Carl Baudenbacher
Judge of the EFTA Court 6/9/1995 to 9/4/2018
President 2003 to 2017

Farewell speech on the occasion of my stepping down from the bench

Mr. President, ladies and gentlemen,

The EFTA Court had a difficult birth and a troubled youth. At the outset, the drafters of the EEA Agreement planned to establish a combined EEA Court which would have comprised both ECJ and EFTA judges. This arrangement did not receive the ECJ's blessing.

Thus the EFTA Court was designed as a structurally independent tribunal for seven judges from Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. It took up its functions on 1 January 1994 with five judges from Austria, Finland, Iceland, Norway and Sweden. In the summer of 1995, the judges from Austria, Finland and Sweden had to leave since their countries had joined the European Union on 1 January 1995. The EFTA Court was downsized to three judges from Iceland, Liechtenstein and Norway. My home country Switzerland was, and remains today, a more or less innocent bystander.

On 1 September 1996, the EFTA Court's seat was moved to Luxembourg. It was a decisive step, because it brought us close to our big sister Court, the ECJ. The formal and informal contacts with colleagues and friends from the other side of the Avenue Kennedy have proven over the years to be invaluable.

I.

The move to Luxembourg strengthened a process which had already been initiated and which has been referred to as a "unique judicial dialogue" by former ECJ Advocate General Verica Trstenjak. Of course, the EFTA Court has from the very beginning based itself on the relevant case law of the ECJ. The magical concept in such a dialogue is homogeneity.

But homogeneity is not a one-way street. To date the EFTA Court has rendered some 200 judgments in contested cases which have

led to 238 references by the ECJ, its Advocates General and the EU General Court in 151 cases. The EFTA Court is thus the only court of general jurisdiction that is regularly cited by the Union judiciary when interpreting EU law.

I should now like to quote Vassilios Skouris who, as President of the ECJ at that time, wrote in the festschrift marking the EFTA Court's 20th anniversary in 2014:

> "The long lasting dialogue between the EFTA Court and the CJEU has allowed the flow of information in both directions [….]. The symbiotic nature of the relationship has contributed to the successful development of the EEA Single Market. Both courts stand as examples for each other thus depicting mutual respect, strengthening the rules of homogeneity and representing a high level of appreciation. Cooperation between the two was built on strong foundations which have stood the test of time."

All the presidents I have worked with, Gil Carlos Rodríguez Iglesias, Vassilios Skouris and Koen Lenaerts from the ECJ, Bo Vesterdorf from the Court of First Instance and Marc Jaeger from the General Court as well as Paul Mahoney from the Civil Service Tribunal, have supported us. I thank them for their generosity and their friendship.

To (informally) work with the judges and Advocates General from the EU courts has been one of the most rewarding experiences of the past 22 years. I want to express my special gratitude to the Advocates General of the ECJ whose opinions have from the start been a gateway between our case law and EU case law. In 2001, the EFTA Court decided to reference the opinions of Advocates General and it has done so ever since.

II.

As the EFTA Court held in its landmark *Sveinbjörnsdóttir* judgment (E-9/97), the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own. In the same case, the EFTA Court recognised State liability as a principle of EEA law.

Sui generis entities are generally hybrids. According to the Cambridge dictionary, a hybrid is a mixture of two very different things, a plant or animal that has been produced from two different types of plant or animal, usually to obtain better characteristics. Whether the EEA Agreement has developed better characteristics from its original raw materials – the supranational EU treaties on the one hand and classical public international law on the other – remains an open issue tonight. However, it must be admitted that the EEA Agreement has functioned well for almost a quarter of a century.

I should also mention that as of 1998, the EFTA Court has recognised, in a series of judgments, the existence of EEA fundamental rights.

A well-known Oslo attorney once said that it was easier for the EFTA Court to be recognised by the EU, its institutions and Member States than by certain EFTA capitals. He may have had a point. Nevertheless, as I leave the bench, I am proud to say that my Court has over the years established an excellent relationship with the courts of last resort of its three Member States.

This is remarkable since the legal framework of the preliminary ruling procedure in the EFTA pillar differs from the one in the EU pillar. There is no written obligation on courts of last resort to refer unclear questions to the EFTA Court and our rulings are, strictly speaking, advisory. At the same time, the principles of homogeneity, reciprocity and loyalty as well as the concept of a fair trial must be taken into account. All in all, our system is generally pretty flexible.

III.

The EEA Agreement is a trade agreement. Its objective is to integrate the EFTA States that are party to it in the single market. But it doesn't aim to create an "ever closer union".

When the Court took up its functions in 1994, EFTA had existed for over 30 years. It was based on certain values such as free trade orientation, belief in open markets and efficiency. I think that the EFTA Court has been successful in upholding these values without giving up the EEA's overarching goal of homogeneity.

Claus-Dieter Ehlermann, the former Chairman of the World Trade Organization's Appellate Body and former Director-General for Competition in the European Commission, has spoken of a certain systemic competition which benefits both EEA Courts.

The late former Luxembourgish ECJ Judge Pierre Pescatore, another international trade law specialist, has made similar remarks. In order to avoid any misunderstanding, I should emphasise that an open market orientation does not mean that the Court is antisocial. It rather means that it is anti-protectionist.

IV.

1.

It is clear that a trade court cannot fulfil its task without taking economics into account. This is not limited to competition and State aid law. It applies to all single market law. Nevertheless, such an approach doesn't necessarily imply that a sophisticated benefit-cost analysis must be carried out. However, the question inevitably rises whether the proposed solution to a case is efficient. In other words, whether it makes people use scarce resources in an economical way.

At the same time, considerations of justice and equity remain relevant. I would like to remind you that the man who is considered the father of classical free market economics, Adam Smith, has written two seminal books. Before he published "An Inquiry into the Nature and Causes of the Wealth of Nations," he brought out a volume entitled "The Theory of Moral Sentiments."

Let me give you three examples of the EFTA Court's approach to economics:

(1) In the first *Icesave* case (E-16/11), the EFTA Court was faced with the question of whether it should hold that under the Deposit Guarantee Directive Iceland was liable for the inability of the Icelandic Deposit Guarantee Fund to compensate depositors in the UK and the Netherlands. We relied, inter alia, on the need to avoid moral hazard. In a market economy the rule must be that economic operators are liable for their debts. The neo-mercantilist idea that

certain banks are too big to fail is dangerous. It is probably no coincidence, therefore, that Iceland recovered much faster from the 2008 financial crisis than Ireland.

(2) In *Vienna Life* and *Swiss Life* (E-15/15 and 16/15), when the EFTA Court had to decide whether the consumer protection rules of the Life Assurance Directive should apply to the purchase of second-hand life assurance policies, it basically said no. This kind of business is motivated by tax considerations and buyers speculate on the lives of people whose drinking and smoking habits they are not aware of. In such a situation, the classical liberal contractual model must apply. From an economic perspective, contracts concluded between equal partners are a tool for the optimal allocation of resources.

(3) In *Fosen-Linjen* (E-16/16), a public authority had awarded a public contract to the wrong bidder. The EFTA Court had to answer the question of whether a simple breach of public procurement law was sufficient to trigger liability or whether a qualified breach was required. The question posed was: Should the State be privileged when taking part in the market economy as a commercial operator just because it is the State? We said no. This corresponds to the teachings of liberal economics; I may mention, for example, the father of ordoliberalism, Walter Eucken. Our judgment was a vote against opaque mercantilism and moral hazard. I am curious to see how the ECJ whose case law on this point has not been very clear (compare C-413/09 *Strabag* and C-568/08 *Combinatie Spijkers*) will decide such matters in the future.

2.

In order to be convincing, answers to legal problems should be reasonable, appropriate and pragmatic. I tend to subscribe to what Richard Posner said when he resigned from the United States Court of Appeals for the Seventh Circuit in September 2017; namely that from a "pragmatic" perspective, a judge often simply has to adopt a common-sense solution.

> "[T]o be pragmatic just means to focus on consequences. What are the likely consequences of each of say two alternative rulings that are within the judge's authority to make? [….] [H]aving found the pragmatic result, the judge asks whether

it's blocked by some authoritative ruling, principle, rule - whatever."

If this pragmatism is underpinned by economic considerations, it is all the better.

V.

At the end of my time on the bench, I want to thank my wife, Doris Baudenbacher-Tandler. Without her relentless support, it wouldn't have been possible to successfully position the EFTA Court not just in Luxembourg but also further afield. Doris' social competence is unparalleled and her activities prove that achieving homogeneity also requires soft skills.

I want to include in my thanks our daughter Laura Melusine who has become a true European here in Luxembourg and is practicing antitrust law with a major American firm in Brussels.

I am indebted to my colleagues for the trust they have placed in me over so many years. Let me *pars pro toto* mention my successor as President Páll Hreinsson and his collaborators, judge Per Christiansen and his team, and former judges Thorgeir Örlygsson, now the President of the Supreme Court of Iceland, and Henrik Bull, now a Justice on the Supreme Court of Norway. I also gratefully remember my late predecessor as President, Thór Vilhjálmsson.

I thank the Court's registrars, in particular Skúli Magnússon and Gunnar Selvik, for their excellent work and their loyalty both to the Court and to me personally. The staff of the registry has always distinguished itself through reliable work

A European judge cannot function without the support of his cabinet. I was privileged to always work with promising young guns from many EU Member States such as my heads of cabinet Michael-James Clifton, Dr Philipp Speitler, Moritz am Ende, Dr Dirk Buschle, and my legal secretaries Theresa Haas, Dr Luísa Lourenço, Marie Cournot, Dr Magnus Schmauch and Dr Meinhard Novak. They provided important input to the case law from various perspectives and their language skills were invaluable.

My personal assistant Kerstin Schwiesow has not only been the heart and soul of the cabinet. She has over the years become an institution in her own right, and her reputation has spread way beyond the EFTA Court.

I thank the EFTA Surveillance Authority and its pleaders, the EFTA Secretariat, the pleaders of the European Commission, but also the agents from our three Member States and from the many EU Member States who have appeared before the EFTA Court.

Last but not least, I wish my successor Bernd Hammermann well. As a former member of the EFTA Surveillance Authority College, he knows the power structure of the EFTA pillar.

VI.

Ladies and gentlemen, I have said that economics is important for the work of a European trade court. According to a Roman proverb the judge doesn't count, *iudex non calculat*. Today, this is often translated as meaning the judge has no clue about maths. However, as I mentioned, an economic approach to the law does not necessarily presuppose that a judge is good at maths. Be that as it may, let me conclude with an old Arabic story, which shows that judges aren't such ignoramuses when it comes to maths.

A wealthy man died and left three sons. His estate consisted of 17 camels. In his will he had decreed that the oldest should get half of the camels, the second-born a third and the youngest a ninth. As I said, there were 17 camels. The three boys were unable to find a solution and went to see the local judge. The judge thought for a moment and said:

> "That's a tricky one, but I happen to have one camel I don't need right now."

With this, 18 camels were available.

Then, the judge calculated:

18 divided by 2 equals 9, so he gave the oldest son 9 camels.

18 divided by 3 makes 6, so the second born was handed 6 camels.

And finally 18 divided by 9 results in 2 camels, which the youngest son received.

The judge calculated again: 9 plus 6 is 15 plus 2 is 17 and added:

“Now I can take my camel back.”

Thank you for your kind attention.