

Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence

Brexit: enforcement and dispute resolution

Tuesday 16 January 2018

10.45 am

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Members present: Baroness Kennedy of The Shaws (The Chairman); Lord Anderson of Swansea; Lord Cashman; Lord Cromwell; Lord Judd; Earl of Kinnoull; Lord Lester of Herne Hill; Baroness Ludford; Baroness Neuberger; Lord Polak; Baroness Shackleton of Belgravia.

Evidence Session No. 2

Heard in Public

Questions 1 - 18

Witnesses

[I](#): Ms Catherine Howdle, Deputy Director, EFTA Surveillance Authority.

[II](#): Professor Carl Baudenbacher, Senior Judge and Former President, EFTA Court.

Examination of Witness

Ms Catherine Howdle.

Q1 **The Chairman:** Thank you for coming and joining us this morning; we are very grateful to you for doing so. I will tell you a little about how it all operates, although I am sure you know. First, will you introduce yourself to the Committee?

Ms Catherine Howdle: Thank you, Lord Chairman. I am the deputy director at the EFTA Surveillance Authority in its legal and executive affairs department. I am speaking today in a personal capacity, so my comments do not bind the EFTA Surveillance Authority, nor indicate that the EFTA Surveillance Authority has taken any formal stance on the outcome of Brexit, because it has not yet done so.

Q2 The Chairman: I think we had imagined that that was the situation. This session is open to the public. A webcast of it goes out live and is subsequently accessible via the parliamentary website for any member of the public who would like to have a look. A transcript will be taken of your evidence and it, too, will be put on the parliamentary website. A few days after this evidence session today, we will send you a copy of the transcript, which you can check for accuracy. If there is anything that you feel is inaccurate, we would be grateful if you would let us know as quickly as possible so that it can be amended. If, after the session, you reflect on some of the questions and would like to add anything, please also take the opportunity to send us any supplementary evidence that you might have. Those are the preliminaries.

I will start by asking you a bit about the European Court of Justice. Our Government have identified the continued jurisdiction of the European court as a red-line issue post Brexit and have concerns about the free movement of people. What would be the most workable alternatives to a jurisdiction of the European Court of Justice after we leave the European Union?

Ms Catherine Howdle: The EEA EFTA model of enforcement and compliance has operated for more than 20 years, so I would hazard a guess that it could be seen as a workable model of enforcement and compliance. I am not certain how familiar the members of the Committee are with the EEA Agreement, so I wonder whether I might take a minute to introduce the concepts.

The Chairman: Please do.

Ms Catherine Howdle: The EEA Agreement, as I am pretty sure everyone in this room is aware, provides for free movement rights and competition and state aid rules within the EEA. Today, I will refer to two pillars of the EEA. By that I mean, on the one hand, the EU Member States of the EEA that are party to the EEA Agreement and, on the other, the three out of the four EFTA States that are party to the EEA Agreement.

The Chairman: I will interrupt you for a minute. It may be that some of the public who are watching do not know even what the EEA is. Perhaps I should explain that there are three countries that together want a slightly arm's-length relationship with the European Union. Therefore it was recognised that some sort of court would have to exist. That is the EFTA Court. Which are the three countries?

Ms Catherine Howdle: Norway, Liechtenstein and Iceland.

The Chairman: For 20 years, the EFTA Court has operated to deal with disputes arising out of that different kind of relationship with the European Union.

Ms Catherine Howdle: That is correct. The EFTA Court came into being as a result of the EEA Agreement's Surveillance and Court Agreement. Article 108 of the EEA Agreement, on the European Economic Area,

provides for the establishment of a surveillance and court mechanism. That establishes not only the workings of the EFTA Court but the EFTA Surveillance Authority, which is the organisation that I work for in the legal department. The EFTA Surveillance Authority's task is to monitor and enforce compliance with the EEA Agreement and its annexes and protocols to ensure the smooth functioning of the EEA Agreement.

When it comes to the EEA Agreement, we have two pillars. The first is the European Union member states, which create secondary legislation. That legislation is then transposed into the second pillar, which is the EFTA EEA part of the EEA Agreement. Legislation created in the EU is then adopted and added to the annexes of the EEA Agreement and becomes part of the law of the EEA. It is adopted by a joint committee made up of the three EFTA states on the one hand and the EU on the other hand.

I will try to give a flavour of how the EEA Agreement works. The idea is to create a level playing field through reciprocal and homogenous rules set out in the EEA Agreement, where it provides for that level playing field regarding the freedoms of movement. They are the classic four freedoms, with a slight twist: on the EEA side, there is no free movement of citizens and persons, and there is no citizenship concept. It is free movement of workers only, so the rights that one would get are contingent on moving as a worker. There are then the freedoms of establishment, services and capital.

The EEA Agreement also provides for a level playing field for competition and state aid, as well as for the "horizontal legislation", as we refer to it in Brussels. By that I mean social legislation, environmental legislation, legislation on transport and legislation covering the horizontal provisions that we find in the EU treaty.

Q3 Lord Cashman: You mentioned that you believe that the EFTA court and the EEA offer a workable model for enforcement and dispute resolution, but I think it is worth recognising that any arrangements for enforcement and dispute resolution post Brexit are likely to relate to three quite distinct areas. So my question is: do you expect that we will see different models of enforcement and dispute resolution to deal with each aspect: the transitional period, the withdrawal and the future relationship?

Ms Catherine Howdle: That is really a matter for the negotiators. I cannot guess how likely it is that there will be different models for bringing a withdrawal arrangement into effect in the transitional period and for the future relationship. However, as the EEA EFTA model is an off-the-peg model that has not yet been ruled out, I could give a quick overview of what the EEA EFTA model for compliance with the EEA Agreement entails. To my mind, that is broader than simply a system of enforcement and dispute resolution.

The EFTA Surveillance Authority's role in enforcement is essentially to maintain alignment between the two pillars and to make sure that the EEA EFTA States fulfil the commitments that they have made under the EEA agreement. The EEA EFTA model—this is an important point—is

based on the principle of self-policing. The EEA EFTA States are represented in the court, which is, of course, an independent body, and they nominate and then jointly appoint the college members of the EFTA Surveillance Authority. The EFTA Surveillance Authority, like the European Council—

The Chairman: “Surveillance authority” is very misleading as a title, because it sounds so much like the heavy hand of Big Brother. Could you explain what is involved in that?

Lord Cashman: It is a bit like the Commission, in fact.

Baroness Ludford: I think it is more the French “surveillance”, actually. Like many European things, it is a translation. It is more a case of looking over, or overlooking.

Baroness Shackleton of Belgravia: It is supervisory.

Ms Catherine Howdle: Yes, you could call us the supervisory authority or the compliance authority. The EFTA Surveillance Authority monitors the implementation of transposed European Union law that has become EEA law into the legal systems of the EEA EFTA states. Then it works to ensure compliance with the obligations in those states.

It does that in two ways: first, through a formal route and, secondly, through a more informal route. In the formal route, the EFTA Surveillance Authority has a process, which we call the infringement procedure and which is also reflected in the Commission procedures, whereby when the Authority considers that there are potential infringements of the obligations that Member States have signed up to in their Member State system—in the law or administrative practice of that Member State—the Authority will send a letter, usually to the Member State ministry, saying, “Okay, we think we have a problem here. Let’s have a discussion about it”.

If the Authority then considers that there is a failure to meet obligations that the Member States have signed up to, it will issue a letter of formal notice. Then—those of you who are familiar with the Commission’s way of doing things will not be surprised by this—the Member State has the chance to reply to the letter of formal notice and either fix the problem or explain why there is no problem. The next stage in the infringement process is to send a reasoned opinion if the EFTA Surveillance Authority considers that there is an ongoing issue.

After the reasoned opinion is sent out, which is normally two months later, although the deadline is extended in some circumstances, if the problem has still not been resolved the EFTA Surveillance Authority may take the member state in question to the court. It then brings an action, called a direct action, before the EFTA court, where it says in its application that the EFTA Surveillance Authority considers that such and such EEA EFTA state is in breach of its obligations under directive such and such or regulation such and such, or under primary law as well.

The Chairman: So the process is quite geared to reconciliation on any problems in order to avoid court hearings. Over the 20 years, has it managed to avoid court hearings in a significant number of cases?

Ms Catherine Howdle: Actually, it goes a little further than that. This brings me on to what I was referring to when I said that we also have an informal mechanism. The EFTA Surveillance Authority has very good, ongoing, constructive dialogue with the EEA EFTA Member States. The case handlers in the two directorates that deal with the substantive law—the Internal Market Affairs Directorate and the Competition and State Aid Directorate—are experts, but they are very accessible and they have frequent contact with the ministries, including visiting not only the central government but local governments that might be making decisions at a local level, in order to ensure that the member states have enough knowledge to ensure that the decisions that are taken are right the first time rather than becoming a problem that needs to be addressed. The aim is that the relationship between the authority and the EEA EFTA States is pretty constructive. There is a good deal of knowledge sharing, and the authority encourages direct contact with citizens.

Lord Lester of Herne Hill: I have a supplementary question on what you have just said: that it encourages contact with citizens.

Ms Catherine Howdle: Yes.

Lord Lester of Herne Hill: Does the EFTA court have any experience of dealing with individual citizens' rights?

Ms Catherine Howdle: Yes, it does. There are three types of cases at the EFTA Court. First, there are direct actions, which are brought by the EFTA Surveillance Authority against a member state for failure to comply with obligations under the EEA agreement. Quite often, the trigger for that will be a complaint that is made to the EFTA Surveillance Authority. In its monitoring activities, ESA tends either to do a conformity assessment of legislation or to receive complaints or inquiries from citizens.

Lord Lester of Herne Hill: Could you give an example?

Ms Catherine Howdle: Yes. An environmental group might bring a complaint about something that is happening in a fjord. The EFTA Surveillance Authority will look into what the problem might be. Sometimes a group comes in, such as a workers' group, that is well aware of what the problem might be and which right it sees is being infringed. Equally, someone might bring a much more nebulous complaint. Then the authority's case handlers will look at the situation and analyse whether there is a problem, which bit of EU law or EEA law is engaged, and where that problem might be.

Essentially, the authority takes a citizen's contact and translates it into a step in the compliance process with the ministries. That is direct action. In a direct action, very occasionally the original complainant might attend

at court, but they would not speak. They could, I guess, apply to intervene as an amicus, but you would have to ask the next witness, Professor Baudenbacher, whether that has ever happened. I cannot, off the top of my head, recall such an instance.

The second kind of case at the Court is the preliminary references procedure. Those of you who are familiar with how it works in the EU will know that you can have an action going on at a national court where a question of EU law arises. Reference is then made to the EU Court of Justice for an answer to that question of EU law and an interpretation of the applicable law. In the EEA EFTA pillar, the equivalent is what is known as the advisory opinion procedure. Likewise, a real dispute in an EEA EFTA state will raise a question as to the interpretation of EEA law. The court in question, the national court, will stop the case and refer a question across to the EFTA Court for a judgment.

The difference between what is happening in the EU and what is happening in the EEA is that in the EEA pillar, first, you end up with an advisory opinion, which is a non-binding ruling, and, secondly, there is the technical difference that courts of last instance are not obliged under the reference provision to refer questions. However, there is an obligation of loyal co-operation, which has certainly been interpreted by Professor Baudenbacher—I do not think he would disagree with me—as suggesting that, where it would be helpful for the consistency and coherence of EEA law as a whole to refer, there is a softer duty of law to send a reference.

The Chairman: So a supreme court is not usually expected to have interim applications made to the EFTA court for an advisory opinion, but to have them travelling along parallel lines that might occasionally happen, despite it not being normal.

Ms Catherine Howdle: Yes.

Lord Polak: You have been very clear and helpful. You have talked about level playing fields, freedom of movement, competition and state aid. It sounds a little bureaucratic, but it sounds as though it is working. Has there been any discussion between the British Government, negotiators and civil servants and your organisation to understand how it has worked for 20 years?

Ms Catherine Howdle: I am not in a position to answer that question, I am afraid. We have had a certain amount of contact at a slightly lower level. People such as me have made themselves available to give factual information as to how the authority works, but I am not in a position to give detailed information.

Lord Polak: You have given enough: you have had discussion.

The Chairman: Are you saying that confidentiality means that you cannot divulge, or are you saying that you do not know?

Ms Catherine Howdle: I just do not know.

The Chairman: Do you want to add anything else to that, Lord Polak?

Lord Polak: No.

The Chairman: We have mentioned the three challenges: there will be a transitional period, then there will be the enforcement of the withdrawal, then there will be a long-term relationship. We need to look at some kind of legal oversight, supervision, surveillance or something to operate at those times. Could the UK join EFTA soon enough for it to operate for us during the transition period? Are there mechanisms that would make it possible to be as speedy as that?

Ms Catherine Howdle: This is why I started with the idea of the two pillars. For the EEA Agreement to function there is the EU side and the EFTA side. To be a Member State party to the EEA Agreement, you need to be either an EU State or one of the EFTA States.

The Chairman: I am asking something different. If we are negotiating something absolutely unique and different, not an EEA type of arrangement but a totally British-EU relationship that will not fall into that pattern, but we need some kind of court to deal with disputes that might arise in that transitional period, could Britain sign up to the EFTA Court? Could that be done with the necessary speed, given that transition will be operative from March next year? Could we join up in that specific period?

Ms Catherine Howdle: If you are talking about the docking solution, that matter would be addressed more easily by the next witness, Professor Baudenbacher. The EFTA Surveillance Authority does not have a position on this. The Authority's mandate comes from the EEA Agreement. That is a matter for negotiators. The concurrent speed will depend on what is being suggested.

The Chairman: I am sure that political will can make things move faster than they might normally do in Europe.

Q4 **Lord Cromwell:** Let us imagine, for a moment, that we are an EFTA country. How long does it take to go through the process of joining up to the EFTA Court?

Ms Catherine Howdle: If you are an EFTA country party to the EEA Agreement, the jurisdiction of the EFTA Court would extend to you as soon as that joining movement is made. There are some complexities in transitioning from one pillar to another. In particular, Article 127 of the EEA agreement provides for withdrawal, but you will see in Article 126 that the territorial scope of the EEA agreement refers on the one hand to the EEC countries, now EU, and on the other to Norway, Lichtenstein and Iceland. It does not mention the EFTA countries as a bloc. If the UK were to join the EEA EFTA countries, Article 126 of the treaty would need to be slightly rewritten.

Some people have suggested that the UK could float as a third country within the EEA Agreement, but I would respectfully disagree with these people. In Articles 16, 28, 31, 34, 36, 40, 41 and lots of others, the EEA

Agreement refers over and over again to the EFTA states and the EC states, now EU states. My view is that you have to be one or the other. By the way, these articles relate to the free movement of workers and the establishment of companies and services: they are the fundamental articles.

Lord Cromwell: That is very helpful, thank you.

The Chairman: I am mindful of time, because this is a mixed session and I have another witness coming.

Lord Cromwell: In that case, Ms Howdle, you could get points for brevity in your answer on this. The single market has the four freedoms that we all know of, but if the UK does not want to be a member of the single market, is there any point in trying to join EFTA at all? Is it realistic option?

Ms Catherine Howdle: The EEA Agreement is intrinsically linked to the four freedoms.

Lord Cromwell: So the answer is no, it is not realistic?

Ms Catherine Howdle: That is a matter for the negotiators.

Lord Cromwell: You are here in your personal capacity to give your opinion, so I will try to make you less shy.

Ms Catherine Howdle: My opinion is that if you are looking for a model that does not comprise the four freedoms, the EEA Agreement does not seem to reflect that wish.

Lord Cromwell: So, at a minimum, the UK would have to compromise on the movement of people—or at least movement of workers, to take the differential you made earlier—to come within the scope of this at all?

Ms Catherine Howdle: Yes.

Lord Cromwell: Thank you.

Q5 **Baroness Ludford:** We all know that the UK Government claims that the jurisdiction of the CJEU and the supremacy of EU law is a red line. How would membership of the EFTA Court be different from the UK's current obligations under EU law? You said two things that seemed a little contradictory. You talked about a level playing field through homogeneous rules, but then you used words such as "self-policing" and "the advisory opinion", which all sounds very soft and intergovernmental and diplomatic.

However, Jean-Claude Piris, the former director-general of the legal service in the Council, has said that, in the case of any divergence, the EU court would prevail. That is the hard fact, is it not? Any kind of dressing up along the lines of, "Well, we don't really have to obey the Luxembourg court and EU law if we are in the EFTA system", is a bit of window dressing, is it not?

Ms Catherine Howdle: First, you have to look at the context of the article to which Monsieur Piris was referring. This is a kind of backstop. If you end up with a divergence that is fundamental, you might end up going to the joint committee. That is a potential resolution, in a context where you already have a lot of judicial dialogue between the two courts. I am pretty sure that you will hear from Professor Baudenbacher that the two courts exchange views very regularly. They try to align their case law in so far as it is possible. Sometimes the EFTA Court goes first. There have been numerous instances where the Court of Justice has taken account of what the EFTA Court has said. It is not simply a one-way street. Then it is important to look at the fact that this article has never been invoked by the joint committee; it has never come to that.

The Chairman: So essentially you can say that, ultimately, the EFTA Court stands alone or that the EU court has to prevail if there is a serious deadlock, but the truth is that it never happens because everybody works together to get some sort of pragmatic solution.

Ms Catherine Howdle: That is more or less correct.

Baroness Ludford: Has the EFTA Court ever made a decision that is regarded as being in breach of rulings of the Luxembourg court?

Ms Catherine Howdle: Not to my knowledge. There are small differences. Regarding consumer protection, for example, the EFTA Court takes a slightly broader interpretation of what the consumer could be expected to know; the EU court takes a slightly gentler, more pro-consumer view. So there are some differences in flavour. There is an EFTA flavour. Again, I am sure that Professor Baudenbacher will talk about the EFTA Court being more focused on economics, reflecting the EEA EFTA way of doing things.

Of course, there are also some differences in the legislation. For example, if we are looking at interpreting Directive 2004/38, we will find that in the EU it is known as the citizenship directive whereas in the EEA it is known as the residents directive, and it has had significant adaptations made to it to reflect the absence in the EEA Agreement of the concept of citizenship and the limited free movement of workers as opposed to free movement of persons that we find in the EEA Agreement. There are some differences where there is no total homogeneity because in the underlying law there is no total homogeneity either.

There are also a couple of structural differences. For example, at the EFTA Court, if direct action is brought by the EFTA Surveillance Authority against a Member State and the Member State does not comply with the judgment against it, there is no fining or penalty payments mechanism as there is in Article 260 of the TFEU. The Commission could bring an EU Member State back to the court and ask it to impose a penalty, whereas the EFTA Surveillance Authority cannot do that. We can return to the court for a declaration that the country in question continues to be in breach, but you can go no further than that.

Baroness Ludford: I have one final question. Is not the reality that this situation has, with some modest effort, been tolerated, because the fiction was that Iceland, Norway and Liechtenstein were on their way to joining the EU and they are rather small countries? If the UK were to join this system, the idea that any real divergence could emerge between the EEA and the EU would cause the EU to sit up and take a great deal more concerned notice.

Ms Catherine Howdle: The relationship between the EU and the EFTA pillar is pretty good. Certainly, it is constructive in the courts and it is certainly constructive at the level of the Commission and the EFTA Surveillance Authority. Article 109 of the EEA Agreement obliges information sharing between the two authorities. There have been numerous occasions when the two authorities have worked together; for example, in competition investigations and state aid investigations.

Often, there is an issue that covers [the] territorial scope [of] let us say, Norway, Sweden and Denmark. There, you would find very close co-operation between the Commission and the Surveillance Authority.

If the UK were to join the EEA EFTA States, that would definitely change the balance in terms of how loud the EFTA voice was. In particular, it might have an effect on what I call the decision-shaping processes. I shall explain what I mean by that. The creation of EU secondary legislation takes place in the EU pillar. That legislation is then transposed to the EEA pillar through the joint committee. In the process of drafting, the EEA EFTA States are invited to participate in the committee. That does happen. If the UK were to be part of the EEA EFTA States, it would certainly have a voice in the committee.

Baroness Ludford: Not when it comes to co-decision between the Parliament and the Council. You do not hear the voice of Norway in that process.

Ms Catherine Howdle: At the moment, there are instances when Norway is heard, particularly regarding the technical regulations, but where you had the UK, that voice would be correspondingly louder, simply by the presence of a larger Member State.

The Chairman: Moving this on now, Lord Judd has a question.

Q6 **Lord Judd:** I am very interested in the flavour you are giving of how it all works, in which good will seems to be very important. There also seems to be a shared common desire to find common solutions that will be in everyone's interest. In the UK Government's present frame of mind on red lines, taking control back and all the rest, are we really likely to be a player in an EFTA setting?

Ms Catherine Howdle: Again, I would be very hesitant to commit myself to commenting on the negotiations or the UK's attitude in them. The flavour that I have tried to give is, I think, a fair reflection of how the EFTA pillar works. There is a sense that the pillar is working pretty well. In Norway, there was a referendum quite early on, I think in 1995, on

whether to join the EU having had the EFTA pillar established. The Norwegian population said, no, they would prefer to stay in the EFTA pillar. If the UK comes in, I would imagine that the UK would decide because it perceived what the advantages of the EEA pillar were. That question might be moot in the event that the UK joined the EEA EFTA states. Like I say, I do not want to be drawn into speculation on the attitudes of the UK Government. Of course, these things can evolve over time.

Lord Judd: Are there any specific ways in which the application of the court in the EFTA setting is more restricted?

Ms Catherine Howdle: It is slightly more restricted. In particular, there is a certain amount of restriction in relation to the framework of the law that it applies, so the treaty is a little more restricted in that it does not have the common foreign and security policy, there is no common fisheries policy, and there is no common agricultural policy. All these are outside the scope of the EEA agreement. That is where the jurisdiction of the EFTA Court stops.

Equally, I would refer you back, for time's sake, to my answer to Baroness Ludford in that certain parts of the EFTA Court's jurisdiction go less far in terms of the practical effects; for example, in the absence of a fining procedure and advisory opinions rather than preliminary references. And, of course, the EFTA Court cannot invalidate legislation either. Only the Court of Justice can do that.

Lord Judd: We are, of course, enjoying the operation of the European arrest warrant. Could you envisage any circumstances in which we could go on enjoying that helpful arrangement if we did not recognise in any way the authority of the European court?

Ms Catherine Howdle: That question is slightly out of my purview of expertise. I certainly do not think it would be precluded by becoming an EEA EFTA state, as Norway has opted in to a number of EU measures to do with justice, security and home affairs, but this is slightly outside my expertise.

The Chairman: So you do not know the answer to that question?

Ms Catherine Howdle: That is correct.

The Chairman: If Norway joins in and says, "We want to be part of the European arrest warrant system because we want to stop trafficking and cross-border crime. We want to be able to work very closely with our European neighbours", what happens if there is a battle between jurisdictions? Who resolves the conflict over a warrant to pick somebody up somewhere else in Europe at the behest of Norway? Where is the final court?

Ms Catherine Howdle: That would also depend on what the arrangement was.

The Chairman: It is the European Court of Justice, is it not?

Ms Catherine Howdle: As I said, this is outside my scope of expertise.

The Chairman: But it does not come to EFTA.

Ms Catherine Howdle: It certainly does not come to EFTA because it is not covered by the EEA Agreement, but nor is it precluded by the EEA Agreement. That is my main point.

Baroness Shackleton of Belgravia: What categories does EFTA leave alone? Family law, for example, benefits hugely from being joined up to Europe and the European Court of Justice. Do you deal with cross-border family matters, children, enforcement of maintenance orders and the like?

Ms Catherine Howdle: We do not do the cross-border jurisdictional side of things, because that pillar of EU law was not around when the EEA agreement was concluded. We do a certain amount of family law, but it relates to free movement of workers, so it tends to be the family rights of third-party nationals who are family members of people who have exercised their rights to move freely within the EEA.

Baroness Shackleton of Belgravia: That is a completely different angle of family law. I am talking about matrimonial law, which normally means non-matrimonial law, meaning divorce, and things such as abduction of children.

Ms Catherine Howdle: Those areas are not covered by the EEA Agreement.

Baroness Shackleton of Belgravia: So there will be a vacuum when we leave.

The Chairman: I am anxious of time. We are up against our deadline. I suggest, Lord Lester, that we have more or less covered question six.

Lord Lester of Herne Hill: I would just like to ask this. I do not understand how the EFTA system could comply with the European Convention on Human Rights dealing with individuals, because the convention requires an independent and impartial tribunal established by law and access after domestic remedies have been exhausted. All the EFTA member states and EU states are bound by the convention. Is that not a problem?

Ms Catherine Howdle: I have not encountered that problem during my five years at the EFTA Surveillance Authority, but that question would be better answered by Professor Baudenbacher than by me.

The Chairman: I was also going to pass on question 7, but I thought it important that Baroness Neuberger asks her question.

Q7

Baroness Neuberger: Yes. I imagine that we will also ask Professor Baudenbacher that. If the UK sought to join the EFTA court, what would

the cost be in cash and manpower terms?

Ms Catherine Howdle: At the moment, the EFTA Surveillance Authority has a budget of €15 million per year, of which €11 million is personnel costs.

The Chairman: Is that per nation or collectively?

Ms Catherine Howdle: That is in total.

Baroness Neuberger: That is quite small.

Ms Catherine Howdle: It is very small, yes. The EFTA Surveillance Authority is made up of 73 people from 16 nationalities. About half are EEA EFTA nationals and the other half are EU nationals. There are I think seven UK citizens working for the EFTA Surveillance Authority, although one is on maternity leave. The EFTA Court's budget is, I believe, €5 million a year. In comparison, the Court of Justice's budget was €400 million for 2017.

Baroness Shackleton of Belgravia: What is the delay between taking an action and getting to court, on average?

Ms Catherine Howdle: Could you explain what you mean by "taking an action"?

Baroness Shackleton of Belgravia: If you want to make an application to the EFTA Court and you want resolution, how long would it take you before putting your application in? If we take an application before the Court of Appeal, we say it will take six to nine months, for example. On that tight budget, are there very large delays?

Ms Catherine Howdle: No, there are not very large delays. The EFTA Court is quicker than the Court of Justice.

Baroness Shackleton of Belgravia: That would not be difficult.

Ms Catherine Howdle: That is partly due to the fact that there are a reasonably small number of cases. For example, last year we had 17 cases at the EFTA Court. Of those, 11 were infringement actions, so direct actions brought by the EFTA Surveillance Authority. Of those 11, eight were for non-implementation of directives and regulations into the national legal order. There is no direct effect provision in the EEA agreement, so the member states have to incorporate directives and regulations into their national legal order. Therefore, it is very important that the EFTA Surveillance Authority follows that up by bringing countries to court if they have not fulfilled their duties to implement into the national legal order. That helps citizens in those countries to enforce their rights as a matter of national law, which is transposed EEA law.

The Chairman: But the remit of the court is narrower. With three countries it is of a very different scale from the European Court of Justice.

Ms Catherine Howdle: Exactly.

The Chairman: I am going to bring in Lord Kinnoull, because I have to draw the session to a close.

Q8 **The Earl of Kinnoull:** I wanted to press you again on what Lady Neuberger asked about resources. Currently, the EFTA Court system looks after the interests and businesses of about 5 million people. If we joined that, 5 million would move to 70 million. I assume that the number of cases and things to do in the court system would be pro rata to the number of people and businesses covered. That is an increase of 13 times. Is it able to take that supercharged shot?

Ms Catherine Howdle: I would imagine that more resources would need to be allocated to the EFTA Surveillance Authority and the Court. Both organisations are quite well-functioning and well-established. It would then be a question of extra workload, rather than total restructuring, but that is speculation.

The Chairman: Earl Kinnoull, could you ask your final question? I am going to draw the session to a close.

The Earl of Kinnoull: Certainly. We will be asking three nations to allow us to come to their party. Do you think they would be enthusiastic about the prospect of Britain arriving?

Ms Catherine Howdle: That would depend on what was on the table. Again, it is a matter for the negotiators, the politicians and the nations. I am very reluctant to speculate on that. I do not know how much more assistance I can give to the committee on the point.

The Earl of Kinnoull: Do you think Britain would bring some advantages to the EFTA Court system, with all our history and pedigree of courts?

Ms Catherine Howdle: From my own experience working for Advocate-General Sharpston at the Court of Justice as one of her référendaires, I know that the Members from the UK make an enormous contribution to the Court of Justice. If there were to be UK Members on the EFTA Court, I would have no reason to doubt that their contribution would likewise be substantial.

The Chairman: Thank you very much. The English legal profession is always pleased to hear nice things said about it. It was very helpful to hear from you, Ms Howdle.

Examination of Witness

Professor Carl Baudenbacher.

Q9 **The Chairman:** Professor Baudenbacher, thank you so much for joining us and giving us the benefit of your wisdom about the workings of the EFTA Court, of which you are the senior judge and, I think, former president. It is a great privilege to have you before this Committee.

I will just explain a little about how the process works. The session is open to the public and a webcast of it goes out live. It is subsequently accessible via the parliamentary website so that people who miss it now can see it later. A verbatim transcript will be made of your evidence. This will also be put on the parliamentary website. A few days after the evidence session you will be sent a copy of the transcript. If there is anything that you would like to correct, please take the opportunity to do so. If you can do that as soon as possible that would be very helpful because people are looking out for it and waiting to read it. If there is anything that you would like to add as a supplementary after the session is over, such as if, on reflection, you think there is something else you would like to tell the Committee, please send it to us as soon as possible.

I have introduced you as Professor Carl Baudenbacher and mentioned that you were a former president of the EFTA Court and a senior judge. Is there anything else you would like to tell us about yourself before we start?

Professor Carl Baudenbacher: Thank you. I have been a judge on the EFTA Court for twenty-two and a half years. Until 31 December last year I was the court's president for 15 years. On 31 March, I will leave the EFTA Court Bench. That does not mean that I will retire, but I will do something new. I have also been, for almost all that time, a professor at the University of St Gallen in Switzerland, which is quite a well-known business and business law school. I was for a certain time a permanent visiting professor at the University of Texas in Austin, where I taught European law and international law. And I have taught at several German universities.

I am a Swiss citizen and I have been nominated to the EFTA Court by the Government of the Principality of Liechtenstein. That means that I am a foreign judge. For Swiss ears, that has a certain connotation. I am stating my private opinion. I do not speak on behalf of the EFTA Court.

The EFTA Court is a court of three regular judges. Three sit in every case. If one is prevented from sitting due to illness or bias there is a list of ad hoc judges, but it is always a three-judge chamber. That means that the judge from the country concerned is always part of the deciding body. You may call that a trait of judicial nationalism. It is not intended; it is just a consequence of the fact that the court is so small, but it is a fact.

Q10 **The Chairman:** It is very nice to have you here. We are very grateful to you for coming. As you will know, the UK Government have identified the continued jurisdiction of the European Court of Justice as a red line issue post Brexit. Also, the Government have concerns about free movement of people. We wanted to know from you, with your vast experience, what would be the most workable alternative to the jurisdiction of the European Court of Justice? If we are looking for something else after we leave the EU, what would you, in your creative moments, suggest to us?

Professor Carl Baudenbacher: Several models have been discussed. First, you should be aware that many of these models have been tried by my home country, Switzerland, not only in the past two years but over

decades. To a certain extent, the experience of the Swiss may be valuable for the United Kingdom. Switzerland is coming from another direction, but after Brexit there will be a lot of parallels between Britain and Switzerland when it comes to the dispute resolution issue. That is why people have started jokingly to speak of "Britzerland".

The first model which you could discuss would be diplomacy. The current sectoral bilateral agreements that Switzerland has concluded with the European Union are basically all governed by joint committees. But this diplomatic way of dispute resolution is no longer accepted by the European Union. In 2008, the European Union told the Swiss that it was not going to fly any more. Ever since, Switzerland has been unable to conclude new market access agreements.

Recently, the European Union has even started to play hardball to force the Swiss to accept a surveillance and court mechanism. It has temporarily refused the updating of existing agreements. Importantly, in December of last year, the EU granted Swiss stock exchanges access to EU markets for only one year. That means it was limited and it was expressly said that in this one year the Union expects Switzerland to accept a court of law. I might come back to that in the course of the questioning.

The second type is arbitration, which has been discussed in this country in particular. The Swiss tried arbitration decades ago and they were always rejected. In fact, Article 111 paragraph 3 of the EEA agreement says that arbitration cannot take place if it comes to the interpretation of provisions in the EEA agreement that are "identical in substance" to EU law. The European Court of Justice would then object. It would feel bound by an arbitration tribunal that would give the interpretation.

The third option, which has been tried by the Swiss—and by the Russians, by the way, in the time of Yeltsin, at least in academic circles in Russia—is a bilateral court UK-EU. That said, a bilateral court did not fly.

Then one could imagine a UK court above the UK Supreme Court. Something similar was attempted by the Swiss Government in 2012: a special chamber in the Federal Supreme Court of Switzerland. It was formally rejected by the European Union in December 2012. Also, a Swiss proposal to establish a so-called independent Swiss surveillance authority was not accepted. The rationale of the latter is quite clearly that, according to EU logic, no country that has access to the single market can monitor itself.

The ECJ has been ruled out by Her Majesty's Government, so I must not go into that.

The EFTA Court has been mentioned. It is a tested court, which has been functioning for almost 25 years. The problem is that if Britain went for full EEA membership, there would have to be free movement of persons, which is part of the EEA acquis to a very large extent.

Finally, there is a multilateral court on the model of the EFTA Court. I remind you of the paper about this written by Bruegel, a Brussels think tank, in the summer of 2016. That is all that I would like to say initially.

The Chairman: That is incredibly helpful, because it is an overview of the alternatives, which have all been explored in other contexts, particularly by Switzerland. One of the problems that we have encountered as a Committee and over which we have engaged in discussions with our own judges is how you try to think this difficult, wicked problem through.

Q11 **Lord Cashman:** Thank you, Professor, for that interesting overview, which connects to my question. Post Brexit, the United Kingdom will be in new territory. Potentially we are looking at a three-model approach to deal with the transitional agreement, the withdrawal agreement and the future partnership. Do you expect that we could see three different models of enforcement and dispute resolution? For me, the key word is “enforcement”. We can have arbitration and these diplomatic committees, but if in the end there is a judgment or a quasi-judgment that needs to be enforced, how do we do that, and how do we do it in relation to the three distinct pillars that the UK will be dealing with?

Professor Carl Baudenbacher: Whether the three different agreements will be dealt with by different courts is difficult for me to say. That is up to negotiations and is essentially a political question. The permanent agreement—the so-called bespoke trade agreement that you are looking for—would need a permanent solution, in my view, or at least a solution for the foreseeable future, as nothing is for eternity on earth. There should be at least some stability. In my view, that is the most important of these. Whether a transitional agreement would be under the jurisdiction of the ECJ, for instance, or of another court is up for negotiation. The same probably goes for the withdrawal agreement.

Lord Polak: It is interesting, if not a little depressing, going forward from how you have described things. Switzerland has been involved in Europe for ever and we are coming out. I just wonder where we are going with all this. Having said that, with the Government’s approach to the enforcement of citizens’ rights, do you think that it will be possible to implement some single, overarching structure to deal with all future disputes, or will we see a fragmented regime, with distinct concerns for trade here and for citizens’ rights there, and so on? How can this work?

Professor Carl Baudenbacher: First, it is difficult for me to answer this question. Secondly, it is difficult for me to imagine that you could juggle with a couple of balls at the same time. There is also the principle of legal certainty and of foreseeability. Your citizens and economic operators must be able to trust precedent, no matter whether you take precedent to have its meaning within the common law or whether you take it as having the slightly different meaning that applies in the civil law countries. It is difficult for me to imagine that you could go on with such a complicated enforcement system.

Q12 Lord Cromwell: Let us start with the fundamental that the single market has the full freedoms of movement within it—we know this—but the UK, or part of it, does not seem very keen to be a member of the single market. If that is the case, is it realistic to talk about joining the EFTA Court at all?

Professor Carl Baudenbacher: Full EEA membership would involve free movement of persons to a large extent. That is clear. Nevertheless, this has been discussed in EU circles. In my view, that means that they have in mind another idea of how Britain could at least be part of the EFTA institutions: the EEA, the EFTA Surveillance Authority and the EFTA Court. This model is not really developed. It was mentioned vis-à-vis Switzerland some five years ago and briefly dealt with in some Swiss government papers.

It was also mentioned in a joint non-paper drafted by the chief negotiator of the European Commission and the chief negotiator for Switzerland in May 2013. This non-paper is still officially secret, but I am on foreign soil here and may at least say that, although I am not supposed to have knowledge of this non-paper, almost everybody in Switzerland knows what is in it. The docking approach is mentioned. It would mean that Switzerland would not take the whole EEA acquis—not all the fundamental freedoms—yet could use the EFTA Surveillance Authority and the EFTA Court and then negotiate the right to have a college member on the EFTA Surveillance Authority and a judge in the EFTA court.

In the case of Switzerland, what is lacking from these fundamental freedoms is freedom of establishment, freedom to provide services and free movement of capital. The Swiss have free movement of people, but given that docking has been discussed in EU circles I cannot see that the lack of freedom of movement of people would prevent the UK from trying to dock to the EFTA EEA institutions; it would just be a different set-up from the Swiss set-up.

As regards Switzerland, in the last five years the Swiss Government did not go for this docking solution. They had another idea of subjecting the country to the jurisdiction of the ECJ, using a model that most of those who know something about European law did not buy. The assumption was that the ECJ would decide in a binding way but not a final way. I never believed that that would have a chance. The Foreign Minister stepped down in June last year because of the apparent failure of these negotiations, and there is now a new Foreign Minister. According to newspaper reports, the Swiss are again looking into this docking solution, with a different acquis, including the free movement of people. You would have the acquis without free movement of people. Again, it is for politicians to resolve that, but I cannot see a priori why this should not be possible.

The Chairman: It will make Lord Polak feel that there is some hope if a docking agreement could be reached that used the courts and found a way of dealing with jurisdiction and so on.

Lord Lester of Herne Hill: Yesterday the Minister in the House of Lords made it clear that the United Kingdom Government will remain bound by the European Convention on Human Rights and the Human Rights Act until the next election at any rate. As you will know as a court, all the EFTA member states and the EU member states are bound by the Strasbourg human rights convention, which guarantees due process, independent courts and so on. If some kind of bespoke deal were negotiated, I do not understand how it could satisfy the European convention so far as the rights of individuals are concerned. Perhaps you can help me.

Professor Carl Baudenbacher: A bespoke deal would leave open the question of who would be the tiebreaker or the dispute settler. If we assumed that Britain would dock to the EFTA Court, I can tell you that the EFTA Court interprets EEA law in the light of the European Human Rights Convention and even in the light of the case law of the court in Strasbourg. The EU Charter is not part of our set-up, but the Convention has largely been taken over by way of case law of the EFTA Court. The EEA is a single market agreement. It is essentially an agreement about giving business opportunities to citizens, but as you all know, there are at least two types of human rights in the case law of the court in Strasbourg. They are the classical human rights—you shall not torture, you shall not take away people's lives, and the like—and there are the economic human rights. They are becoming more and more important in, for instance, anti-trust law, intellectual property law, collective-bargaining and industrial action law, property law, and freedom of expression and so on when it comes to advertising, unfair competition and the like. There we are on a similar track to our sister court, the ECJ.

Q13 **Baroness Ludford:** Thank you very much for addressing us. I want to try to pin down the relationship of the EFTA Court to EU law. In the speech you made last November, you said it was an improper simplification to say that EU law and the Luxembourg court would prevail in the event of any conflict. That was the position of Jean-Claude Piris, the former director-general of legal services for the Council. The fact that the EFTA Court has to take due account of EU law has been described as a quasi-direct effect or quasi-supremacy, but in practice is the reality not that the EFTA Court cannot rule differently from the CJEU and that there is a little bit of smoke and mirrors going on here—forgive me for being blunt—about how much freedom there is in the EFTA system to diverge from Luxembourg case law? It might suit some people politically to maintain that there is some wriggle room, but is there any?

Professor Carl Baudenbacher: I am familiar with the position that Mr Piris has taken. It is an oversimplification to state that in the case of divergence the solution of the ECJ will prevail. It is far more complicated than that. The best thing is always to give examples. In the vast majority of its cases, the EFTA Court has to tackle novel legal questions. The homogeneity rules are then of limited relevance a priori—if you have a new legal question, you have to answer it. Then we have seen that the ECJ has followed us in many cases. A very intensive judicial dialogue has

been going on. It has been confirmed by presidents of the ECJ that homogeneity is not a one-way street. It works by osmosis.

If you ask me whether there is any freedom not to follow the ECJ, I would say that the EFTA Court has never been keen on being inhomogeneous, but the ECJ has also seen to it to avoid inhomogeneous outcomes. Yet, homogeneity is not a concept that can be understood as a snapshot in time. If you have two courts applying law that belongs to separate legal orders but is identical in substance, it is inevitable that from time to time the courts come to different solutions. In the course of time, such temporary inhomogeneities must be sorted out. We have seen that we have sometimes followed the ECJ, but the ECJ has followed us several times.

I will give you an example. One of the early cases concerned a question of whether a Government could ban the sale of fortified food with the argument that there is no nutritional need in their country. The ECJ, in an old judgment from the early 1980s, had ruled in a way that some people thought would go in that direction. We said in 2001, "No way. This is a paternalistic approach". You cannot rule out the sale of something because your people allegedly do not need it. Who should assess this? It does not work. The ECJ then overruled its old case law and followed us on this.

Another example that is interesting for British entrepreneurs in particular is the old question of whether an in-house lawyer enjoys the right of audience and whether they may represent his or her own company in a European court. The ECJ said that this was out of the question; we said that it must be assessed based on the facts of the case. The in-house lawyer may be sufficiently independent or they may not. There are many other examples.

Ultimately, it is quite clear that if you are as small as we are right now and the other ones are as big as they are—they have thousands of cases and we have a limited case load—that they are number one, but it is not that we do not have our own voice. I also urge, and I always say this to people in Switzerland, that you must engage in process-oriented thinking. You cannot assess what is going on in the EFTA Court based on the current structure. If you really consider membership there, or docking or something like that, you have to take into account what it would mean if your people went there.

The Chairman: That sort of judicial dialogue is very much the currency in international courts in these times. The Supreme Court of Britain is involved in a similar sort of dialogue with the European Court of Justice, it is just that those dialogues do not take place out there for the public to know about them. Therefore, the public do not know that they exist. Is that not one of the problems?

Professor Carl Baudenbacher: Yes, but there is a difference between the dialogue between the UK Supreme Court and the ECJ and the dialogue between the EFTA Court and the ECJ. The ECJ would never

quote the UK Supreme Court, so far as I can see, whereas it does quote the EFTA Court. We are on a different level there.

Talking about the triangle of the UK Supreme Court, the ECJ and the EFTA Court, I will tell you about a very important case that was decided two and a half months ago by the EFTA Court on a fundamental problem of public procurement law. As you know, public procurement law involves billions and billions. One of the big issues is what should happen if a public authority awards a contract to the wrong bidder—to the bidder that was not the best. Does the bidder that did not receive the contract then have an easy or a difficult claim for damages?

In this case, the ECJ, in two chambers within two months, came up with two contradicting answers. One chamber said, "This is a simple issue of tort law"—that means that a simple breach of procurement law is sufficient—whereas the other chamber said, "Well, that is a state entity, which means that the state liability rules must apply". Under the state liability rules, the state would be liable only if the breach qualified and was sufficiently serious.

Last April, the UK Supreme Court followed the chamber that ruled in favour of state liability, thereby privileging the state. Without referring to the ECJ, it gave an interpretation to these two conflicting judgments and found that the one that went for state liability rules was more convincing. We opted for the other solution. We said that a simple breach must suffice.

Sooner or later, this question will end up in the ECJ again. Then it will probably be assigned to the Grand Chamber, given all the discussion. We have rulings in Denmark, Sweden, Iceland, Norway, Liechtenstein, and all over Europe, because it is a fundamental question. There, it may be that the EFTA Court has given an important input. It remains to be seen.

In this context, I want to mention that, due to our size, the lack of an advocate-general at the EFTA Court and the fact we are less powerful than the ECJ vis-a-vis our national courts, we have to give judgments that are reasoned in a much broader way. We also did this in the fundamental public procurement law case.

Q14 Lord Judd: We are talking about this in very legal terms. The reality is that Brexit and everything around it is very much governed by emotional considerations. There is this perception that somehow we want to be free of any obligations to any legal system beyond our own shores. In conducting the line of argument that I believe must be conducted on this issue, it is very important to be clear. Could you clarify ways in which the scope of the EFTA Court is more limited than that of the European court? Are there certain areas where the EFTA Court does not currently have jurisdiction to make rulings?

Professor Carl Baudenbacher: As a matter of principle, all the common policies, with the exception of competition and state aid policy, are exempt from the scope of the EEA agreement. In detail, it is a little more

complicated, but as a general rule one can say that agriculture is out—the EFTA states are not part of the common agricultural policy, of the common fisheries policy, of large portions of taxation policy and of foreign policy. In particular, they have retained their sovereignty in foreign trade matters.¹ Norway has initiated, if I am correct, three WTO dispute settlement proceedings. It could not have done that on its own if it had been a member state of the European Union.

A question that has not been resolved is the legal situation of the continental shelf and the special economic zone of Iceland and Norway. The two Governments take the view that this must be answered based not on EEA law but on international law, and they have retained full sovereignty over their continental shelf. If they were in the European Union, this would be different. My court never had the opportunity to rule on this, but for the time being you cannot say that this is part of the scope of the EEA agreement.

There are other differences between the EU and EFTA pillars when it comes to the judicial set-up. My court has never recognised the primacy and direct effect of EU law. New EEA rules must first be implemented by the parliaments of the EEA EFTA states before they can be applied. We have ruled that state liability applies, but not direct effect and primacy, and our supreme courts are under no written obligation to refer unclear questions of EEA law to us. Our preliminary rulings are, strictly speaking, advisory. It is complicated. Our rulings are of a *sui generis* nature because there is this general principle of loyalty, but, in any case, there is more flexibility and more sovereignty with the supreme courts of our member states.

What is also important—I do not speak only about the judicial style, which is different—is the language. I do not claim that we speak real English; we speak EFTA English. Language is not unimportant. Language transports thinking. EFTA was founded by the United Kingdom, or at least under the UK's leadership. It is probably not a coincidence that free trade thinking, the thinking in market terms and efficiency terms – although efficiency does not mean that you do not care about justice—is still present in EFTA.

Lord Judd: The point is that we currently enjoy—I think there will a good deal of agreement about this in Britain, even among hard core Brexiteers—the benefits of the European arrest warrant, which has been valuable in fighting crime and related issues. With all your experience, can you envisage any circumstances in which we could go on enjoying the benefits of the European arrest warrant without accepting the jurisdiction of the European court?

Professor Carl Baudenbacher: No, I am afraid I cannot.

The Chairman: That was very clear.

¹ This does not only mean that they have the power to conclude trade agreements with countries outside of Europe.

Baroness Shackleton of Belgravia: I think the last witness answered my question, but, correct me if I am wrong, domestic disputes between couples—matrimonial law or, as I describe it, non-matrimonial law—unhinging couples and children are not within your remit, I understand.

Professor Carl Baudenbacher: We never have such cases.

Baroness Shackleton of Belgravia: So in circumstances where we are not joined up to Europe, you would not step or could not step into the breach to resolve those disputes, such as in the enforcement of maintenance.

Professor Carl Baudenbacher: No.²

Baroness Shackleton of Belgravia: Off the menu.

Professor Carl Baudenbacher: I am glad that we always have to deal with economic stuff.

Baroness Shackleton of Belgravia: Well, financial claims are economic.

The Chairman: Baroness Shackleton deals with the very difficult stuff, which is about families.

Lord Anderson of Swansea: The concept of loyalty is a very imprecise obligation. If a national court stays proceedings and submits a question for a preliminary ruling, can it then disregard that entirely? Have there been examples where, notwithstanding the reference, a national court has refused to follow the judgment in a preliminary ruling of the EFTA court?

Professor Carl Baudenbacher: The most important example is the STX case, which was about the posting of workers directive. It was referred to the EFTA Court by the Borgarting Court of Appeal in Oslo. We declared that certain clauses in a collective agreement were not in accordance with the directive. This was appealed to the Supreme Court of Norway by the employers and the Supreme Court did not follow our judgment. After a while—it is now five years ago—the EFTA Surveillance Authority opened infringement proceedings, claiming that Norway was inhomogeneous because of the Supreme Court's judgment. These proceedings are still under way. This is a delicate matter, as you can imagine, but as far as I can see the EFTA Surveillance Authority is now waiting for the social partners—the shipbuilding industry and the respective unions—to reach a settlement à l'amiable. That is the only case of which I am aware in which action has been taken.

There are a couple of other cases where the implementation of judgments by national courts was, from my perspective, questionable.

² Matrimonial law is not part of the EEA Agreement. It would be a political decision whether to include that in a future UK-EU agreement which could be subject to the EFTA Court by way of docking.

Not all the member states of the EEA at large, the 31 states, are familiar with, for example, the principle of proportionality as it has been developed in particular by the Germans and taken over by the Austrians and others—also by the Swiss, by the way. There are jurisdictions that would adhere more to a culture of authority than a culture of proportionality, where everything must be justified even down to the last details. So in certain cases a national supreme court may well apply a different type of proportionality test from that applied by the European Court.

Q15 Lord Lester of Herne Hill: A long time ago, there was a great struggle in Strasbourg to allow individuals to appear at all in their own right before the European Court of Human Rights. In the old days, only the Commission could appear and there was a great struggle about it. Now it is quite clear that in Strasbourg the individual, having exhausted domestic remedies, has full rights of access to that court. Suppose, Professor, that a bespoke arrangement was agreed between the United Kingdom and the EFTA states. I know that this is hypothetical, but do you think that the citizen would need to have direct access to the EFTA Court?

Professor Carl Baudenbacher: It is a political question at the end of the day as to whether the UK would like this to be the case. In classic public and international law, individuals have not played a great role. These conflicts were state to state. In my experience, it is quite useful, not only for individuals but also for economic operators, to have access to a court in Luxembourg. If I look back over my 22 years on the EFTA Court bench, in many cases economic operators were in conflict not with a foreign Government but with their own Government curtailing their rights. Their own courts were probably closer to their Government than the courts in Luxembourg. From their perspective, it may have been beneficial to have this court in Luxembourg but, as I said, that is a political question, which I cannot decide. I am probably biased, because I so much enjoyed being part of the EFTA Court.

Lord Lester of Herne Hill: When you say that it is political and not legal, is that quite right? The European convention says that, when you determine rights and obligations, there has to be a fair hearing before an independent and impartial court or tribunal.

Professor Carl Baudenbacher: Yes, but you would then have that hearing here in the UK before an impartial court, I suppose.

Lord Lester of Herne Hill: You do not apply that to the EFTA Court.

Professor Carl Baudenbacher: I cannot go further than what I said.³ Separately, I cannot imagine that it could be challenged under Article 6 of

³ While the EU Charter is not part of our set-up, the Convention has largely been taken over by way of case law of the EFTA Court. I would add that there is recent case concerning collective agreements of stevedores and the freedom of establishment, *Holship*, which was referred to the EFTA Court by the Supreme Court of Norway. The EFTA Court gave its advisory ruling, which the Supreme Court of Norway followed. What is particularly interesting is that, according to the newspapers, the case has been

the European Convention on Human Rights if the UK were to go for a state-to-state model.

- Q16 **Lord Anderson of Swansea:** In the past, the Court of Justice of the European Union has overruled the initiative of the Commission in respect of the European Union joining the European convention. That was in 2014, I think. Do you think there is a danger that any withdrawal arrangement could be challenged in that way?

Professor Carl Baudenbacher: It would be speculation to say that there is a chance. All I can say is that paragraph 11 of Article 218 of the Treaty on the Functioning of the European Union states that certain players may bring such a question before the ECJ and the ECJ will then give an opinion that is binding, although it is only called an opinion. To find out whether there is this risk, you or your legal services must carefully analyse the available case law.

There is not only the opinion on the co-operation between the ECJ and the European Court of Human Rights; there is another important opinion on a patent court, which was thrown out by the ECJ a couple of years ago. There is also the first EEA court opinion. Before the EFTA Court was established, the drafters of the EEA agreement had foreseen a combined EEA court, which would have consisted of judges from the ECJ and judges from the EFTA states. This was declared incompatible with EU law by the European Court of Justice.

I have said several times in Switzerland that when Swiss diplomats negotiate with EU diplomats, they do not seem fully aware of the fact that the ECJ may have a say on this. In several cases, they came up with all sorts of original solutions, which were thrown out by the ECJ. If you want to make sure that you do not run this risk, you have to analyse the case law, but I cannot advise you on that. I may be able to do that after 31 March, but not before.

The Chairman: We may have to invite you back.

Lord Anderson of Swansea: So the risk exists, but the point that is relevant to our internal discussions and debates is the timetable. From your knowledge of the European court system, if such a reference were to be made, what sort of delay would one anticipate?

Professor Carl Baudenbacher: It would take quite some time. It would not fit into your timetable.

The Chairman: It would not fit into the timetable. That was our concern.

- Q17 **Baroness Neuberger:** We have already heard from Ms Howdle about the size of the EFTA Court's budget. If there were to be some docking arrangement with the EFTA Court for the UK, what would that mean financially and in people terms, as the court would be so enormous in

brought before the European Court of Human Rights. I cannot say more than that. I look forward to reading what the Strasbourg Court has to say.

comparison to its size at present?

Professor Carl Baudenbacher: The EFTA Court is a very small court. Including trainees, there are some 22 people. The budget is a bit more than €5 million. The premises are nice but modest. It is a very lean organisation. It has been rather quick in the past; you obtained a preliminary ruling or advisory opinion after between six and eight months. It would be easy for a country of the economic power of the United Kingdom to finance its share in the EFTA Court, even with British membership, where you had one or two judges, legal secretaries and other staff there.

Baroness Neuberger: You do not think that the participation of the UK and the number of cases that would come from it would make a huge difference to the workload.

Professor Carl Baudenbacher: Certainly the workload would increase, but there are well-equipped cabinets at the EFTA Court even now. They should be able to take on a number of additional cases before the whole thing would have to be enlarged.

The Chairman: If we were to join, could even just dealing with the transitional agreement fit into the timetable? Could our docking in for the specific purpose of transition be done in the timeframe—by the end of this year?

Professor Carl Baudenbacher: I am a judge. I cannot answer that question.

The Chairman: You do not look optimistic.

Professor Carl Baudenbacher: First, your Government would have to make up their mind and start talking about this option to both sides, because you would need the consent of the European Union and the current EEA member states. I do not know whether you would also need the consent of the Swiss for docking—whether docking would be reserved to EFTA states or whether it would be such a new thing that somebody who was not in EFTA could dock. There is not much about it.

The Chairman: But you are pessimistic about the timing.

Professor Carl Baudenbacher: I am basically always an optimist in life, but this is not for me to say.

The Chairman: Earl of Kinnoull, if you had any questions lurking, this is your moment in the sun.

Q18 **The Earl of Kinnoull:** The question that lurked from earlier is whether there are any examples in the rest of the world of docking. Can you point us to successful docking, or unsuccessful docking, going on elsewhere?

Professor Carl Baudenbacher: I am not aware of this, but there is no other example quite like the EFTA Court.⁴ It is a unique European thing.

In the early 1960s, when Britain tried to join the European Economic Community for the first time, the three EFTA neutrals—Austria, Sweden and Switzerland—started association negotiations with the European Economic Community. At that time, it was clear that there would be only one pillar and that they would have to accept the Commission and the ECJ. In 1992, the EFTA states successfully negotiated the right to have their own pillar and their own institutions, but this is a unique thing. It has functioned well. It is not only me who says that; it is said in every government report. My counterpart at the ECJ, until the last day of last year, Koen Lenaerts, said in an interview on Flemish television that the system works perfectly. But it is a unique European thing.

The Earl of Kinnoull: A very brief question: how do you think the existing members of the court system would feel about the arrival of great big Britain?

Professor Carl Baudenbacher: You do not mean the judges.

The Chairman: The nations.

Professor Carl Baudenbacher: I probably should not speak about this, but you will have read in the newspapers, as I have, the statements of the individual member states. One is positive. Another is reluctant. The third is open-minded. That is all that I want to say. But you never knocked at the door. It is difficult to expect others to say, "Please come in", if you do not knock at the door.

The Earl of Kinnoull: My final mini-question is this: do you think that if Britain arrived in the EFTA Court, either as a member of the court or as a docked member, we would bring benefits to the court, given our long history of courts?

Professor Carl Baudenbacher: Personally, I am an admirer of the British way of lawyering—the quality of argument that you have in this country, the quality of your judiciary and the quality of reasoning. From my personal perspective, it certainly would be a benefit.

Lord Polak: What you have said is refreshing and interesting. The one thing that I would say is that, over here, we believe very little of what we read in the newspapers, with reference to your last comment. I have found this extremely practical. I note that you are finishing on 31 March. If anyone is listening, I think that from 1 April you should advise our Government on what is practical and possible.

The Chairman: A consultancy job awaits you, Judge Baudenbacher. I want to say thank you. It was very illuminating having you here. It has been invaluable, so thank you so much. I think that the EFTA Court has been hugely lucky to have had you leading it for 15 years. We wish you

⁴ In a broad way, you could say that here are other examples of docking around the world, for example, at the Caribbean Court of Justice. One could see a similar sort of idea here in London with the Justices of the Supreme Court also sitting on the Judicial Committee of the Privy Council.

well into the future, because you have clearly have been a very distinguished judge and leader of that court. We feel honoured that you have come to testify before us. Thank you.

Professor Carl Baudenbacher: Thank you very much, Lord Chairman and ladies and gentlemen.