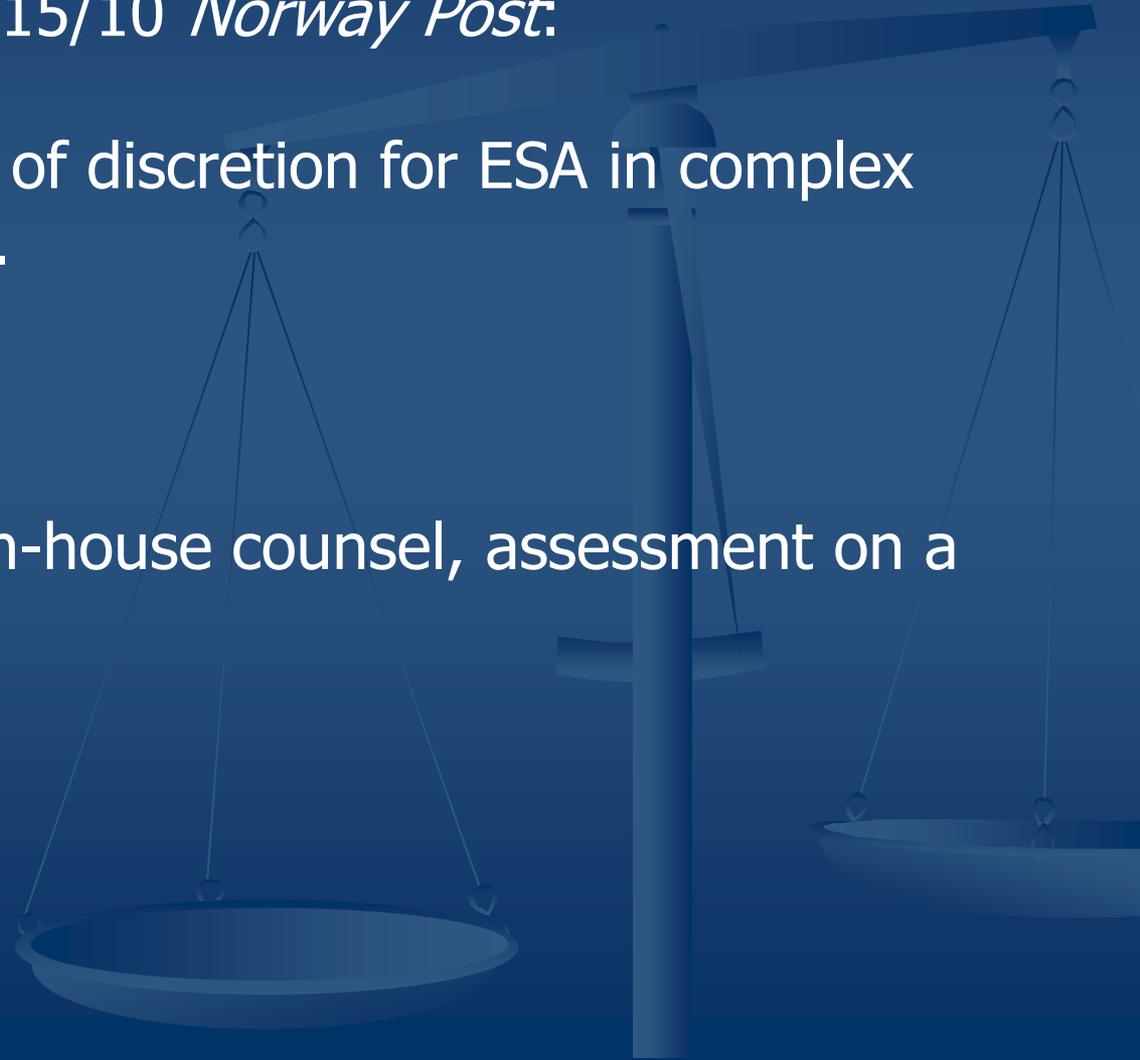
3. Examples (i)

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.



VIII. Judicial style and underlying philosophy

3. Examples (ii)

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:

Consumer can be expected to download or print out content from the website of a financial service provider.

VIII. Judicial style and underlying philosophy

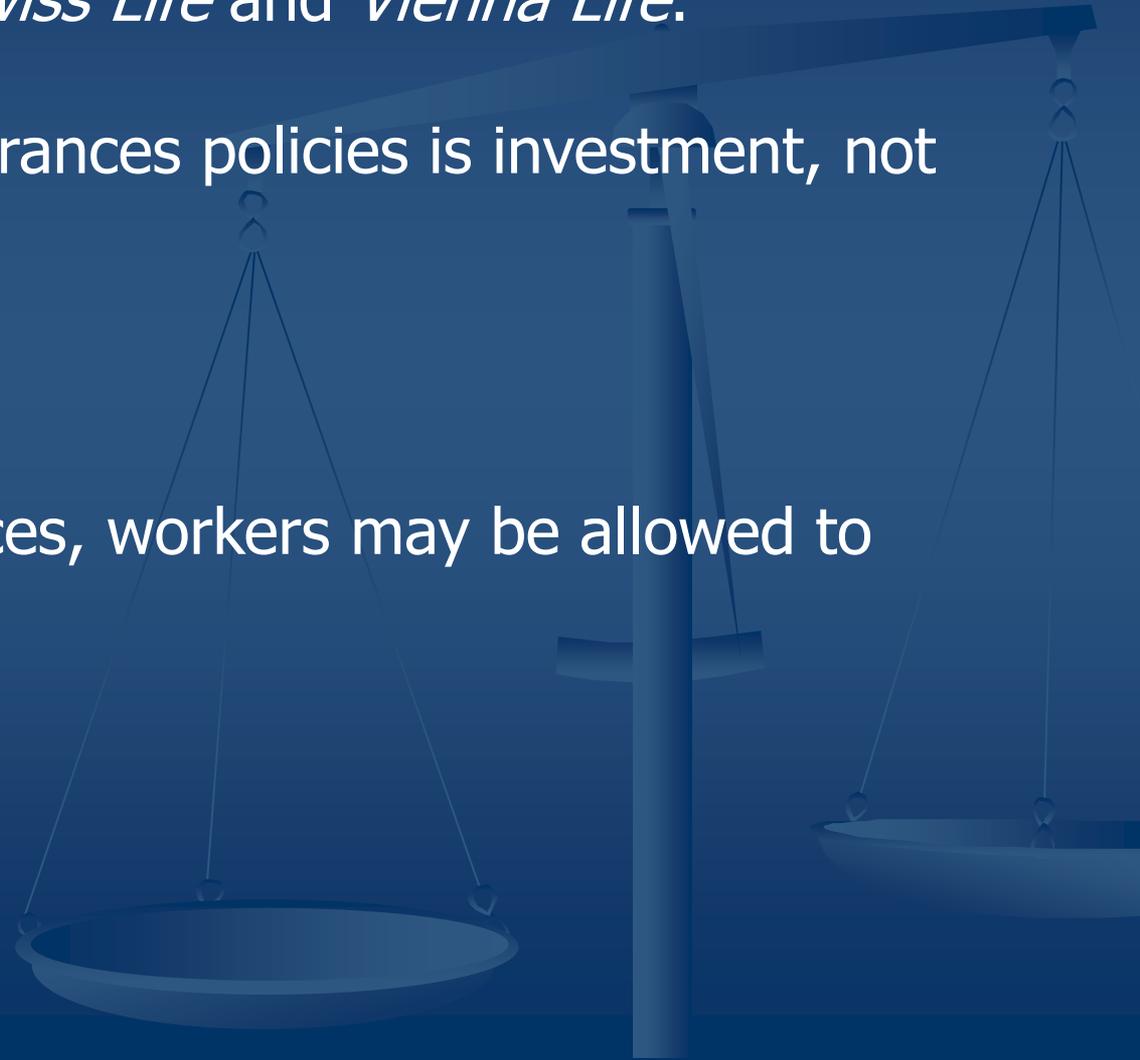
3. Examples (iii)

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.



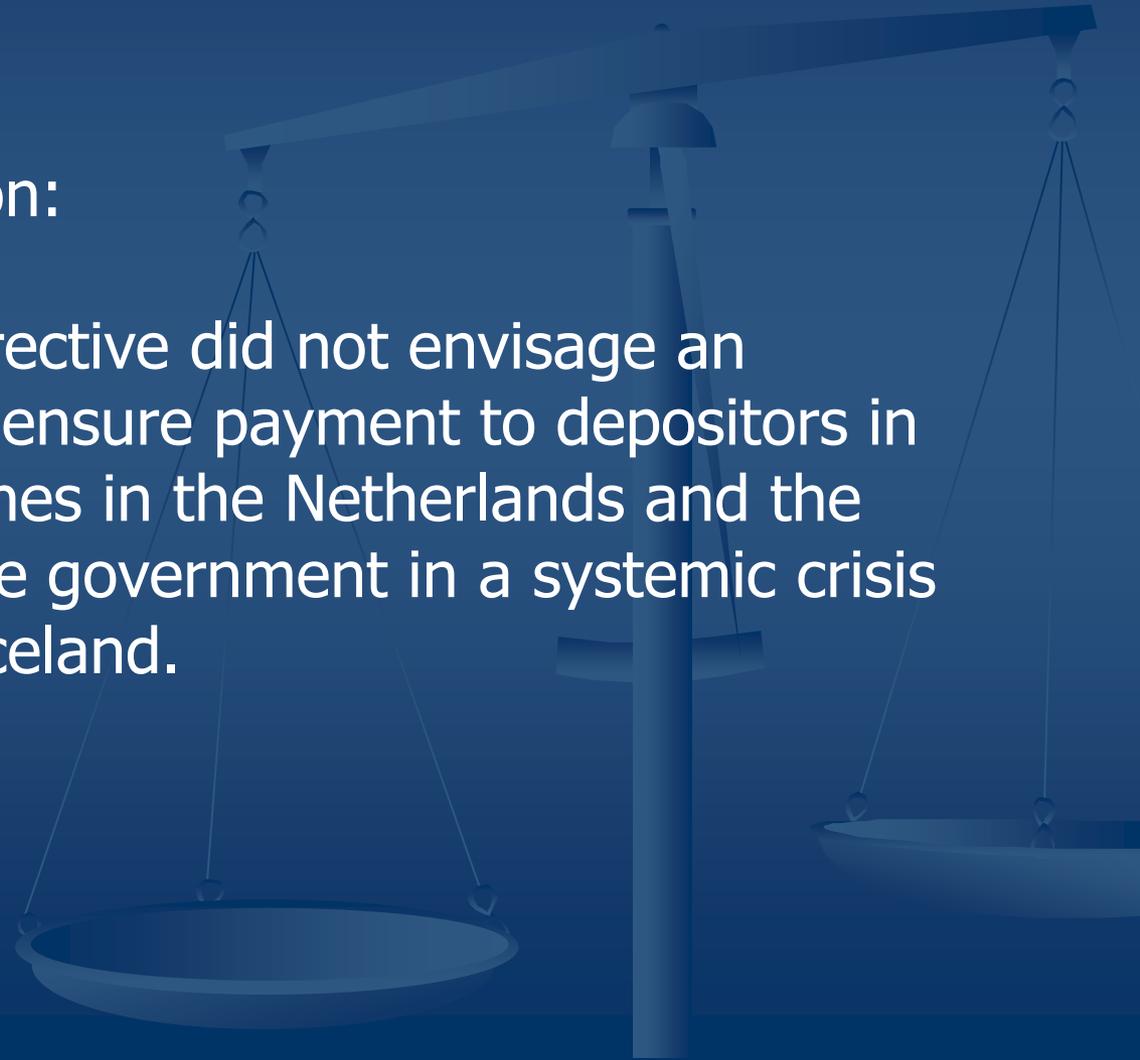
VIII. Judicial style and underlying philosophy

3. Examples (iv)

Icesave I (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.



VIII. Judicial style and underlying philosophy

3. Examples (v)

Icesave I (ii)

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*.

Icesave I referred to by AG's *Mengozzi* and *Wahl*.