Carl Baudenbacher
President

Oral Statement at the EFTA Ministerial Meeting on 26 June 2017 in Longyearbyen, Svalbard, Norway

I refer to my comprehensive written statement. Today I want to make the following remarks:

1.

The Court has rendered judgments of pan-European and even global significance in cases E-29/15 *Sorpa*, E-3/16 *Ski Taxi* and E-5/16 *Vigeland*. In *Sorpa*, it held that a publicly owned waste management must be considered an undertaking EEA when it does not act in the exercise of official authority but engages in an economic activity, which consists in offering goods or services on a market. The Stockholms Tingsrätt/Patent- och marknadsdomstolen relied on this finding in case DOM 2016-12-21, Meddelad I Stockholm, Mål nr PMT 17299-14. In *Ski Taxi*, we held that only conduct whose harmful nature is easily identifiable, in the light of experience and economics, should be regarded as a restriction of competition by object. On this point, we did not follow the ECJ's judgment in *Cartes Bancaires*, but the Opinion of AG Nils Wahl. It appears that the development of the case law in the European Union is in a state of flux. This case shows once more that EEA homogeneity cannot be understood as a snapshot in time. It is a process oriented concept. *Vigeland* is, together with the U.S. Supreme Court's ruling in *Eldred v. Ashcroft* (537 U.S. 186), one of the few judgments of highest courts dealing with the issue of prolongation of a copyright term and re-monopolisation of intellectual property which, as a matter of principle, would fall into the public domain.

Another particularly important case is E-14/15 *Holship*. On 16 December 2016, the plenum of the Supreme Court of Norway rendered its landmark judgment in this matter. With 10 votes against 7, the Supreme Court followed our judgment of 19 April 2016 and held, that a collective

agreement which provided organised dockers a priority right to load and unload ships in Norwegian ports, was contrary to the EEA Agreement. In June 2017, the unions announced that they will challenge the Supreme Court's judgment before the European Court of Human Rights.

2.

The Court has noted with interest that in its written statement for this meeting the EFTA Surveillance Authority points to the fact that there is "a real opportunity of giving an 'EFTA flavour' to the development of EEA law by providing the EFTA Court with opportunities of taking the lead in deciding issues of EEA law."

3.

Advocates General have proposed to the ECJ to follow the Court's case law in a number of cases. The one-sided written homogeneity rules have in practice largely been replaced by a system of judicial dialogue. In the landmark case C-375/15 *BAWAG*, the ECJ, following Advocate General Michal Bobek, has adopted the Court's approach in E-4/09 *Inconsult* that certain ("sophisticated") websites constitute durable mediums within the meaning of the directive on payments services in the internal market.

4.

The Court's Spring Conference of 16 June 2017 was attended by more than 170 people, among them many Judges from our Supreme Courts and from the EU judiciary, Ambassadors from EFTA and EU countries as well as from non-European countries, high civil servants, leading academics, business leaders, labour unionists and legal practitioners. The keynote speech with the title "The Future of Europe - A View from the North" was delivered by the 5th President of Iceland Ólafur Ragnar Grímsson.

5.

2017 is the year of judicial summits. From 2 to 4 May, the Supreme Courts of Norway and Iceland *in corpore* and Judges from the three Liechtenstein Supreme Courts - State Court, Supreme Court and Administrative Court - met with the Court in Luxembourg. The distinguished guests attended oral hearings, and participated in

roundtables and a seminar on Brexit. In the course of the summit, they were joined by the Judges from our three Member States at the European Court of Human Rights.

From 5 to 7 July 2017, a delegation of the Swiss Federal Supreme Court led by President Ulrich Meyer and Vice-President Martha Niquille will pay an official visit to the Court. The distingui0shed guests will attend an oral hearing and several roundtables. Both Presidents will explain the tasks and procedures of their courts.

6.

The Court had occasion to deal with its own integrity and with the independence of its Judges in a Decision and in an Order of the President in E-21/16 *Nobile*, a case referred from the Princely Court of Appeal in Vaduz. It was held that Article 30 SCA precluded the Governments of the EEA/EFTA from abridging the term of office of a Judge to three years. The six-year term is mandatory and constitutes a minimum protection of judicial independence, an essential part of the judicial constitution of the EFTA pillar. Without an independent court, the purpose of the Agreement would be rendered nugatory and the EFTA States would fail to safeguard the protection of the rights of individuals and economic operators. To maintain the independence of the judiciary is not a privilege for judges, but a guarantee for the respect of these rights and a bulwark of the democratic order.

In 2011, the Court proposed to the Governments of the EEA/EFTA States to establish a panel with the task of scrutinizing the candidates for judgeship made by the Governments and to make a non-binding assessment. The Governments did not react. The Court recalls the panel set up in the EU under Article 255 TFEU and renews this invitation. There is no any valid reason why the establishment of such a panel - probably in an improved form - should be refused. A panel would contribute to securing the full independence of the Judges. This is not only required in the interest of our own citizens and business operators, but also of their counterparts in the EU pillar of the EEA. It is in other words also a matter of homogeneity and reciprocity.

The proposition in question enjoys the support of, *inter alia*, the Supreme Court of Iceland, the Supreme Court of Liechtenstein and of important Norwegian academics.