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The Style of the EFTA Court

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In honour of the twentieth anniversary of the EFTA Court

I. A FIRST ENCOUNTER

LAWYERS WHO HAVE the honourable challenge of pleading before one of the three European Union Courts will often spend the night in the hotel across the road from the Courts (née Holiday Inn and having undergone several incarnations and face-lifts since then). Usually a fitful night is followed by the not very welcoming security precautions at the door of the Court of Justice. Hours of preparation for 20 minutes of speech before the Court of Justice may elicit nothing in intellectual challenge other than polite silence from the bench.

By contrast, my first argument before the EFTA Court, in the *Bellona* case,¹ took place in the Salle Flamande of the Cercle Municipal, off the bustling public square in the middle of Luxembourg city. A band played outside (coincidentally, one presumes, not at the expense of the Court), and law students were served croissants and coffee as they waited for the argument to start. I changed into the court dress of a Scot (adapted to mark the death of Her Britannic Majesty Queen Anne in 1715, and changed only moderately since then) in the hallway, facilities in rented accommodation for the wig-wearing exotic not being a judicial priority, one imagines. During the robing process, one of the judges passed the clients on the stairway and commented that they had picked counsel well. (Never trust judicial flattery: we were deemed inadmissible.) But the experience was civilised, demanding, and there was vigorous debate between counsel and the bench.

Was this a metaphor, the lively Place d'Armes in the middle of a city, as opposed to the Kirchberg with its monstrously long, cold, intimidating black stone

* Thanks are expressed to Nuno Calaim Lourenco, Jerome Dickinson, Fabian Lutz, Martin Möllman, Sophie Sählin and others unnamed, for valuable ideas. The opinions expressed are wholly personal.

¹ Case E-2/02, *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA*, EFTA Ct Rep [2003] 52.

staircase, one of the most painfully unwelcoming means of access to a supreme court that I know? Yes, to some extent.

II. EARLY CHOICES

Twenty years ago, the judges of the EFTA Court had to decide whether they should follow closely the approach of the European Community Courts to competence and procedure. Some judges of these Courts encouraged their prospective judicial brethren (no sistren then or since) to seize the opportunity not to be ‘too continental’, to be pragmatic and direct, and to get to the problem directly. Easy to say, difficult to practise. Relevant to these discussions was the fact that the European Court of Justice and the Court of First Instance had laid down a body of European law: the new EFTA Court could not become something so totally new that it was shockingly different. On the other hand, whereas the ECJ was an accepted necessity for the EC world, the auspices for the EFTA Court were not unanimously enthusiastic. The EFTA had existed for decades without needing a court. And the Court’s experience has indeed confirmed the potential for constitutional dissent about its role. Even though there was no malign sorceress at the baptismal party,² one EFTA government has made no secret of its opposition to judicial meddling in the affairs of robust independent states. Indeed, the members of the EFTA were by definition dissenters, candidate passengers who had elected not to board the Community train bound for European Union.³

An early question for the EFTA judges to address was whether to follow (and if so, how closely) the style of the other European Courts. The aspiration of the early judges, sitting in Geneva, with Austria, Sweden, Finland, Iceland and Norway as Member States, was to be both dynamic and homogeneous. But the political evolutions of the European adventure altered the Court’s constituency. Thus in 1960, the EFTA consisted of Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom, joined by Finland in 1961, Iceland in 1970 and Liechtenstein in 1991; but by 1995, the EFTA Territory had shrunk to two maritime countries—Norway and Iceland—and two land-locked Alpine countries—Switzerland and the principality of Liechtenstein. Whereas the six founding Member States of the EC were contiguous and had the potential to be, if not rivals, economic partners, Liechtenstein and Iceland are very differently placed.

Like the inevitable wasps that arrive at a picnic, clever lawyers will discover unimagined questions if given a few hours of library time. So the EFTA Court could not hope for a carefree ride, welcomed by governments which it would

² In Tchaikovsky’s ballet ‘Sleeping Beauty’, the dark force who arrived uninvited and grumpily and who placed a curse was named Carabosse, not a Norwegian sounding name. Indeed, the uneasy atmosphere at the creation of the EFTA Court could instead be attributed to the hostile terms of Opinion 1/91 of the European Court of Justice, referred to below.

³ The satirical magazine *Private Eye* referred to Worshippers of the Single European Light-bulb.

annoy by disagreeing with their policies or actions, but who would accept with moderate good grace unwelcome judgments. Likewise, it could not refrain from addressing and answering questions put by national courts, convinced by clever lawyers that there are Treaty-based doubts.

Judges are easy targets for political criticism, as they usually do not answer back. ‘Amazing order by Euro-Court’, or ‘Judge frees terrorist’ usually reflect less dramatic news than the headline might suggest.⁴ Indeed, the EFTA Court judges (President Carl Baudenbacher, Judge Per Christiansen and Judge Páll Hreinsson) do not convey the physical appearance of being messianic power-hungry zealots. All three live in Luxembourg and might be called relatively stateless. The President has lived in Texas, but he eschews snakeskin boots, guns at the hip, the death penalty and other indicia of eccentric independence. Sven Norberg, Leif Sevón, Bjørn Haug, Thór Vilhjálmsson and the other diplomats, teachers and officials are well-recognised jurists who have served on the EFTA Court.

Most of the 11 judges who have served the EFTA Court since 1994 have had academic experience, and the others have been very senior diplomats or officials (not so many judges). President Baudenbacher has written many books and articles on European and international law covering a wide range of issues from competition law to intellectual property law. The members of the Court write prudently, legally and diplomatically, and their personal conduct matches that restraint. That said, there have been occasions when their judgment has displeased a country, or the ESA, or several countries.⁵

III. THE MELANCHOLY BIRTH

The ECJ rejected the establishment of an EEA-wide judiciary in an Opinion about which I (and others) felt rather puzzled, in that the tone of the Opinion sounded positively hostile to the judicial cooperation which we now regard as natural. It revealed the European Court’s initial suspicions towards integrating EFTA country judges in a grand European judicial project.⁶ The ECJ feared a threat to the integrity of the European Union if all EFTA States were to send judges to sit

⁴ My mentor, Sir David Edward, habitually an elegant figure, was once depicted in a British newspaper looking like a *sans-abri*, presumably to suggest the unreliability of his court, and was reproached in the article for working more than the Working Time Directive contemplated.

⁵ Of the extensive literature on Norwegian reluctance to give deference to the EFTA Court, see H Haukeland Fredriksen, ‘The Troubled Relationship between the Supreme Court of Norway and the EFTA Court—Recent Developments’ in Müller-Graff and Mestad (eds), *Europe and its European relations* (Bergen Open Research Archive, UiB publications, to be published 2014) as a good recent account of the constitutional problem.

⁶ Opinion 1/91 of the ECJ on the Draft agreement between the European Community and the countries of the European Free Trade Association relating to the creation of the European Economic Area [1991] ECR I-6079. Under the draft agreement, the envisaged EEA judiciary would have comprised ECJ and EFTA judges.

together with the judges from the EC/EU. The idea of a plenum with five ECJ judges and three EEA judges was not welcomed in the Court's Opinion.

Consequently, the agreement's objective of ensuring homogeneity of the law throughout the EEA will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law.

It follows that in so far as it conditions the future interpretation of the Community rules on free movement and competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community.

The threat posed by the court system set up by the agreement to the autonomy of the Community legal order is not reduced by the fact that Articles 95 and 101 of the agreement seek to create organic links between the EEA Court and the Court of Justice ...

On the contrary, it is to be feared that the application of those provisions will accentuate the general problems arising from the court system to be set up by the agreement.⁷

...

In those circumstances, it will be very difficult, if not impossible, for those judges, when sitting in the Court of Justice, to tackle questions with completely open minds where they have taken part in determining those questions as members of the EEA Court.⁸

These bleak words about judges working together may be contrasted with the current cordiality. It was against this background (or despite it) that the principle of homogeneity, which is at the heart of the EEA Agreement, was formulated.⁹ Thus although EEA law and the law of the EC (now the EU) were separate legal orders, and although the EFTA and the EU were constitutionally significantly different, there was a powerful policy consideration in favour of consistency in the applicable European law rules. There would also be constitutional arguments in favour of maintaining differences between the two regimes.

The EFTA Member States have agreed to accept the *acquis communautaire*. EFTA States may sometimes feel politically irritated that, although they have not endorsed an agenda in favour of an ever closer union with the EU, they are bound by a set of rules which evolve regularly, which they are obliged to apply, but which they have not drafted or amended. Worse, the EFTA Court elected to create a *Francovich* rule on the basis that homogeneity would be enhanced if EFTA citizens had direct claims against their states where national legislation failed to deliver the benefits intended by the EU legislator. Some of the judicial steps were bold. For example, though EFTA citizens have quite limited EU Treaty rights, they can nonetheless invoke the principle of state liability against the state in case of breach of duty. Thus the EFTA Court has adopted what we might call quasi-direct effect, quasi-primacy and state liability. There has also been what is called a useful

⁷ Opinion 1/91, paras 45–48.

⁸ Opinion 1/91, para 52.

⁹ Art 6 of the EEA Agreement.

EFTA Court dialogue with the EU Courts. Indeed there are dozens of references in EU law to EFTA precedents, as well as even more references in EFTA judgments, from the very first case on,¹⁰ to EU judgments.¹¹ Both the EU and EFTA Courts have recognised the importance of the EEA homogeneity objective.¹² The EU Courts take account of and regularly refer to EFTA Court case law. Likewise some national supreme courts. The European Commission is a regular intervener in EFTA Court cases, the ESA a less frequent intervener before the ECJ.

While it is usually the ECJ that attracts media attention (often erroneous, or at least exaggerated), the EFTA Court has its moments in the limelight. Sometimes, the EFTA Court encounters the question after the ECJ, sometimes before. In *Philip Morris*, the EFTA Court was the first international court to examine the legality of a visual ban on tobacco products at points of sale with trade rules.¹³ The case received widespread media attention, notably from the mainstream press.¹⁴ In *GEMO*, Advocate General Jacobs agreed with the EFTA Court's so-called 'state aid approach' in *Husbanken II*, in which a state guarantee granted by Norway to its State Housing Bank to provide a service of general economic interest was deemed to constitute state aid.¹⁵ *Television Without Frontiers* was another relative first, as were cases about the precautionary principle, transfer of undertakings, and insurance.

The EFTA Court has the great advantage of smallness and of using only one language. It was born after the most interventionist phase of the ECJ had come to an end. When one discusses style, one is necessarily comparing aesthetics, tone, crispness and other not easily quantifiable factors. So my remarks are anecdotal, impressionistic and unscientific. My guess at the start of preparing this chapter was that the style of the EFTA Court would be perceptibly, though not radically, different from that of the other EU Courts. The differences would be: speedier (easy if there are only three judges and one language), somewhat shorter (compare

¹⁰ Of many examples, see the opinions of Advocate General Kokott in Case C-681/11 *Schenker & Co AG and Others*, 28 February 2013; Advocate General Mischo in Case 192/01 *Commission v Denmark* [2003] ECR I-9693; Advocate General Maduro in Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171; Advocate General Jacobs in Case C-126/01 *Ministre de l'Économie, des Finances et de l'Industrie v GEMO SA* [2003] ECR I-13769; Advocate Jacobs Geelhoed in Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743; and Advocate General Sharpston in Case C-384/04 *Federation of Technological Industries and Others* [2006] ECR I-4191.

¹¹ Case E-1/94 *Restamark* [1994–1995] EFTA Ct Rep 15, paras 32 *et seq* noted that individuals and economic operators must be entitled to invoke and claim nationally EEA rights if unconditional and sufficiently precise; Case E-1/01 *Einarsson* [2002] EFTA Ct Rep 1, on primacy of EEA law; Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct Rep 95, paras 44–60 on state liability.

¹² Case T-115/94 *Opel Arstia* [1997] ECR II-00039, paras 104–110; Case C-452/01 *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung* [2003] ECR I-09743, para 29.

¹³ Case E-16/10 *Philip Morris Norway AS and Staten/Helse-og omsorgsdepartementet* [2011] EFTA Ct Rep 330; see also Alberto Alemanno, 'Philip Morris v Norway: EFTA Court upheld visual display bans of tobacco products with a precautionary twist', 16 September 2011.

¹⁴ Stephanie Bodoni, 'Philip Morris Must Show Norway Tobacco Display Ban Is Unfounded', Bloomberg News, 12 September 2011.

¹⁵ Opinion of Advocate General Jacobs in *GEMO*, cited above n 10.

*Posten Norge*¹⁶ and *Post Danmark*¹⁷), and more internally consistent (see *Lelos v GSK Greece*¹⁸ as a judgment written by multiple hands). Let us consider if these first impressions are confirmed by examples.

IV. THE SINGLE MARKET: A MAGNIFICENT OBSESSION?

It is appropriate to begin with the model against which the easiest comparison can be made: the European Court of Justice itself. There was a time when judgments of the ECJ traced out a fearless, confident line in which problems of disparity between regulators were resolved by endorsing whatever would enhance market integration. The Commission was given considerably more generous latitude than the Member States. If a disparity emerged between how a Member State and the Commission assessed a particular question, the Court was likely to endorse the Commission's approach. In matters like food recipe law, the Member State posture was sometimes frivolous, though solemnly defended in emotionally rich terms ('beer is liquid bread on which our country's working men depend for their strength and selling as beer any less noble liquid than Real Beer will weaken our men'). Controversies over inconsistent national rules on croissants, feta, hams, wine, boudin sausage, cheese and other comestibles came to the Court's attention, until in *Cassis de Dijon*¹⁹ it robustly adopted something close to full faith and credit: if it can be sold in that Member State, it should be sold in this Member State unless exigent circumstances can be shown to exist.

There was in those days a period when the ECJ produced quirky gems: short, pithy, and flavourful. The ECJ's '*Sunday Trading*' cases were a summer flowering of litigious and judicial creativity. (One ECJ judge told me that he was advised to render a draft more antiseptic, less coloured.) The ECJ was accepting many cases which were remotely and tangentially linked to market integration. Under the Court's broad interpretation of national rules which hindered trade between Member States, blocking the sale of goods on the English Sabbath could indeed (coincidentally and unintentionally) hinder the sale of imported goods. There were numerous clever challenges to local English trading rules, with some success for the creative lawyers involved. Then the music stopped, and the ECJ ultimately decided that national trading rules imposing shop closures on Sundays did not hinder intra-EU trade as these applied equally and non-discriminatorily to domestic products and imports from other EU Member States.²⁰

¹⁶ Case E-15/10 *Posten Norge v EFTA Surveillance Authority* [2012] EFTA Ct Rep 246.

¹⁷ Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, judgment of 27 March 2012, published electronically.

¹⁸ Joined Cases C-468/06 to C-478/06 *Lelos kai Sia EE v GlaxoSmithKline* [2008] ECR I-7139.

¹⁹ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

²⁰ Case C-169/91 *Stoke-on-Trent* [1992] ECR I-6653; Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV* [1994] ECR I-2355.

The political context of today's European Union is hugely different from that before 1972 and the first enlargement from six to nine Member States. In its early days, the Court had the advantage of small size, light case-load, the rather warm support of the lawyers who regularly appeared before it, and a certain vision of the legal future. (At my first argument, counsel were invited to pre-lunch drinks with the judges.) As the EU has swollen to 28 members, the savour of its judgments has diminished. That is a matter of regret, but not of criticism. The judgments of the EFTA Court have never been exuberant, but they have remained intelligible and unconvoluted.

There is a great difference between a court of three, using one language (English, which is grammatically tolerant of stretching and of novel structuring), with a moderate case-load, and a court with 38 members (judges and advocates general) and 23 official languages of which French (grammatically rather more conservative) is the working language. It is easier for a small monolingual court which is not much in the public eye to reach consensus, remain consistent, and identify sensitivities, questions best postponed, and intelligent solutions.

V. UNWELCOME PERSONS

Sometimes, the underlying choices are genuinely delicate, and the jurisprudence is not consistent. Creating order out of miscellaneous and contrasting precedents calls for skill. The delicacy of the choices to be made is illustrated by several cases about the right to reside, in particular circumstances, of foreign individuals who were lawful but unwelcome.

Mrs van Duyn, a Dutch citizen, was an active member of the Church of Scientology, which was regarded by the UK authorities as a lawful but socially undesirable cult. She was denied permission to live in the United Kingdom to work as a Scientologist, and challenged the immigration officer's decision as being an unjustified restriction on the free movement of workers.²¹ The UK government invoked public policy for the restriction. The ECJ found that Mrs van Duyn's personal conduct did not in itself need to be unlawful. The United Kingdom was allowed to exclude her from entering the country. But then came *Adoui v Belgian State*,²² in which two French nationals, delicately referred to in the European Court Reports as 'waitresses' who attracted customers by sitting in the windows of establishments in the red-light area of the city of Liège, were threatened with deportation. Prostitution was not illegal in Belgium. They prevailed on the grounds that French citizens could be deported only if Belgian citizens, who could not be deported, were equally liable to repressive penalties intended to combat the same conduct.

²¹ Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337.

²² Joined Cases 115 and 116/81 [1982] ECR 1665.

The EFTA incarnation of the problem of the lawful but unwelcome foreigner was Jan Anfinn Wahl,²³ a Norwegian citizen who was refused admission to Iceland on the grounds of his membership of the Hells Angels motorcycling fraternity. He was a university student (albeit an elderly one, in his mid-thirties), had no criminal record, and wanted to go sight-seeing in Iceland as well as to make contact with prospective members of the Hells Angels club. But Hells Angels paraphernalia were found in his luggage, and he was refused permission to enter Iceland. It emerged that Iceland's law enforcers had 'been taking measures over a considerable period to prevent the national motorcycle club in question from becoming a charter of the Hells Angels, inter alia, by repeatedly denying foreign members of Hells Angels entry on arrival to Iceland by reference to public policy and public security'.²⁴ Thus they wanted to prevent 'a national motorcycle club acceding to become a full charter member of an international motorcycle club associated with organised crime ... Furthermore, it appears from the reference that the national motorcycle club needed the support of an established charter of Hells Angels in order to become a full charter itself and, for that reason, the measures in question could only target foreigners. Since there was no such charter in Iceland, the support of a foreign member was a prerequisite'.²⁵

One can readily see the different points of view. Norway and Iceland fiercely opposed limitations on their power to control social turbulence and potential criminality. The European Commission reminded the Court of the need to respect the principle of proportionality.²⁶ The ESA submitted that a person may be a threat despite not having a criminal record. But the man was not a criminal, and what was wrong with motorcycle enthusiasts getting together? Why assume they would break the law?

The EFTA Court produced an adroit and elegant conclusion, which called for 'specificity, precision and clarity'; then demanded a danger assessment based on the individual's personal conduct, and further stipulated that the controversial conduct should 'represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society'. It was for the national court to apply those liberal-sounding but actually fairly cautious notions to the situation of Mr Wahl.

Even though the Court may have had a view about whether he should be allowed to travel the road of Iceland, it left the crucial determination to be made locally. In the famous *Bosman* case,²⁷ the ECJ had to decide on supposed tensions between national and European football rules and the Treaty's rules on free movement of workers.²⁸ The Court found that the duty of the acquiring club to make a

²³ Case E-15/12 *Jan Anfinn Wahl v the Icelandic State* ('Hells Angels') [2013] EFTA Ct Rep 534.

²⁴ *ibid*, para 102.

²⁵ *ibid*, paras 106–107.

²⁶ See some examples cited in *Hells Angels*: Case 36/75 *Roland Rutili v Minister of the Interior* [1975] ECR 1219; Case 30/77 *Régina v Pierre Bouchereau* [1977] ECR 1999.

²⁷ *ibid*, paras 114 and 137.

²⁸ Case C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921.

payment to the former club of the young player in recognition of the former club's contribution to his professional development was factually unacceptable (rather than leaving it to the national court to check whether the practice did in fact have the alleged negative consequences). The ECJ erred there—I submit—by making factual conclusions which the national court was better equipped to make. In a hotly contentious, facts-rich case, it is wise, as the EFTA Court did in the *Hells Angels* case, to trust the local judge to decide the facts prudently and accurately.

VI. CONTROVERSIAL MATTERS: GAMBLING, TRADE UNION PRIVILEGES AND BANKING REGULATION

Governments, for good reasons, strictly regulate the activity of gambling. There are risks of addiction and risks of corruption, as well as the potential for raising large sums of revenue for the state. Commonly, the national measures regulate on a national basis and limit or forbid gambling equipment or services from other countries. The Norwegian authorities indeed voiced reluctance to contemplate that a national rule might be overruled on grounds of incompatibility with EEA law, but the crisis evaporated. Later on, however, in *STX*,²⁹ the question arose of whether workers in a shipyard should receive compensation for expenses incurred when detached to work away from home, not an obviously politically sensitive topic. After consulting the EFTA Court,³⁰ the Norwegian appellate court found against the employer on the basis of the European Directive,³¹ but its decision was then appealed to Norway's Supreme Court, the Høyesterett. There the idea was discussed of circumventing the problem by having the employees hired locally in Norway rather than transferring them. The Høyesterett criticised the EFTA Court's decision, and was in its turn the object of a critique by President Baudenbacher,³² who concluded by saying approximately 'This is not what EEA law is about'.³³ He noted that the same court³⁴ had in the earlier case accepted the authority of the EFTA Court as regards the regulation of gaming machines. Thus the EFTA Court has well demonstrated its political readiness to displease governments, a crucial marker of true constitutional independence.

Another occasion when a judgment displeased governments was *Icesave*, concerning Iceland's possible liabilities for lost deposits in Icesave accounts in the aftermath of the economic crisis of 2008.³⁵ Under Directive 94/19/EC, EEA States are required to put in place deposit-guarantee schemes to cover a minimum

²⁹ Norges Høyesterett, Rt 2012 s 1447, *STX and Others v Staten v/Tariffnemnda*.

³⁰ Case E-2/11 *STX Norway Offshore AS m fl v Staten v/Tariffnemnda* [2012] EFTA Ct Rep p 4.

³¹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

³² C Baudenbacher, 'EFTA-domstolen og dens samhandling med de norske domstolene' (2013) 52 *LOV OG RETT* 8, 515–534.

³³ 'Det er ikke dette EOS-retten handler om.' *ibid*, p 525.

³⁴ Norges Høyesterett, Rt 2005 s 1320, *Norsk Lotteri- og Automatbransjeforbund v Staten v/Kultur- og kirkedepartementet*.

³⁵ Case E-16/11 *EFTA Surveillance Authority v Iceland* [2013] EFTA Ct Rep 4.

amount of the deposits of depositors in case of bank failures. This is intended to protect depositors as well as to prevent panic, calm investor agitation, and avert runs on banks. Iceland had not paid the UK and Dutch depositors of one of its failing banks, Landsbanki, within the three-month time limit set by the Directive. By a Reasoned Opinion, the ESA commenced proceedings before the EFTA Court against Iceland, alleging failure to guarantee the deposits and to respect the Directive. At the heart of the dispute was the ESA's claim that the Directive imposed a strict '*obligation of result*' on EEA States in the event that deposit-guarantee schemes fail. Iceland argued instead that its obligations were limited to creating and ensuring the maintenance of a deposit-guarantee scheme, but not to pay compensation as a last resort no matter what the circumstances.³⁶

It was evident that the political stakes were high, and that the ESA as well as two heavyweight countries were of one mind. But the EFTA Court demurred. Instead of deciding between Iceland ('small democracy, financial ruin, no one could escape the crisis') and the UK and the Netherlands ('Iceland created or tolerated a lax unsustainable banking environment'), the Court followed a procedurally narrow approach, examining the merits of the reproaches of the Reasoned Opinion. It did not explore more widely the other contentions advanced by Iceland's critics. While there were indeed potent arguments that Iceland's tolerant banking regulations had provoked a preventable flood of deposits on unsustainable terms, the Court confined its analysis to the Reasoned Opinion and did not consider the wider range of regulatory criticisms relating to subsequently arising obligations which might have been made but did not figure in the Reasoned Opinion.

Iceland had set up a deposit-guarantee scheme.³⁷ There was no obligation on EEA States to compensate deposits in all circumstances, but only to make arrangements towards a harmonised minimum level of protection.³⁸ These could therefore not be expected to fill in the void of failing banks in the face of a systemic crisis of the magnitude encountered. Any suggestion to the contrary would cause moral hazard by having the effect of encouraging unsound management of credit institutions.³⁹ The EFTA Court acknowledged that under the new Directive 2009/14, which provides for much stricter requirements, a different conclusion would probably have been reached. The outcome would probably have been different in the EU.⁴⁰

VII. THE PRECAUTIONARY PRINCIPLE

I will add one case where I enthusiastically endorse the Court's approach to that slippery and woolly minded doctrine, the precautionary principle. To save the

³⁶ *ibid*, paras 96–97 and paras 102–103.

³⁷ *ibid*, paras 130–131, 133.

³⁸ *ibid*, paras 134–135 and 144.

³⁹ *ibid*, para 167.

⁴⁰ See R Milne, 'Iceland triumphs in Icesave court battle', *Financial Times*, 28 January 2013.

health of Norway's child-bearing and elderly citizens, cornflakes with added iron or vitamins were banned.⁴¹ Norway forbade the sale of cornflakes enriched with iron or vitamins, mainly on the ground that there was no need to deliver extra iron to the population, that there was a problem of excess iron in the bodies of some Norwegians, that scientific enquiry was ongoing, that Norway's endorsement of adding iron to cheese and whey should not change the result for cornflakes, and that the ban was both necessary and proportionate. Judge-Rapporteur Baudenbacher's Report for the Hearing is 35 pages long, sober and detailed. It deserves reading as an example of how to record neutrally a variety of different opinions, some of them extravagant, respectfully but accurately.

In a short judgment, the Court disagreed with Norway. When the case arose, the government's policy on iron fortification was inconsistent, in that some 'fortified' products (cheese and whey, for example) were sold as a matter of government policy. Moreover, no comprehensive risk assessment had been conducted. The argument that if cornflakes could be 'fortified' other products could not be refused by the authorities as candidates for 'fortification' was rejected as 'flood-gates' fears. Most importantly, the judgment noted that the principal justification for the measures was a supposed lack of need in the Norwegian population, rather than danger to the public health.

The Judgment and the Report for the Hearing are admirably lucid, easy to follow, and concrete. The Court declined to accept the precautionary principle as a justification to use a hypothesis to ban something which is probably harmless but might not be. The ECJ went roughly the same way in a Danish case about ill-justified prohibitions on vitamin additives to cranberry juice.⁴² The difficult choices for a court confronted with a confident state scientist who says his country is correct, and a hugely eminent expert in the specific area of health who says the fears are absurdly exaggerated, are noted in a lengthy article in honour of David Edward on the topic of the precautionary principle and the risks of its regular invocation as an excuse to avoid political criticism.⁴³ I there regretted that the Court of First Instance was less confident in *Pfizer Animal Health v Council*⁴⁴ than was the EFTA Court in *ESA v Norway*.

VIII. TRADEMARKS AND REPACKAGING

As to trademark exhaustion, the EFTA Court had to consider whether grey imports into Norway of portable torches made in the United States could be blocked on trademark grounds in the *Maglite* case.⁴⁵ The dispute was classic: the

⁴¹ Case C-3/00 *EFTA Surveillance Authority v Kingdom of Norway* [2000–2001] EFTA Ct Rep 73.

⁴² Case C-192/01 *Commission v Kingdom of Denmark* [2003] ECR I-9693.

⁴³ I Forrester, 'The Dangers of Too Much Precaution', *A True European: Essays for Judge David Edward* (Oxford, Hart Publishing, 2003).

⁴⁴ Case T-13/99 *Pfizer Animal Health* [2002] ECR II-3305.

⁴⁵ Case E-2/97 *Mag Instrument Inc v California Trading Company Norway* [1997] EFTA Ct Rep 127.

local distributor argued that his effort had created demand and the parallel importer was an illegitimate free-rider who should not be allowed to use the brand name. The selling of trademarked products was a breach of the trademark rights of Maglite and its corporate family. Several EU governments agreed, invoking the risk that if international exhaustion existed, some EFTA countries would have parallel imports and others would not: free movement of goods would be compromised. The EFTA Court disagreed: since the EEA Agreement did not create a customs union but only a free trade area, with no common external trade policy, it was for the EFTA States to reach their own individual conclusions as to which trademark regime would apply.

Courts should be embarrassed about having to make U-turns, but not too embarrassed. The ECJ has corrected its route on a few occasions. Courts very properly are reluctant to change their mind, but very properly do so occasionally. In the words of Advocate General Lagrange in the famous *Da Costa*⁴⁶ case, one of the longest analyses in the Court's reports about the role of previous jurisprudence and the desirability of departing therefrom in appropriate circumstances:

In other words, the Court of Justice should, in this as in all other matters, remain free when giving its future judgments. However important the judgment which it is led to give on some point may be, whatever may be the abstract character which the interpretation of some provision of the Treaty may present—or appear to present—the golden rule of *res judicata* should be preserved: it is from the moral authority of its decisions, and not from the legal authority of *res judicata*, that a jurisdiction like ours should derive its force. Clearly no one will expect that, having given a leading judgment, such as the judgment in Case 26/62, the Court will depart from it in another action without strong reasons, but it should retain the legal right to do so. The rule that *res judicata* binds only the particular case is a wise rule; rather than enabling the court to shelter formally behind a previous judgment, as one shelters behind a law or regulation, it obliges it unceasingly to retain awareness of its responsibility, that is, to confront the realities of the situation with the legal rule in each action, which can lead it in appropriate cases to recognize its errors in the light of new facts, of new arguments or even of a spontaneous rethinking, or more frequently to alter its point of view subtly without changing it fundamentally, thus being party in the light of experience and the evolution of legal theories and economic, social or other phenomena, to what is called the evolution of case law.⁴⁷

Ten years later, the EFTA Court had to take account of the fact that the ECJ, in its *Silhouette*⁴⁸ and *Sebago*⁴⁹ judgments, had decided the trademark holders had the right to invoke before the EU Courts their rights to prevent the importation of non-spurious (genuine but unwelcome) merchandise from third countries into the EU. The EFTA Court adroitly noted that there were 'weighty arguments' in favour of both approaches, and concluded that 'the differences between the EEA

⁴⁶ Joined Cases 28, 29 and 30/62 *Da Costa v Nederlandse Belastingadministratie* [1963] ECR 31.

⁴⁷ *ibid*, pp 42–43.

⁴⁸ Case C-355/96 *Silhouette International Schmied v Hartlauer Handelsgesellschaft* [1998] ECR I-4799.

⁴⁹ Case C-173/98 *Sebago and Maison Dubois* [1999] ECR I-4103.

Agreement and the EC Treaty with regard to trade relations with third countries do not constitute compelling grounds for divergent interpretations of Article 7(1) of the Trade Mark Directive in EEA law and EC law.⁵⁰ As a result, grey imports of trademarked goods from third countries can be blocked consistently throughout the EEA. This was a good choice. I regret that the Court was less bold in another trademark case, *Paranova*.⁵¹

IX. PARANOVA: AN OPPORTUNITY FOR INDEPENDENT THOUGHT WASTED

The current state of EU trademark law as to pharmaceutical law is fuelling curious and quite artificial patterns of commerce which might trouble patients if they knew about them. Wholesalers of pharmaceutical drugs in Europe have achieved the right to buy and take delivery of large volumes of boxes of drugs from the patentee or its affiliates, unwrap and discard the original packaging of each bottle or blister, repackage the drug in a new packet bearing the trade dress of the wholesaler, and bearing the manufacturer's name and trademark, and resell such repackaged products in competition with the un-manipulated goods being resold in the manufacturer's trade dress. Such manipulations have been authorised by the European Court of Justice in a series of judgments for the policy goal of easing barriers to trade between Member States. Such lawful manipulations of trademarked products are unique in the world.⁵²

The pharmaceutical manufacturers made a number of predictable arguments about different sell-by dates, light-sensitive products, out-of-date products, opportunities for counterfeit medicines to enter the supply chain and so on, but these arguments were rejected. To take one case as an example, the ECJ said: 'It is not possible for each hypothetical risk of isolated error to suffice to confer on the trade mark owner the right to oppose any repackaging of pharmaceutical products in new external packaging.'⁵³ It is intriguing to observe that the ECJ was quite categorical in rejecting the complaints of manufacturers of highly dangerous products about possible confusions or errors in the dispensing of those products to the public. But those factors assume that there is no trademark consideration worth protecting, and that market integration of pharmaceuticals (uniquely) justifies permitting the repackaging of drugs in such a manner as to allow the repackager both to build his own reputation and affix the patentee's trademark. Paradoxically, one may assume that producers of less toxic consumer products such as tennis balls, razor blades or other trademarked items have today virtually

⁵⁰ Joined Cases E-9/07 and E 10/07 *L'Oréal Norge AS, L'Oréal SA v Per Aarskog AS, Nille AS, Smart Club AS* [2008] EFTA Ct Rep 259, para 37.

⁵¹ Case E-3/02 *Paranova AS v Merck & Co, Inc and Others* (2003).

⁵² I Forrester, 'The EFTA Court confronts re-labelling' (2003) 7–8 *European Law Reporter* 278.

⁵³ Joined Cases C-427-93, C-429/93 and C-436/93 *Bristol-Myers Squibb v Paranova* [1996] ECR I-3457, para 63.

no concern that a parallel trader would repackage or re-label their goods in order to facilitate resale in another Member State, because such an exercise would not be worth the money and would be a clear breach of trademark rights.

Good law drafted to remedy wrongs in one industry can be bad law when applied to another industry. Would one want to tolerate the re-labelling and repackaging of whisky, cola, film, sun-cream, golf balls and other products to assist traders who identify price discrepancies and hope to boost their own name by referring to the famous brand? Should it be permissible for Marks & Spencer to sell 'Marks & Spencer Coca Cola' in bottles designed to promote Marks & Spencer products? Or for Carrefour to sell 'Carrefour Uncle Ben's Rice'?

When judges endeavour to remedy a wrong and have to make new law, the outcome of well-intentioned judicial generosity can be hazardous. Whenever a judgment is written to give comfort to the morally superior party whose claim is weak in legal or technical terms, or in principle, there is a risk of broken crockery, broken because of the unforeseeable consequences (sometimes foretold but not believably foretold). To take again the example of football, the ECJ was so keen to help Mr Bosman, who had unquestionably been badly treated, that it rewrote Article 48.⁵⁴ Article 48 had hitherto been regarded as an obligation on Member States, so that it covered private action, not based on nationality, taken by an association governed by private law. The consequences have been bad for football and bad for most footballers, though excellent for the richest clubs and players.

One function of trademarks is to make money. Some are very valuable. Taking away from the pharmaceutical rightholder the sole right to affix his mark is a massive encroachment, a European first which does no particular good to European industry, consumers or health ministries, although it has helped parallel traders.

X. DELAY AND VOLUME OF CASE-LOAD

Courts are sometimes slow, but sometimes they try to speed up. The account of a case from the year 1310 states thus:

And after the inquest was sworn, they could not agree.

STANTON J. Good people, you cannot agree?

STANTON J., to John Allen [apparently the marshal]: Go and put them in a house until Monday, and let them not eat or drink.

On that commandment John put them in a house without [food or drink]. At length on the same day about vesper-time they agreed. And John went to Sir Hervey and told him that they agreed. Then STANTON J., gave them leave to eat.⁵⁵

Seven hundred years later, delay is still a judicial anxiety.

⁵⁴ *Bosman*, above n 28.

⁵⁵ *Walding v Fairfax* (1310) YB Mich 4 Edw II, 22 SS 188.

The EFTA Court has an enviable record of delivering judgment within reasonable periods of time. There are influencing factors: the Court's monolingual practice, its size, limited geographic reach and lesser workload compared to EU Courts. A closer look reveals that while these may all have an effect, recent figures indicate that, in relative terms, the EFTA Court has arguably more cases than the ECJ. For instance, there were 631 new cases for the ECJ in 2010, which represents 1.26 cases per million inhabitants.⁵⁶ For the same year, there were 18 new cases for the EFTA Court, which represents 3.6 cases per million inhabitants. Thus, the EFTA Court hears approximately three times as many cases as the ECJ per million inhabitants. There is no evidence to suggest that such a high yield has had any negative repercussions on the quality of the EFTA Court's judgments. To the contrary, their lightness of style is a merit, although it is also a natural consequence of small size and only one language.

XI. DUE PROCESS IN COMPETITION CASES

The emergence of European competition law as world leader in creativity and severity of financial penalty has rekindled an old debate about the procedures by which cases are decided by the European Commission and reviewed on appeal. Thus far, there have been very few judicial setbacks for the Commission's practices and its choices of level of fines. The advent of the direct applicability of the ECHR (at some date) and the arrival of the Charter of Fundamental Rights (now) have increased interest in the constitutional propriety of the EU's arrangements for detecting and condemning economic crimes. The ECtHR has recognised that the 'criminal charge' under Article 6 of the ECHR has expanded beyond the traditional categories of criminal law to potentially include competition law.⁵⁷ The ECtHR's judgment in *Menarini*⁵⁸ confirmed that a fine imposed by the Italian competition authority, because of its seriousness, amounted to a criminal sanction within the meaning of Article 6 ECHR.⁵⁹ However, the imposition of such a sanction by an agency could be lawful as long as the decision was subject to a full review by a court having 'full jurisdiction'.⁶⁰

Both the EU and EFTA administrative regimes opt for an administrative model with a strong authority to enforce competition law. There is an extensive body of literature on the topic of how the processes by which competition cases are decided by the European Commission match the requirements of the ECHR.⁶¹

⁵⁶ See Note by the EFTA Court on the Norwegian Official Reports NOU 2012:2 'Outside and Inside, Norway's Agreements with the European Union', 27 January 2012: http://www.eftacourt.int/fileadmin/user_upload/Files/News/2012/2012_A_Note.pdf.

⁵⁷ *Jussila v Finland*, ECtHR (Application No 73053/01), 23 November 2006, para 43.

⁵⁸ *A Menarini Diagnostics SRL v Italy*, ECtHR (Application No 43509/08), 27 September 2011.

⁵⁹ *ibid*, para 44.

⁶⁰ *ibid*, para 59.

⁶¹ See, among many, F Montag, 'The Case for a Radical Reform of the Infringement Procedure under Regulation 17' [1996] 8 ECLR 428, at 430; J Schwarze and R Bechtold, *Deficiencies in European*

I have argued that the current inquisitorial regime is inadequate in that the investigators are attributed decision-making and punishing functions, there is no hearing by a decision maker, and the decision on guilt or innocence of an economic crime is taken by a political body; and I have separately argued that deferential judicial review by the EU Courts has exacerbated the underlying problem. It is 30 years since the Commission lost an abuse of dominance case in Luxembourg.⁶²

It is my anecdotal impression that the ESA's competition enforcement uses a lighter touch, and is less prescriptive, than its EU counterpart. It follows from the nature of the EEA Agreement itself that both legal orders are broadly based on an administrative model under which the enforcing authority investigates, prosecutes, and decides in competition cases. The Commission and the ESA each have similar powers to sanction competition law infringements by fines and behavioural remedies. In addition, the basic competition provisions which both authorities enforce (ie Articles 101/102 TFEU, and 53/54 EEA Agreement) are broad in language, which makes them subject to evolution and changes in policy. The words of the two Treaties are substantially identical.⁶³

Fines imposed by the European Commission have reached heights which are by any standard astonishing. They are heavy (tens of millions of euros may be deemed low; hundreds of millions are deemed normal; over a billion is unusual), and may exceed any other financial penalty for any offence in any democracy in the world. The severity of its interlocutory penalties is also striking.⁶⁴ According to the ESA's own statistics, competition-related fines were approximately €30 million in 2012.⁶⁵ Commission statistics for that same year reveal that, for cartel cases alone, fines reached €1.87 billion.⁶⁶ While it is true that part of this may be attributed to the reduced geographic scope of the EFTA countries and the lower turnover of targeted companies, the difference is substantial.

Community Competition Law: Critical analysis of current practice and proposal for change (Gleiss Lutz, 2008); D Slater, S Thomas and D Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?', *Global Competition Law Centre Working Paper 04/08*; A Andreangeli et al, 'Enforcement by the Commission: The Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System' in Merola and Waelbroeck (eds), *Towards an optimal enforcement of competition rules in Europe* (Brussels, Bruylant, 2010); F Castillo de la Torre, 'Evidence, Proof and Judicial Review in Cartel Cases' (2009) *World Competition*, 32, 1; and CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford, Hart Publishing, 2010); WPJ Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2010) *World Competition: Law and Economics Review* 33, 1.

⁶² On this issue, see D Geradin and N Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment', Tilburg Law and Economics Center (TILEC), Discussion Paper No 2011-008 (October 2010).

⁶³ See, eg, the recent *Euribor/Libor* case, where fines imposed on banks amounted to €1.7 billion; the *TV and computer monitor tubes* case, where the fine totalled €1.47 billion; and finally the *Car glass cartel* case, where the Commission imposed a €1.35 billion fine on producers.

⁶⁴ Cases COMP/39388 and COMP/39389—*E.ON* (2008): huge fines for possibly disturbing a possibly out-of-date adhesive seal, which was neither photographed nor preserved *in situ*.

⁶⁵ EFTA Surveillance Authority, Annual Report 2012.

⁶⁶ See Cartel Statistics, DG COMP website.

On the specific issue of fines, the EU Courts have often done no more than verify whether these were consistent with the Commission's applicable Fining Guidelines. But that should be the beginning of the process of judicial review, not the end. Unlimited jurisdiction supposes consideration of whether the fine actually imposed is fair, proportionate and just. That the Commission has followed its own guidelines should not confer immunity from judicial scrutiny.

XII. A WELCOME DISSENT? THE PROBLEM OF LIGHT JUDICIAL REVIEW

It is difficult to avoid the conclusion that the judicial review of European Commission action, especially in competition cases, has been inconsistent. Sometimes the Court has gone deeply into the facts and has indeed substituted its own conclusions for those of the authority (see, for example, the early case of *Geitling*);⁶⁷ sometimes it has elected, after reflection, to agree with a conclusion reached by the Commission (*Remia/Nutricia*);⁶⁸ frequently it has endorsed light judicial review in the sense of deferring to the Commission's assessment of complex economic matters; in one case⁶⁹ it extended that deference to technical matters; and in several cases it endorsed fines on the same deferential basis, verifying if they were lawful, not whether they were just. In *Chalkor*,⁷⁰ the ECJ was asked to rule on the scope of the judicial review by the EU General Court on an appeal from a Commission decision imposing a fine. Faced with the language in the judgment under appeal of 'light judicial review', the ECJ ruled that the General Court could not refrain from reviewing the Commission's assessment of complex economic data. Not only should the evidence relied on be 'factually accurate, reliable and consistent', it should also support the Commission's assessment and the conclusions.⁷¹ The position has improved with *Chalkor*, but it remains the case that most practitioners regard judicial review in competition matters as unpredictable. The underlying decisions are hundreds of pages long, there may well be tens of thousands of pages in the administrative file, and the relevant standard is legality, not full merits review. So diligent judges must naturally find it difficult to be confident that the authority slipped into illegality.

On some occasions in competition matters, the EU Courts have expressed themselves admirably: 'the essential function of evidence ... is to establish convincingly the merits of a ... decision'.⁷² On other occasions, there has been

⁶⁷ Joined Cases 36, 37, 38 and 40/59 *Geitling RuhrkohlenVerkaufsgesellschaft mbH and others v High Authority* [1960] ECR 423. (The author is indebted to Michel Waelbroeck for drawing this case to his attention.)

⁶⁸ Case 42/84 *Remia BV v Commission* [1985] ECR 2545.

⁶⁹ Case T-201/04 *Microsoft Corp v Commission* [2007] ECR II-3601.

⁷⁰ Case C-389/10 P *KME v Commission* [2011] ECR I-0000, nyr; C-386/10 P *Chalkor v Commission* [2011] ECR I-000, nyr.

⁷¹ *KME*, above n 70, para 121.

⁷² Case C-12/03 P *Commission v Tetra Laval* [2005] ECR-I 987, para 41.

embarrassingly deferential approval. In *Wieland-Werke* the Court stated: ‘In areas such as determination of the amount of a fine imposed pursuant to Article 15(2) of Regulation No 17, where the Commission has a discretion, for example, as regards the amount of increase for the purposes of deterrence, review of the legality of those assessments is limited to determining the absence of manifest error of assessment.’⁷³ The Court here appears to start from a presumption that the Commission enjoys a ‘discretion’ with which the Court will be reluctant to interfere ‘in absence of manifest error of assessment’. The ECJ has regularly used language such as ‘The Court cannot substitute, on grounds of fairness, its assessment for that of the Court of First Instance’. Such abstention from the merits is not, I submit, constitutionally appropriate these days.

XIII. THE *POSTEN NORGE* CASE

Three cheers, therefore, for the EFTA Court’s rejection in *Posten Norge*⁷⁴ of the light judicial review weed which has crept into the EU garden: ‘The submission that the Court may intervene only if it considers a complex assessment to be manifestly wrong must be rejected.’⁷⁵

The EFTA Court mentioned in its judgment the ECtHR’s *Menarini* judgment (about full merits review being available on appeal) and its *Jussila* judgment (about stigma). It did not question the administrative enforcement model but instead focused on the scope of judicial review. It found that the fine imposed on *Posten Norge* was ‘substantial’ and the stigma attached to being condemned ‘not negligible’.⁷⁶ In the process, the EFTA Court disagreed that the review of complex economic assessments by the ESA would have to be based only on whether they were ‘manifestly wrong’ and went further than the ECJ in *KME* by not accepting that ESA was entitled to a substantial amount of discretion in complex economic assessments.⁷⁷ In its view, there was ‘no doubt’ *Posten Norge* had been abusive.⁷⁸

The *Post Danmark* Case in the EU Courts In *Post Danmark*,⁷⁹ a reference, the ECJ followed the EFTA Court’s lead in a case which also concerned an alleged abuse of dominance by a postal service. The problem and the facts were not dissimilar. More specifically, the incumbent postal service provider, Post Danmark, had a pricing system which made the life of competitors difficult. The ECJ chose

⁷³ Case T-116/04 *Wieland-Werke v Commission* [2009], ECR II-1087, paras 32–33. See also Case T-241/01 *Scandinavian Airlines System v Commission* [2005] ECR II-2917, para 79 cited in *Wieland-Werke* (‘It next has to be examined whether the Commission’s assessment of the seriousness of the infringements, having regard to the three factors of their nature, the extent of the geographic market concerned and their actual impact on the market, is vitiated by obvious error’).

⁷⁴ Case E-15/10, *Posten Norge v EFTA Surveillance Authority* (2012).

⁷⁵ *ibid*, para 102.

⁷⁶ *ibid*, para 90.

⁷⁷ *ibid*, para 102.

⁷⁸ *ibid*, para 180.

⁷⁹ Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-0000, nyr.

to assess this pricing system by adopting the ‘As-Efficient-Competitor’ test.⁸⁰ Thus it may be legal for a dominant player to charge prices which a competitor cannot match, provided that an equally efficient competitor could do so. It is probably fair to say that the ESA’s approach to discounts and rebates can be more comfortably reconciled with the Commission’s modern effect-based approach to exclusionary conduct under Article 102 TFEU⁸¹ than the actual practice of the Commission and the ECJ, since both of them are hampered by the court’s old case law which makes little commercial sense in today’s world.

XIV. RIGOUR TOWARDS THE PUBLIC AUTHORITY

My impression is that the ESA may have a harder job than the Commission in defending its cases in court. In *Norwegian Bankers’ Association v EFTA Surveillance Authority (Husbanken II)*, the ESA had found that a state guarantee for Husbanken (the Norwegian State Housing Bank) constituted state aid under Article 61(1) of the EEA Agreement, which was justified under Article 59(2) thereof on services of general economic interest grounds.⁸² On appeal, the EFTA Court essentially agreed with the above but annulled the ESA’s decision on the grounds that it had not considered ‘to the extent necessary’ several factors: the relevant market, whether there were alternative means less distortive of competition, a cost and benefits analysis of state aid, and the proportionality test.⁸³ The EFTA Court evidently did not give the ESA an easy ride.

Of course every case is different, and it is difficult to generalise; it is also true that Commission officials and lawyers as well as ESA lawyers feel frequently that the Court has been too intrusive. Judges in both the EU and EFTA Courts are probably equally guided by a sense of smell, a judicial instinct that something is not right.

XV. THE GOAL OF HOMOGENEITY BETWEEN THE TWO REGIMES

In the recent case of *Irish Bank Resolution Corp*, the EFTA Court attempted to push the boundaries of the duty of loyal cooperation under Article 3 EEA even further.⁸⁴ Article 34 of the EFTA Surveillance and Court Agreement (SCA) does not have a preliminary reference procedure and instead provides for an ‘advisory opinion’ procedure. The national courts of the EFTA States are neither obliged to

⁸⁰ *ibid*, para 38.

⁸¹ Guidance on the Commission’s enforcement priorities in applying Art 102 TFEU to abusive exclusionary conduct by dominant undertakings (2009).

⁸² Case E-4/97 *Norwegian Bankers’ Association v EFTA Surveillance Authority* [1999] EFTA Ct Rep 1, paras 9–10.

⁸³ *ibid*, paras 67–70.

⁸⁴ See Case E-18/11 *Irish Bank Resolution Corporation Ltd* [2012] EFTA Ct Rep p 592.

refer questions for interpretation of EEA law nor bound to follow the EFTA Court ruling. But that is not the end of the matter.

While the EFTA Court recognised that there were differences between Article 267 TFEU on the procedure for a preliminary reference and Article 34 SCA based on ‘less far-reaching’ depth of integration considerations, it also strongly hinted that the national courts of EFTA States were less free than they might have hoped to disregard their duty of loyalty under Article 3 EEA:

At the same time, courts against whose decisions there is no judicial remedy under national law will take due account of the fact that they are bound to fulfil their duty of loyalty under Article 3 EEA. The Court notes in this context that EFTA citizens and economic operators benefit from the obligation of courts of the EU Member States against whose decision there is no judicial remedy under national law to make a reference to the ECJ (see Case C-452/01 *Ospelt and Schlössle Weissenberg* [1993] ECR I-9743).⁸⁵

In other words, the national courts of the EFTA States may be bound by what we might call a strong moral duty to refer. Indeed, other observers have been quick to compare this development to a small step towards a preliminary reference procedure for EEA EFTA countries.⁸⁶ This assessment is further supported by the findings in *Jonsson*, where it was held that if the legal situation lacks clarity, then a reference is appropriate since by that means ‘unnecessary mistakes in the interpretation and application of EEA law are avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU are ensured’.⁸⁷

In a recent interpretation order, the EFTA Court speaks of ‘the different legal situation concerning courts against whose decisions there is no remedy under national law’.⁸⁸

XVI. CONCLUSION

Lord Justice Megarry said that ‘One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process’.⁸⁹ By that standard, the EFTA Court does rather well. The processes it uses convey a readiness to listen, to engage in public, and to be independent.

No one reading the exchanges between Judge Baudenbacher and Norwegian critics⁹⁰ could doubt that the Court is independent. Equally, the tone of the

⁸⁵ *ibid*, para 58.

⁸⁶ See ‘Case E-18/11: Small steps towards a preliminary reference procedure for the EEA EFTA countries?’, *European Law Blog*, 16 January 2013.

⁸⁷ Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Jonsson* [2013] EFTA Ct Rep 136, para 60.

⁸⁸ Case E-2/12 *HOB-vin ehf and The State Alcohol and Tobacco Company of Iceland (ÁTVR)* [2013] EFTA Ct Rep 1092, para 11.

⁸⁹ RE Megarry, ‘Temptations of the Bench’ (1978) 12 *Univ Brit Colum L Rev* 145 at 151, 152.

⁹⁰ See Baudenbacher, above n 32, as well as the perceptive comments of H Haukeland Fredriksen in ‘The two EEA Courts—a Norwegian perspective’ in EFTA Court (ed), *Judicial Protection in the European Economic Area* (Stuttgart, German Law Publishers, 2012) 187–210.

Court's pronouncements on whether the ESA has done its job appear neither sceptical nor deferential. Those are all merits.

Its judgments are easy to read, and not too long. They seem to be little burdened by the repetition of familiar mantras taken from previous judgments. They have conclusions which are rather clear. The layout is largely familiar to those who are accustomed to the judgments of the three EU Courts.

It is astonishing that, despite the antipathy of a number of legal and political figures to such creativity, the EFTA Court has been able to endow the EFTA regime with constitutional judicial principles matching those of the EU. Homogeneity lives.

Lord Denning, an icon of judicial robustness combined with the common touch, spent much of his career in the Court of Appeal, below the House of Lords. He noted wryly that the House of Lords had the position of being the examiner of the Court of Appeal and that his court had no choice but to accept that when the House of Lords took a different view:

We did our best, but recently our papers were marked by the House of Lords ...⁹¹ They only gave us about 50 per cent. The House of Lords are fortunate in that there is no one to examine them or mark their papers. If there were, I do not suppose they would get any higher marks than we.⁹²

Lord Denning perhaps underestimated the European Court of Justice, which certainly today is a powerful source of authority to which even the House of Lords must defer; and teachers of law as well as writers of articles have no inhibitions about offering alternative views about any judgment, even from a supreme court. But in any event, it is a rare honour for a practitioner to be asked to mark the exam paper of a court. I would award the birthday court an honourable pass.

⁹¹ Citing *Bremer Handelsgesellschaft mbH v Vanden (Avenue-)Izegem PVBA* [1978] 2 Lloyd's Rep 109.

⁹² *Bremer Handelsgesellschaft mbH v C Mackprang Jr* [1979] 1 Lloyd's Rep 221 at 222.

