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Some Remarks on the EFTA Court

50 years EFTA / 15 years EEA, statement made at the Geneva seminar of 10 December 2009

Chairman Walch,

Thank you for giving me the opportunity to make a few remarks on 15 years of EEA from the perspective of the Court.

Minister Frick, Ladies and Gentlemen,

on behalf of the Court I thank the Secretary General for having set up this conference on the occasion of the 50th anniversary of the EFTA Convention and the 15th anniversary of the EEA Agreement.

Introduction

The morning of today's event was dedicated to the history of EFTA and in the afternoon, some focus was on the present and on the future of the EEA Agreement. Not much has been said about the Court. Yet, as the first President of the EFTA Surveillance Authority, *Knut Almestad*, stated almost 16 years ago, at the ceremony which marked the beginning of the Court's activities, the mechanism of surveillance and judicial control constitutes "the quintessence of the EEA Agreement"¹. The Court's task is, in particular, to guarantee that the rights of the players of the EC/EEA single market are duly protected: manufacturers, workers, consumers, distributors and investors. In international legal theory it is widely agreed that the establishment of the EFTA Court has been an important example of *judicialisation* of international law. Conventional diplomacy was to a large extent replaced by adjudication as a dispute resolution mechanism. The EEA Agreement is the only association agreement ever concluded by the European Union which allows the

¹ [1994-1995] EFTA Court Report, 177.

associated States to have their own court. It is no exaggeration to state that without the Court the EEA Agreement would simply not function. Hence, at this juncture, I believe that the EFTA Court and its role in the evolution of the EEA merits a mention.

My remarks will be **legal remarks** although I do not ignore that an international court such as the EFTA Court is working in a political environment. But first of all, let me pay my respects to the many fathers and mothers of the EEA Agreement who are present in this room, including the Swiss negotiators whose contributions were important, some say, even legendary. These negotiators who, according to many managed to 'square the circle', deserve credit for the success the EEA has proven to be. But once the EEA Agreement came into force on 1 January 1994, other players took over the responsibility, one of them being the EFTA Court.

I would like to briefly address four **issues**: (1) the role of the Court with relation to the protection of individuals and economic operators; (2) the Court's influence on the case law of the Community courts; (3) the question of political considerations serving as a basis for EFTA Court decisions, and (4) the role assigned to the Court under a recent international agreement, the so-called *Icesave* case.

1. Protection of individuals and economic operators

The protagonists of the EEA are not only the governments, but also individuals and economic operators. In fact, it could be argued that the private operators are the main protagonists, since the agreement is about the establishment of a single market. However, important questions concerning the scope of individual rights and of their enforcement were left open by the drafters of the Agreement. These 'hot potatoes' were handed to the Court. Thus, in its very first case, *Restamark*, the Court held that quasi-direct effect, i.e. the capacity of EEA rules that had been implemented into the national legal orders of the EFTA States of being **invoked in national courts**, followed from EEA law². In *Einarsson*, the Court applied the approach used in *Restamark* to the issue of primacy³. Most importantly, in its 1998 landmark judgment in *Sveinbjörnsdóttir*, the Court found (against the advice of the Governments of Iceland, Norway and Sweden as well as, a bit

² E-1/94 [1994-1995] EFTA Court Report, 15.

³ E-1/01 [2002] EFTA Court Report, 1.

surprisingly, of the European Commission) **State liability** to be part of EEA law⁴. One of the decisive factors, which led the Court to rendering these judgments, was the goal of the EEA Agreement of protecting individuals and economic operators. This aim also became manifest in the recognition of **fundamental rights** in cases *TV 1000*, *Bellona* and *Ásgeirsson*⁵ and of other general principles of EEA law, such as non-discrimination, proportionality, good administration, legal certainty and the protection of legitimate expectations⁶.

2. The Court's influence on the case law of the Community courts

After 15 years we can hardly say that the Court has been overloaded, but unlike some other international courts it had a relatively **steady influx of cases**. We have a very close and friendly relationship with our colleagues from the Community courts. Some of them occasionally tease us by asking the question: How many cases do you have? My answer is: more cases than the International Tribunal for the Law of the Sea! In fact, we had to decide **difficult cases** and, most importantly, we had to do so quite frequently without there being relevant case law of our sister court, the Court of Justice of the European Communities. In other words we had to **go first**. The homogeneity rules laid down in the EEA Agreement and in the Surveillance and Court Agreement do not address this constellation. They only state that the Court should follow the relevant case law of the ECJ rendered prior to the date of signature of the EEA Agreement (2 May 1992) and to take into account the case law rendered after that date. In light of the homogeneity goal underlying the EEA Agreement, the EFTA Court has basically qualified this politically important distinction and has thereby developed a principle of interpretation which is best described as dynamic homogeneity.

The Court has broken new ground in approximately **70 cases**, in particular concerning the four fundamental freedoms, State monopolies in the fields of alcohol, tobacco and gambling, EEA State liability, competition and State aid law, labour law, trademark law, insurance law, food law and social security law. This has prompted at least the **same**

⁴ E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Court Report, 95.

⁵ E-8/97 *TV 1000* [1998] EFTA Court Report, 68; E-2/02 *Bellona* [2003] EFTA Court Report, 52; and E-2/03 *Ásgeirsson* [2003] EFTA Court Report, 185.

⁶ See Carl Baudenbacher, *EFTA Court – Legal framework and case law*, 3rd ed., Luxembourg 2008.

number of reactions by the Court of Justice of the European Communities, its Advocates General, the Court of First Instance of the European Communities and high courts in countries such as Germany, the UK, Austria, Sweden, and the Netherlands, in one case also by the Zurich Commercial Court⁷. To name one specific example: When the Supreme Court of Germany did away with the famous **real seat theory** in international company law vis-à-vis the EEA/EFTA countries in a case involving a Liechtenstein corporation, it made reference to the case law of the EFTA Court⁸.

This development started early on, when the Community courts realised that the EFTA Court was serious not only about securing homogeneity, but **dynamic homogeneity**. I want to mention, in particular, the *Restamark* case, where the Court found the **Finnish State alcohol import monopoly** to be incompatible with the EEA rules on free movement of goods⁹, and joined cases *Mattel/Lego* which deal with the question of whether Norway could exercise control over TV ads broadcasted from the UK under the Television Directive¹⁰. I am particularly happy that Former Judge Dr. *Sven Norberg*, who acted as a Judge Rapporteur in those cases, is with us today. Sven Norberg is also one of the founding fathers of the EEA.

From the perspective of our dialogue with the EC judiciary, the most important ruling was the one rendered in *Kellogg's* in 2001¹¹, where we recognized the **precautionary principle** in food law and the preconditions for and limits of its application. This decision has influenced the ECJ's and the CFI's case law on the fortification of food with vitamins and minerals, the fortification of animal feedingstuff with antibiotics, the release of GMO's, and the fight against mad cow's disease¹². Some think that, indirectly, *Kellogg's* may also

⁷ See Carl Baudenbacher, The EFTA Court, the ECJ, and the latter's Advocates General – a Tale of Judicial Dialogue, in: Continuity and Change in EU law. Essays in Honour of Sir Francis Jacobs, ed. by Anthony Arnulf, Piet Eckhout and Takis Tridimas, Oxford 2008, 90 et seq.

⁸ Bundesgerichtshof, Judgment of 19 September 2005, Case II ZR 372/03.

⁹ E-1/94 [1994-1995] EFTA Court Report, 15.

¹⁰ E-8/94 and E/9/94 [1994-1995] EFTA Court Report, 113.

¹¹ E-3/00 *Kellogg's*, [2000-2001] EFTA Court Report, 73.

¹² See Carl Baudenbacher (fn. 7).

have had an impact on the case law of the WTO Appellate Body¹³. You have seen that former Judge *Per Tresselt* is among us today who participated in this seminal judgment.

I know that some politicians complain about the fact that the EEA/EFTA States' influence on new EC law and thereby on new EEA law is limited to the decision shaping phase, whereas they are excluded from the actual decision making. As far as the development of judge-made law in the EEA as a whole is concerned, this is clearly not the case.

3. EFTA Court and ECJ going different ways

As I have touched upon, the EFTA Court has decided questions of EEA law as the first court in the EEA in a number of cases. In pragmatic terms, it can be argued that a small court which is bound by homogeneity rules cannot but stick to the law and to legal arguments in the strict sense. In this regard, it is interesting to see that in three major cases, the ECJ has not followed the Court's approach when it had to address parallel problems under EC law.

In the first of these cases, *Tore Wilhelmsen AS v Oslo kommune*,¹⁴ the Court had to rule on whether **Norwegian legislation**, according to which the **retail sale** of beer containing more than 4.75 percent alcohol by volume is reserved to the **state alcohol trading monopoly** *Vinmonopolet*, was compatible with Articles 11 and 16 EEA. These provisions correspond to Articles 34 and 37 TFEU. The Court found that certain aspects of the Norwegian system, including the 4.75 percent demarcation, give rise to discrimination between foreign and local beer brands. As far as a possible applicability of an exemption under Article 13 EEA was concerned, the Court acknowledged combating alcohol abuse to constitute a public health concern. Article 13 EEA would only cease to be applicable if the national court were to find that the measures in question were aimed at protecting domestic production as compared to foreign production or at restricting trade between the Member States in a disguised way. With respect to Article 16 EEA, the Court held that provisions granting an exclusive right for retail sale of beer containing more than 4.75 percent alcohol by volume to *Vinmonopolet* form an inherent part of the regulations designing the system. The Court therefore assessed these provisions in light

¹³ See Alberto Alemanno, Trade in Food – Regulatory and Judicial Approaches in the EC and the WTO, Cameron May 2007, 120 et seq.

¹⁴ E-6/96 *Wilhelmsen*, 1997 EFTA Court Report, 53.

of Article 16 EEA, but found that – since they were, as such, justified under Article 13 EEA –, it was not necessary to examine them further. In view of the fact that *Vinmonopolet's* selection of strong beers consisted of ten domestic and seven foreign brands, the Court added that a state retail monopoly retaining an exclusive right to sell products was in practice in a position to discriminate against goods from other countries. It was for the national court to assess whether the selection of products was based only on factors such as higher transport costs for foreign beer and local taste, or whether it was a result of a discriminatory application of the retail monopoly. In this context, the EFTA Court held that the national court had to take into account whether the method of selection was able to replace the market mechanism **to the fullest possible extent**. In other words, we based ourselves on a concept of “as if” competition.¹⁵

Six months later, the ECJ used a different kind of reasoning in its judgment in *Criminal proceedings against Harry Franzén*, which concerned the **Swedish State monopoly, Systembolaget**, on the **retail of alcoholic beverages**¹⁶. The ECJ held that the existence and operation of the monopoly was to be considered solely under what is now Article 37 TFEU (ex Article 31 EC). Restrictions on trade, which are inherent in the existence of a monopoly, had to be accepted. This included the limitation of the number of points of sale. The ECJ found, in particular, the criteria and methods of selection used by *Systembolaget* to be non-discriminatory, since the monopoly followed a purchase plan which was based on foreseeable changes in consumer demand, the calls for offers were made irrespective of the origin of traders and types of beverage and the offers were selected on purely commercial or qualitative criteria. The ECJ pointed to the fact that **blind tasting** was used as a selection mechanism and that **consumer panels** were formed. The fact that the system was able to handicap small producers was accepted. Based on these arguments, the ECJ declared the retail monopoly compatible with what is now Article 37 TFEU.

The second example is *Fokus Bank ASA*¹⁷, where the Court rejected the argument put forward by the Norwegian government that a restriction of the right to free movement of capital under Article 40 EEA, consisting in disadvantageous treatment of non-resident

¹⁵ Loc. cit., at paragraph 107.

¹⁶ C-189/95 *Franzén* [1997] ECR I-5909.

¹⁷ E-1/04 *Fokus Bank*, [2004] EFTA Court Report 11.

taxpayers with respect to the granting of an imputation tax credit, could be offset by advantages which shareholders may obtain in their countries of residence by way of invoking provisions of bilateral **double taxation agreements**. The principle of **legal certainty** would require that the granting of an imputation tax credit to a non-resident shareholder may not depend on whether a tax credit is granted in his or her state of residence in respect of dividend payments. In contrast, in *Test Claimants in Class IV*, the ECJ's Grand Chamber acknowledged, in principle, that the effects of double taxation agreements could be taken into account. In *Denkavit*, the ECJ's First Chamber followed that line of argument¹⁸.

In the third example, *Gaming Machines*¹⁹, **Norway** had given the State-owned company *Norsk Tipping* the **exclusive right to operate gaming machines**. Private operators, which so far had been able to operate gaming machines on behalf of charitable organisations, were thereby excluded from the market. In accordance with the ECJ's relevant case law, the Court held that, although the Contracting Parties are free to set the objectives of their policy on gaming and to define the level of protection sought, the restrictive measures they impose must nevertheless serve legitimate aims and satisfy the conditions of proportionality. The Court continued by stating that a limitation in the authorisation of gaming is acceptable only if it reflects a concern to bring about a genuine diminution in gambling opportunities, and if the financing of social activities constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. With regard to consistency, the Court held that, where an EEA State has chosen to fight gambling addiction through the reduction of gambling opportunities by subjecting the operation of gaming machines to a State-owned monopoly, it may not at the same time endorse or tolerate measures, such as **extensive marketing**, which could lead to an increase of gambling opportunities. A consistent and systematic approach to fighting gambling addiction must also encompass an effective control of the exclusive right holder's activities once the contested legislation has entered into force. With regard to the aim to prevent gambling related crime, such as money-laundering and embezzlement, the Court held that Norway had failed to demonstrate that less far-reaching measures will not be equally effective. As regards the aim of fighting gambling addiction, however, the Court found it reasonable to assume

¹⁸ C-374/04 *Test Claimants in Class IV* [2006] ECR I-11673; C-170/05 *Denkavit* [2006] ECR I-11949.

¹⁹ E-1/06, *EFTA Surveillance Authority v The Kingdom of Norway*, 2007 EFTA Court Report, 8.

that a monopoly operator in the field of gaming machines subject to effective control by the competent public authorities will tend to accommodate that concern better than commercial operators. The effectiveness of **public control and enforcement** of a genuinely restrictive approach to machine gaming was considered the focal point. As the reform of the gaming machine regulation in Norway had not yet taken effect, the Court would not base itself on the general assumption that public control and policy enforcement would not satisfy these requirements. Based on these considerations, the Court dismissed ESA's application for a declaration that Norway had violated the EEA rules on freedom of establishment and on freedom to provide services²⁰.

In *Ladbrokes*²¹, the world's largest bookmaker and gaming company, had been denied the permission to operate and provide different **gaming and betting services in Norway** and to market these games. The Court accepted the aims of fighting gambling addiction and crime and malpractice as being legitimate aims. In order to be lawfully based on the aim of fighting gambling addiction, legislation must, however, reflect a concern to bring about a genuine diminution in gambling opportunities. The aim of preventing gambling from being a source of private profit can serve as justification only if the legislation reflects a moral concern; if a state-owned monopoly is allowed to offer a range of gambling opportunities, the legislation at issue cannot be said to genuinely pursue this aim. To the extent it would find Norwegian legislation to pursue legitimate aims, the **national court** was told to consider whether that legislation was consistent. The **marketing activities** and the development of new games by Norsk Tipping are of particular relevance when assessing consistency. The national court was also instructed to examine whether the legislation at issue goes beyond what is necessary to meet the aims pursued. Again, the level of protection chosen by the Norwegian authorities is decisive. Where other, less restrictive measures would have the effect of fully achieving the objectives at the level of protection chosen, an exclusive rights system could not be considered necessary simply because it might offer an even higher level of protection.

²⁰ See *Eleanor Cashin Ritaine/Eva Lein*, La notion de proportionnalité appliquée au droit des jeux de hasard - Les cas Placanica et Autorité de surveillance de l'AELE/Royaume de Norvège, *Schweizerisches Jahrbuch für Europarecht = Annuaire suisse de droit européen* 2006/2007 2007 355.

²¹ E-3/06 *Ladbrokes Ltd. V The Government of Norway, Ministry of Culture and Church Affairs; The Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Court Report, 86.

In its judgment of 8 September 2009 in *Liga Portuguesa*, a case involving a restriction of the freedom to provide services in the form of offering internet betting on football games, the ECJ confirmed its well-established jurisprudence, according to which, in the absence of Community harmonization, Member States are free to set the objectives of their gaming policy and to define in detail the level of protection sought. Certain overriding reasons in the public interest were recognised, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order. With regard to the suitability of the restrictive measure, the **ECJ itself** accepted the argument of the State monopoly, Santa Casa, and of the Portuguese Government, that the main objective pursued by the national legislation was the fight against crime, more specifically the protection of consumers of games of chance against fraud on the part of operators. The ECJ was convinced that the Portuguese system functions in a secure and controlled way because **Santa Casa's long existence**, spanning more than five centuries, was evidence of that body's reliability and the fact that Santa Casa operates under the strict control of the Portuguese government. With regard to the specific facts of the case, the ECJ added that, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games²².

I will not comment in any detail on the ECJ's approach in the cases mentioned above, but only note that the monopolies in question were not only about enforcing certain public policy goals, but also about securing **important sources of revenue** for the Member States concerned. In any case, there cannot be any doubt that certain EC Member States wish to maintain those sources of revenue²³.

²² C-42/07, nyr. See *Simon Planzer, Liga Portuguesa – the ECJ and its Mysterious Ways of Reasoning*, [2009] European Law Reporter, 368 et seq.

²³ Concerning the Swedish State retail alcohol monopoly see the Opinion of Advocate General *Elmer* in C-189/95 *Franzén* [1997] ECR I-5909, at paragraph 108.

4. The Icesave Agreement

Let me then say a word on the EFTA Court's potential role as envisaged by the so-called **Icesave Agreements**, concluded between the Government of Iceland on the one hand and the Governments of the UK and The Netherlands on the other. The Government of Iceland guaranteed payment of almost 4 Billion Euros to these two countries as a compensation for the losses occurred by the depositors of *Landsbanki Ísland* after the banks insolvency. In the original Icesave Agreements of June 2009, the Icelandic Government accepted a provision by which the UK, the Netherlands and Iceland (on behalf of these states' depositors' guarantee funds) were considered to have an equal position (and to be paid *pro rata*) with regard to any payments coming from the Landsbanki liquidations to their subrogated claims resulting from the lost deposits. However, on behalf of the Icelandic State, the argument had been raised that the claim of the Icelandic guarantee fund should take precedence vis-à-vis the other funds, the reason being that the Icelandic fund had paid the depositors the guarantee according to Directive 94/19/EC, which constituted, so to speak, the first 20.887 EUR of the depositor's claim.²⁴ In the supplementary Icesave Agreements signed in October 2009, the Icelandic negotiators succeeded in convincing the two EC governments to agree to have this modus of the division of subrogated claims tested before an Icelandic court. This reservation was, however, conditional upon the Icelandic court making a reference to the EFTA Court and that the EFTA Court's ruling would be followed by the Icelandic Court.

In other words, the governments of the UK and of The Netherlands agreed to accept the ruling of the EFTA Court, no matter whether it would be favourable to them or not²⁵. It is quite clear, and it has actually been confirmed by Icelandic negotiators, that this door was only open because of the **credibility** and the **independence** of the EFTA Court. I will

²⁴ Hence, in the case of 20% of subrogated claims stemming from deposits being paid, the Agreement stated that the all parties should be paid 20% without discrimination. The Icelandic view, which did not succeed, was that, to the point this payment would suffice to cover the guarantee according to Directive 94/19/EC, the Icelandic fund should have all its claims covered.

²⁵ www.icenews.is/index.php/2009/10/18/icesave-negotiations-concluded-outcome-presented/, last visited 20 December 2009.

not try to shed light on the financial interest at stake here for Iceland, but I believe this issue was of considerable concern.

Thus, the Icesave Agreements in concrete terms shows how the EFTA States may gain from an independent and credible EFTA Court. This example could also be a reminder to these States not to be tempted to undermine the standing of the Court, even though the Court's decisions may, from time to time, not be to the respective governments' expectations²⁶. In this context, I am obliged to note that it is much more difficult to preserve the independence of a **three members** international court from its own Member States than that of a big court such as the ECJ with 27 judges. I may also mention the specific structure of the EFTA pillar in this context, a structure which resembles a pond with one big fish and two small fishes.

Government officials have sometimes complained about the Court being activist, even 'stealing' Member States' sovereignty. We have seen Member States' agents telling national courts that they should not refer politically sensitive cases to the EFTA Court. And occasionally there have even been announcements that, if we would not decide in favour of certain governments, this would have a chilling effect on the feelings toward the EEA Agreement in the country concerned or that our judgment would not be complied with²⁷. The Court has not given in to such pressure. And, as I believe the Icesave case demonstrates, this has proven to be the right thing to do. I can also add that the **Council of the European Communities** has found laudable words on the functioning of the EEA judicial mechanism in its paper on the relations with the EFTA States issued in December 2008²⁸.

As far as the future of EFTA and of the EEA is concerned, allow me a final remark: There is a huge interest in EFTA and in the EEA in **Japan**. For the last three years I have participated in workshops in Tokyo and in Kyoto, where the possibility of establishing a

²⁶ Halvard Haukeland Fredriksen, Watching the Rendezvous from the Sidelines – Norway, the EEA Agreement and the EFTA Court, Jørn Øyrehagen Sunde/Knut Einar Skodin (eds.), Rendezvous of European Legal Cultures, Bergen 2010.

²⁷ See Bergen's Tidende of 2 February 2007.

²⁸ Council conclusions on EU relations with EFTA countries of 8 December 2008 (only the draft document is available on <http://register.consilium.europa.eu>, 16651/1/08 REV 1 of 5 December 2008).

free trade area comprising, in particular, China, Korea and Japan were discussed. Most of the Japanese university professors of international law and of European law are involved in this and the government has decided to sponsor a five year project.