

## After Brexit: Is the EEA an option for the United Kingdom?

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**Professor Dr Dr Carl Baudenbacher, President of the EFTA Court, University of St. Gallen**

**Chair: Professor Sir Francis Jacobs KCMG, QC**

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Thank you very much, Sir Francis, for your kind words of introduction. Dear Francis, as an Advocate General of the Court of Justice of the European Union you took a keen interest in the EFTA Court from the beginning. As early as 1996 you opened what would become a very fruitful dialogue with us, and we quote you until today also in cases in which the ECJ has not followed you, but you have convinced us.

Ladies and gentlemen, I would like to thank the organisers, and in particular Professor Andrea Biondi, for the kind invitation to speak here tonight. I thank King's College London for hosting this event, and I may start by saying that the UK has been quite a frequent participant in proceedings before my court. I may just mention that Eleanor Sharpston has appeared as a lawyer for the UK Government and that Christopher Vajda has pleaded before us. Yesterday, another representative of Her Majesty's Government, Nick Saunders, appeared before the Court. Tim Ward has been the Lead Counsel of the Icelandic Government in the first *Icesave* case (E-16/11), so there may be some truth to the saying:

“Once EFTA, always EFTA.”

### **A. Introduction**

After the events of the last two weeks it looks as if Britain is heading for what has been called hard Brexit, but there is also the hope that British industry will keep access to the single market. My subject tonight is, “After Brexit: Is the EEA an option for the United Kingdom?”

Let me start by showing you this poster from the campaign where the gentleman who is now the Foreign Secretary said:

“We should get out of the empire of EU lawmaking and what we should have instead is access to the single market.”

I will not comment on this but I have another statement that he made recently:

“Our policy is having our cake and eating it. We are pro-secco but by no means anti-pasto.”

I am not anti-pasto either, but I prefer champagne over prosecco.

As indicated, there are two forms of Brexit which are being discussed, no matter whether this is official language or not: soft Brexit on the one hand, which means with access to the single market. This could be the EEA or EEA plus, or the Swiss model, but there are in fact two Swiss models; one proposed by the European Union and one proposed by the Swiss Government. Then there is the Continental Partnership Agreement, which has been proposed by Bruegel, a think tank in Brussels. If soft Brexit is not possible there will be hard Brexit, and this will be without access to the single market and there we have, for instance, WTO. Then there is Canzuk, followed by what has been called ‘new NAFTA.’

A proponent of soft Brexit is the former Icelandic President, Ólafur Ragnar Grimsson, who dreams of a new super triangle in the North Atlantic reaching from Greenland, then to the United Kingdom and up to Norway. He has forgotten Liechtenstein and he has also failed to remember Switzerland.

As far as hard Brexit is concerned, Canzuk would be a global confederation comprising Canada, Australia, New Zealand and the United Kingdom. Those who dream of Canzuk say these are all States with low unemployment, whereas in France, in Italy and in Spain, you have high unemployment and in addition to that these are the countries in which 18 of the world’s top universities are located.

Finally, new NAFTA has been mentioned whereby Britain would trade with the USA, Canada and Mexico under a free trade agreement.

Being a guest here, I will refrain from commenting on these models. I rather want to come to the issue of access to the Single Market after Brexit.

## **B. Access to the Single Market after Brexit**

### **I. Status quo**

Britain as an EU Member State is currently part of the EU Single Market and the following rules apply:

- The fundamental freedoms, including the free movement of persons,
- Competition and State aid law,
- The vast area of harmonised economic law,
- The common policies, with the exception of the currency policy.

Then there are the competencies of the Commission, of the EU agencies, of the European Court of Justice and of the General Court.

But Britain is, right now, also a Contracting Party to the EEA Agreement on the EU side, as are all the EU Member States.

### **II. Access for Non-EU-States only with a surveillance and court mechanism**

Now, few people are aware of the following, but the Swiss do know it, and also the Swiss Ambassador, who is sitting here in the first row, knows this very well. Access for Non-EU States to the Single Market is only possible if they accept a non-national surveillance and court mechanism. That follows from conclusions the EU Council has presented every other year in December - 2008, 2010, 2012, 2014 - regarding the EFTA States, Iceland, Liechtenstein, Norway and Switzerland. But since Liechtenstein, Norway and Iceland do have a non-national surveillance and court mechanism - the EFTA Surveillance Authority and the EFTA Court - the claim was directed against Switzerland. Switzerland is the only Non-EEA/EFTA country in Europe and they were told that they would not get new market access agreements if they would not accept surveillance and court control.

Switzerland is linked to the European Union by a network of bilateral sectoral agreements, but since the Union has imposed this new condition, no new market access agreement has been concluded. It is hard to imagine that this will not apply to the United Kingdom.

### III. Conceivable models

#### 1. EEA membership or improved EEA membership on the EFTA side

The EEA is an extension of the EU Single Market to the EFTA States, Iceland, Liechtenstein and Norway. It comprises the famous passporting rights for financial operators, something which is of interest for the City of London. Let me mention a recent case of my court, the *Swiss Life* case (E-16/15). Operating from Switzerland, Swiss Life does not have passporting rights, but in this case they operated from their subsidiary in Liechtenstein, and since Liechtenstein is an EEA country on the EFTA side, they enjoyed these rights. The law in the European Economic Area is largely identical in substance to the law in the European Union, but there is no “ever closer Union” goal, the EEA is only an economic association.

Neither are there common policies in the fields of foreign trade, of agriculture, of fisheries, of taxation. The EEA is not a customs union and, importantly, the three EFTA States have their own common EFTA institutions. Surveillance is done by the EFTA Surveillance Authority (ESA) and judicial control by the EFTA Court. At present, there are 28 Commissioners in the EU pillar and three ESA College Members in the EFTA pillar, 28 Judges and 11 Advocates General on the ECJ, three Judges, but no Advocate General on the EFTA Court. This two pillar system is the backbone of the EEA Agreement.

The EEA was originally planned for seven EFTA States, at the time Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. The Swiss pulled out after a negative referendum. The Swiss Government had also launched an application to join the European Union, the voters mixed this up, and the opponents said, in reality, this is not a referendum about the EEA. This is a vote about EU membership, and they prevailed.

It is important to note - Mr. Ambassador, I say this quite openly here - that the line of the Swiss Government has for a long time been pro EU membership. That means their ultimate goal is to join the European Union, even if this cannot be spelled out openly right now.

On 2<sup>nd</sup> May 1992, the EEA Agreement was signed and on 1<sup>st</sup> January 1994 it entered into force. The EFTA pillar lost Austria, Finland and Sweden after only one year and ever since the EFTA pillar has been slim, consisting of Iceland, Liechtenstein and Norway, Norway being the Super Power.

## 2. Docking to the EEA/EFTA institutions

This is what the European Union proposed to the Swiss Government in 2013. Under the existing sectoral bilateral agreements, dispute resolution is in the hands of joint committees; that means in the hands of diplomatic bodies. There is no common surveillance and no common court. The EU, as I have said, deems this to be no longer sufficient. They are asking for a surveillance and court mechanism and they said to the Swiss, “Why don’t you make a second attempt to join the EEA on the EFTA side? Or dock yourselves to the institutions in the EFTA pillar; ESA and the EFTA Court.”

In both cases the idea was that Switzerland would negotiate the right to nominate a member of the ESA College and a judge of the EFTA Court, and these people would sit in cases concerning the sectoral agreements between Switzerland and the European Union together with the College Members and the Judges from the EEA/EFTA countries.

In case of docking, ESA and the EFTA Court would apply two sets of treaties, the EEA Agreement on the one hand and the sectoral agreements Switzerland - EU on the other.

The docking model would require the consent of Iceland, Liechtenstein and Norway and of the European Union and possibly its Member States. I heard today from British Parliamentarians that this docking model is, to some extent, being discussed in your country.

The docking solution has never really been worked out, because the Swiss Federal Council said no after a few months. So what I am stating here is to a large extent guesswork. What I can say is that a few high Swiss diplomats paid a visit to the EFTA Court during those years and we discussed that with them. It would all be up for negotiation.

## 3. The Swiss Government’s proposal

However, this is not what the Government in Berne wanted. The EEA and the docking solution were rejected, and in May 2013 the Swiss Government came up with a proposal, which had never crossed a human being's mind before. It was allegedly figured out late at night with the help of some French diplomats and laid out on a beer coaster. The model is supposed to work as follows:

The Joint Committee shall keep the competence to decide on conflicts between Switzerland and the European Union. If the parties cannot agree, each side, the Swiss and the European Union, shall have the right to bring the matter unilaterally before the ECJ. The ECJ will not rule in infringement

proceedings but in dispute settlement proceedings, which means that the ECJ “cannot sentence Switzerland”. The ECJ will, in other words, not decide the conflict. It will only give an “authoritative interpretation” of the relevant law, and after this the Joint Committee will decide the conflict.

Now comes the high point. If the ECJ finds in favour of Switzerland, the European Union will feel bound because they cannot disregard their own court's ruling. If the ECJ finds against Switzerland, this will not be the end, because the Swiss Government may then still refuse to comply with the judgment. If it does, the European Union may impose sanctions, and how far these sanctions should go is controversial. Also - and this resembles supernatural hocus-pocus - Switzerland will be left without surveillance under this model.

In light of mounting criticism, including from my humble self, the Swiss Government promised to the people that it would retain the freedom to say “No,” at reasonable conditions; that has been called a “red line.” If this promise is not kept then Parliament, and eventually the people, will say, “No.” On the other hand, if it is not guaranteed that the ECJ’s judgment is binding and implemented, the ECJ will say “No.” This follows from the Opinion 1/91, the first EEA Opinion, and the Commission as the EU’s negotiator knows this very well and is acting accordingly.

In fact, a negative judgment by the ECJ would indeed amount to sentencing, regardless of the sophistry which has been used by the Swiss civil servants that this would not mean condemning, but only giving an “authoritative interpretation”. And in reality the Commission, the surveillance organ of the other party, would be the watchdog for Switzerland because it could, at any time, bring the matter unilaterally before its own court, from Switzerland’s perspective the court of the other party.

That any judgment by the ECJ would be absolutely binding, irrespective of the type of procedure, has been confirmed by the then ECJ President, Vassilios Skouris, in a newspaper interview in 2013, and by the current ECJ President, Koen Lenaerts, in a TV interview in 2015. That the ECJ, which considers itself a counterpart of the United States Supreme Court, would act as a deputy sheriff with a water pistol in essentially political proceedings is, in my view, unthinkable. So we have in fact an impossible situation here and I ask myself why these negotiations haven’t been terminated.

But even if Switzerland were to retain the freedom to say no, the fact would remain that the ECJ is the court of the other party which by definition lacks impartiality.

## C. How to obtain EEA membership?

### I. Accession to the EEA on the EFTA side

Article 128(1) EEA states:

“Any European State becoming a member of the Community shall, and the Swiss Confederation or any European State becoming a member of EFTA may, apply to become a party to this Agreement. It shall address its application to the EEA Council.”

That means membership in EFTA would be a precondition for EEA membership. The question could then be asked, “Would that be BRENTRANCE or BREENTRANCE in view of the fact that the UK was a founding EFTA State in 1960?”

### II. Will the UK lose EEA membership if it leaves the EU?

A second topic, which has been discussed in your country, is whether the UK will lose EEA membership the day it leaves the European Union. I think yes. A State can only be an EEA Contracting Party either *qua* EU membership or *qua* EFTA membership. That follows from the two pillar structure of the EEA Agreement. You are either in the EU pillar or in the EFTA pillar, but you cannot be floating around freely. To those who think that the UK would retain EEA membership when it leaves the EU, I raise the question on which court would the British judge sit?

### III. Pre-condition for EEA membership is EFTA membership

If the UK wanted to join EFTA the consent of Switzerland, Iceland, Liechtenstein and Norway would be required. First positions were taken at the EFTA Ministerial Meeting on the 27<sup>th</sup> June 2016 in Bern, where the Icelanders said, “We should invite the UK to join EFTA.” Switzerland stated, “We are basically positive but we shouldn’t be too outspoken here, in order not to anger the European Union.” The Liechtensteiners were also cautious but a bit more positive. The Norwegians had reservations and the Norwegian politicians openly said they may lose the number one position in the EFTA pillar in case of British EEA membership, “and this is not in our interest”. In view of the historic ties between Norway and the UK, I cannot imagine that this will be the last word. In fact, the Norwegian Government has softened its stand in the summer of 2016. For EEA membership of the EFTA side the consent of Iceland, Liechtenstein and Norway and of the European Union would be needed.

#### IV. What does EFTA offer?

Now, what would EFTA membership without EEA membership offer? The UK could profit from the global EFTA free trade agreement network. EFTA has, for example, concluded FTA's with Canada, Mexico, the Andean States, South Africa, and Saudi Arabia. The approach used in EFTA in that regard is very flexible. If a country wants to conclude an FTA with a non-EEA country and the other EFTA countries do not follow then it can conclude the FTA on its own. I mention three examples: the Japan/Switzerland Economic Partnership Agreement, the China/Iceland Free Trade Agreement and the China/Switzerland Free Trade Agreement. But I repeat that EFTA membership alone does not provide access to the Single Market.

#### **D. Major challenges**

20 years after its signature the EEA Agreement was assessed in the EEA/EFTA States as well as in the EU, and the result was always that the Agreement has worked extremely well, even better than imagined, but that there are some shortcomings, some room for improvement. Certain of these features have, at the time, prompted the Swiss to refrain from joining the EEA.

##### I. Legislation

When the EEA process started, Jacques Delors, who was the President of the Commission at the time, said on 17<sup>th</sup> January 1989, in a speech before the European Parliament:

“We offer the EFTA States a more structured partnership with common decision-making and administrative institutions.”

This was music to the ears of the EFTA folks. In particular the Swiss said, “this is what we have been dreaming of for a long time, that we do not join the EU but still have a co-decision right”. But since EFTA was not unanimous in the time that followed and some EFTA States said, “We want to join the Union anyway, the EEA is only an intermediary step for us”, Delors took his pledge back one year later, without further ado. And at the end of the day the EFTA States obtained a co-determination right in the preparation of new EU legislation, which is then transposed into EEA law, but no co-decision right.

So the question is whether the UK would be able to negotiate some sort of a co-decision right? This obviously would also be in the interest of the current EEA/EFTA States and would probably also be noted in Switzerland.

I have the feeling that the lack of a co-decision right has partly been overstated by politicians of the current EEA/EFTA States. They cannot participate in the European Summits. They cannot play with the big boys and, in particular, one must note that they have not made sufficient use of the co-determination right. In addition to that, it is obvious that a lot of EU legislation is based on global regulation, I may just mention here the Basel Accords, or the WTO, or the United Nations. But the fact that Delors at the time made this promise shows that it would not be unthinkable to have such a model.

The Brussels based think tank Bruegel made an interesting proposal on 1<sup>st</sup> September 2016. They wrote:

“The EU States and the Non-EU States could enter into a Continental Partnership Agreement, CPA. The discussion of single market legislation in a new CP Council, which would consist of EU institutions and Non-EU CP States, would take place and the CP States would have a right to propose amendments.”

The EU would, in the end, be enacting its law in its normal legislative procedure, but there would be a political commitment by the EU States to take into account the points made in the CP Council. The name “Continental Partnership Agreement” is probably now not such a good idea because the UK, Norway, and Iceland, would be part of this, and they are not Continental countries.

## II. Free movement of persons

In EEA law there is almost, albeit not entire, free movement of persons, but the UK no longer wants to accept this. The Bruegel paper has breached a taboo in that regard. It discusses whether the EU should make a concession to the UK on this point and the authors wrote:

“Unlike the freedoms of goods, services and capital, the free movement of persons is in the view of the authors not economically but politically determined.”

It is to be noted that one of the five authors is the former German Federal Minister, and now Chairman of the Bundestag Committee on Foreign Affairs, Norbert Röttgen.

Free movement of persons has caused difficulties in Switzerland. And critics say that whether the EU can go on with free movement of persons including a right of residence and Union citizenship is questionable. It is questionable whether people are a production factor like any other.

Statements such as “Full-fledged free movement of persons is part of our DNA” put dogma before discussion.

Critics point to the fact that the Euro has deprived weaker Member States of the last mechanisms they had after the abolition of customs duties and trade barriers, namely of the possibility to devalue their currency. The consequences are, as we know, enduring unemployment, in particular among young people, and forced austerity measures. The wealthy Member States, in particular the Germans, consider the necessity of austerity as being without alternative, and they show their wealth and take the high moral road. There are enormous inequalities which lead to migration, to brain drain. Capable citizens: professionals, doctors, dentists, engineers and so on, from weaker Member States move to the wealthier EU States and this brain drain further weakens these EU States. At the same time the citizens of the stronger EU States feel threatened by this.

I also note that in the American Presidential campaign immigration has become a big issue. In previous campaigns it was abortion, for instance, or family values and the like. This development is all the more remarkable because the US is a country of immigrants. In Switzerland with its direct democracy, the first referendum concerning immigration was held as early as 1970.

But the leaders of the remaining EU States seem to be determined not to give in. I note two recent statements in that respect by the German Chancellor Angela Merkel, and by French President François Hollande. However, the German Vice Chancellor, Sigmar Gabriel, said last week:

“The red line on free movement must be enforced, but it should not preclude a healthy deal with Britain.”

He continued:

“We must try to formulate offers in a way so that the Britons remain close to us, also to have the chance that they return some day.”

### III. Financial contributions for the benefit of the EU

The Bruegel paper says that if Britain wants to remain in the Single Market, it would have to make payments into the EU budget. I think it is reasonable that a Non-EU State which participates in the Single Market pays, indeed Switzerland also contributes. The EEA/EFTA States pay, but not into the EU budget, and that is actually the point. They have their own organisation and they have their own projects, and the amount of money would amount to roughly 50% of the current payments in the case of Britain.

I finally want to mention the so-called Norway grants. The Norway grants are payments made by the Norwegian Government without an obligation under EEA law. This was decided in early 2000s when a Lutheran priest was Prime Minister of Norway and felt that, as good Christians, they should give some of their oil and gas money away to others, less fortunate, in the European Union. I think they just obtained some improvements in the field of trade in fish as a quid pro quo.

#### IV. Common surveillance and common court

Why should Britain accept ESA and the EFTA Court if it dislikes the Commission and the ECJ? There are homogeneity rules in EEA law which say that the EFTA Court shall follow or take into account ECJ case law in order to guarantee a level playing field for the operators.

The Bruegel paper states in that respect: “Whether such a mechanism would be sufficiently strong in the case of the Continental Partnership with a major country, as the UK, is for political and legal debate.” Now, if you have a look at the sources, they base themselves on an outdated Wikipedia article on the EFTA Court and a newsletter from a law firm on that point.

In my experience, own institutions are an advantage, and Britain, like Norway, Iceland and Liechtenstein, would always have an own actor, due to the size of the EFTA institutions.

From the British perspective the following may be interesting: the judicial constitution of the EFTA pillar is less onerous than that of the EU pillar. It leaves the EFTA States and their courts more sovereignty.

- There is no direct effect and no primacy in EEA law. These effects take only place after implementation of a legal act into the domestic legal order.
- There are no penalty payments in case of non-compliance with an infringement judgment of the EFTA Court.
- There is no written obligation from courts of last resort to make a reference and the preliminary rulings of the EFTA Court are not formally binding. I do not say that the Supreme Courts in the EFTA States are free to refer and free to follow or not. They are still bound by the duty of loyalty and the principle of reciprocity. But these are obligations that are difficult to enforce so, on balance, the EFTA States and their courts enjoy more flexibility.

- In a recent judgment the EFTA Court has, for the first time, said that despite the homogeneity rules we are an independent court of law.

(1) In most cases the EFTA Court has to go first. That means we decide on legal questions, which have not been decided by our counterparts in the European Union. My court has decided some 250 cases all together and this has led to more than 150 references by the ECJ, the Advocate General, the General Court, to EFTA Court case law.

Mr. Skouris wrote two years ago in the festschrift marking the EFTA Court's 20<sup>th</sup> anniversary:

“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.”

(2) If there is ECJ case law, the fact remains that judging is not an exact science, that the EFTA Court is not a court of lower instance, that homogeneity is not a snapshot in time but a procedural concept, and that a mature court has more self-confidence than Sir Francis will remember from his days in Luxembourg. Certainly, in matters of procedural homogeneity we are less bound. In any event, we may rely on a notion which has been created by the former Dutch ECJ Judge, Christian Timmermans, who spoke of the possibility of having creative homogeneity. Obviously this is a fine line, but it is an interesting concept.

I spoke last week at the twentieth anniversary of the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, and I found out that there is a parallel in the relationship between ITLOS and the International Court of Justice (ICJ) and the relationship between us and the ECJ. ITLOS also has a bigger sister.

(3) Now, let me point to some cases in which you can see that, in spite of the homogeneity rules, the EFTA Court has been able to develop its own profile.

We have gone a different way from the ECJ with regard to the scope of judicial review in State aid and competition law cases. We said in *Posten Norge* (E-15/10) that a full review on the merits of the decisions of ESA must be carried out. The ECJ still leaves the Commission a margin, in particular, when it comes to the assessment of complex economic questions and the like.

We said in the first *DB Schenker* case (E-14/11) that when it comes to granting public access to documents in the possession of ESA, the concept of the private Attorney General must be borne in mind. A private plaintiff in a follow-on a damages claim after a cartel has been discovered, or the abuse of a dominant position has been established, is acting as such as a private Attorney General.

In *LO* (E-8/00) and in *Holship* (E-14/15), which were about the relationship between collective bargaining on the one hand and competition law and freedom of establishment on the other, we pointed to the negative freedom of association - that means no closed shop - and in both cases we were looking for allies. In *LO* our ally was Sir Francis. We based ourselves on his conclusions in *Albany* (C-67/96), although the ECJ had not followed him. In the *Holship* case we referenced the *Sørensen and Rasmussen* judgment of the European Court of Human Rights (Case nos 52562/99 and 52620/99).

In *Abelia* (E-8/13) the EFTA Court held that an in-house counsel cannot generally be denied the right of audience. It must be assessed on a case by case basis whether an in-house counsel is independent or not. That means we did not buy any presumption or fiction to that effect.

Finally, in the first *Icesave* case (E-16/11) which was about the liability of banks we said that moral hazard must be avoided, and we made reference to the American Nobel Laureate for Economics Joseph Stiglitz on that. I may add two remarks here: Bengt Holmström, who received the Nobel Prize for Economics this year, has also dealt with the concept of moral hazard. But most judges, at least on the continent, do not even know what moral hazard is. Now, I had an advantage here because my wife Doris, who is sitting here in the first row, has dealt with moral hazard in her Ph.D thesis.

An important difference between the ECJ and the EFTA Court concerns the image of man, and here I would like to mention the case of *Inconsult* (E-4/09) on the one hand, and the ECJ's case *Content Services* (C-49/11) on the other. The question in *Inconsult* was whether an insurance company can tell the insured person: "We do not give you a hard copy of the contract any more. You have a section on our website where your contract is located and then you can do what you wish. You may leave it there, or may can print it out, or you may download it for your own purposes." We implied that in the Internet age consumers can be expected to download or print out the document from the website of a financial services provider. If it is secured that this website cannot be unilaterally changed and if it is guaranteed that the contract will remain there even after its expiry. Shortly afterwards, the ECJ held in *Content Services* (C-49/11) that the consumer

cannot even be expected to make a mouse click. That is based on a different image of man.

In *Matja Kumba* (E-05/15) we gave a rather flexible interpretation of the Working Time Directive.

In the *Olsen* cases (E-3/13 and E-20/13) the EFTA Court pointed to the importance of tax competition and found that abuse of rights in EEA law must be assessed in the light of the objective circumstances and that this included some sort of a rule of reason.

In *Sorpa* (E-29/15) the Court held that municipal bodies are capable of abuse of dominance.

#### (4) The EFTA Court's social model

We do not have the French tradition in our court. We give a lot of weight to economics. We go, if possible, for a fact based approach and we are critical towards presumptions and fictions. We give comprehensive, but succinct reasons. This thinking would become even more relevant in the case of British membership. That is quite clear.

So let me say a word on the role of the common law. In view of a possible British EEA membership I point to the legal origins or legal DNA theory, which I think was developed in the United States. It says that institutions depend on political factors, in particular the dominant believes in France on the one hand and in England on the other on the roles of the King/Queen/Government, the Parliament, the judiciary and individuals in society. I may quote Professor Paul G. Mahoney from the University of Virginia, who wrote:

“English common law developed as it did because landed aristocrats and merchants wanted a system of law that would provide strong protection for property and contract rights, and limit the Crown's ability to interfere in markets. French civil law, by contrast, developed as it did because the revolutionary generation, and Napoleon after it, wished to disable judges from thwarting government economic policies.

Thus, quite apart from the substance of legal rules, there is a sharp difference between the ideologies underlying common and civil law, with the latter notably more comfortable with a centralised and activist government.”

Efficient financial markets seem to arise and flourish better under common law than under civil law, and I personally think that the idea that somebody else can just take over the City of London is a bit naïve.

Massimiliano Vatiro, an Italian economist teaching at the Università della Svizzera Italiana, has discovered that there seems to be a correlation between a flexible labour market, diffuse ownership in corporations and radical innovation, as opposed to incremental innovation. This correlation has been found in the United States, in the United Kingdom and in Switzerland. I remind you of Joseph Schumpeter who said that “Radical innovations create major disruptive changes and incremental innovations continuously advance the process of change.”

Now if we look at the EFTA pillar from the perspective of this legal origins theory, Norway and Iceland are, like the UK, located in the North Atlantic and have strong historic ties. The former Icelandic President was even dreaming of a new Arctic alliance. Liechtenstein law has an important common law element with concept of trusts. It is the only continental country, which has trusts as part of its company law. The EFTA Court is already on some sort of a common law track.

It is also important to note that English is the Court’s working language. It is not real English, but EFTA English. Obviously language also transports thought. I may quote here the Austrian writer Karl Kraus who famously wrote:

“Language is the mother of thought, not its handmaiden.”

## **E. A Word on Competition law**

### **I. General**

Articles 53 and 54 of the EEA Agreement reproduced Articles 101 and 102 of the Treaty on the Functioning of the European Union. There is a division of competence between the Commission and ESA based on turnover thresholds reached by undertakings in the EEA/EFTA territory. This rule was laid down when there were seven EFTA States and 12 EU States, so this has become very one-sided. In case the UK would consider EEA membership on the EFTA side, this would have to be renegotiated.

Right now this division of competence means that the Commission is competent basically in all cartel cases. It also handles all the merger cases. But ESA has dealt with two major dominance cases - *Posten Norge* and *Color Line* (ESA Decision 387/11/COL) - and is currently working on the

case of *Telenor* (Case No. 71480) in which it has sent a statement of objections.

In addition, there have been a number of interesting and challenging preliminary reference cases.

## II. Case law

The EFTA Court's competition case law is fact based. It has a strong focus on economics, as I mentioned, and I may quote John Temple Lang, a former Director of the Commission and later a lawyer in private practice, who wrote:

“In general one has the clear impression that the EFTA Court deals more readily with economic issues than either the General Court or the European Court of Justice.”

In academic literature it has been said that in *Posten Norge* we have gone further in the protection of the right to a fair trial under Article 6 of the European Human Rights Convention than our sister court. *Posten Norge* has been referred to by several Advocates General, by the EU General Court, the Swiss Federal Supreme Court and the Swiss Federal Administrative Tribunal.

## III. The future of European Competition Law

As regards the future of European Competition Law after Brexit, London competition lawyer Ali Nikpay has stated that the UK has over the last 20 years been a strong supporter of a competition policy which focuses on consumer welfare and is based on economic analysis. A few days after Brexit French President François Hollande said at the Bratislava summit that EU competition law could be adapted in order to foster growth, investment and employment. That would be a major shift in the direction of economic policy in the European Union towards industrial policy. On the other hand, competition law in the EFTA pillar would possibly profit from British membership.

## F. Conclusions

### I. Gateway function of the UK

Japan is an example of a country which has heavily invested in the United Kingdom in view of the unhindered access to the European Single Market. I spoke in Japan at Keidanren, their business confederation, some weeks ago on this issue. There are some 1,000 Japanese businesses in the UK,

which employ some 140,000 people and they want to maintain the access to the Single Market. If this is no longer the case they said they would consider to move to another place where they make good sushi, which is Dusseldorf in Germany.

Other large countries consider the UK their gateway to the European Union, the United States, Canada, China, and India. All this would speak in favour of soft Brexit.

## II. Intelligence, security and defence

The Bruegel paper says that the Continental Partnership should be a forum for foreign security and defence policy. Boris Johnson stated on 11<sup>th</sup> September 2016:

“Leaving the EU is not about leaving Europe. We will remain the closest of allies, co-operating fully on intelligence, security, defence and foreign affairs.”

These fields are crucial for the well-being of Europe as a whole.

## III. Need to compromise on both sides

The wish to punish the UK for the Brexit vote is not reasonable and is unwise. But the UK cannot have unrealistic expectations; to have your cake and eat it has never functioned. Bitterness and divisions for decades to come must be avoided. A resuscitation of the old demons of Europe would be a common disaster which also must be avoided.

So let me conclude by citing Oscar Wilde, who wrote in ‘The Picture of Dorian Gray’ in chapter three:

“It is personalities, not principles, that move the age.”

Thank you very much.