

Exiting the European Union Committee

Oral evidence: The Progress of the UK's Negotiations on EU Withdrawal, HC 372

Wednesday 7 February 2018

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Members present: Hilary Benn (Chair); Joanna Cherry; Sir Christopher Chope; Stephen Crabb; Mr Jonathan Djanogly; Richard Graham; Wera Hobhouse; Stephen Kinnock; Jeremy Lefroy; Craig Mackinlay; Mr Pat McFadden; Seema Malhotra; Mr Jacob Rees-Mogg; Emma Reynolds; Stephen Timms; Mr John Whittingdale; Sammy Wilson.

Questions 965 - 1048

Witnesses

[I](#): Professor George Yarrow, Chair of the Regulatory Policy Institute, Emeritus Fellow, Hertford College, Oxford, and visiting professor; Ulf Sverdrup, Director, Norwegian Institute of International Affairs; and Professor Alla Pozdnakova, Law Faculty, University of Oslo.

[II](#): Professor Carl Baudenbacher, Judge of the EFTA Court.

Examination of witnesses

Witnesses: Professor Yarrow, Ulf Sverdrup and Professor Pozdnakova.

Q965 **Chair:** Good morning. On behalf of the Committee, I welcome our three witnesses for the first of two panels today: Professor George Yarrow, Chair of the Regulatory Policy Institute, Emeritus Fellow, Hertford College, Oxford, and a visiting professor at Newcastle University Business School; Ulf Sverdrup, Director of the Norwegian Institute of International Affairs; and Professor Alla Pozdnakova from the Law Faculty at the University of Oslo. You are all very welcome. We have a lot of ground that we want to cover this morning. Therefore, answers as succinct as possible to enable us to bring colleagues in and cover the ground would be exceedingly helpful.

To kick off, Professor Yarrow, can I begin with you? You have said that EEA membership—I think this was the quote—“ticks all the major leave



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boxes.”

Professor Yarrow: Yes.

Q966 **Chair:** Would you care to offer a view as to why you think it is not being greeted by acclaim, if that is what it does?

Professor Yarrow: That is a very interesting question. I think it is a political question. The people who feel most deeply about this issue have their own first-best solution, which they are advocating with great intensity, whether that is a clean break, a hard Brexit on the one hand, or to remain on the other. It is nobody’s favourite. I actually believe it is a very attractive alternative and think it is what most people in the country would prefer. Therefore, it is the major rival to both ends. There is, therefore, a “trash the nearest alternative” psychology in the debate.

Q967 **Chair:** The membership of the single market as a member of the EU and membership of the EEA, as Norway has, is often described as if they are identical.

Professor Yarrow: Indeed.

Q968 **Chair:** You have set out, quite clearly, why you think they are not. Do you want, very briefly, to explain why they are not the same thing?

Professor Yarrow: The simplest way—and I have thought about doing this—would be to bring the two treaties along, but I decided not to because I thought it was a waste of paper. If you look at the Treaty of Lisbon and the associated Treaty on the Functioning of the European Union, it would stack that high. You have probably seen the EEA Agreement, which is a much shorter document.

In moving from one to the other, you lose a tremendous amount, including the topic of the hour—the customs union— including agricultural policy and fisheries policy. They are two different rulebooks, essentially. Under the smaller rulebook, you can negotiate your own international treaties, so there is commercial policy and sovereignty. They are four very big things. Fisheries is small for the economy as a whole but important in areas along the east coast and in Scotland. It is a politically important issue. The other three are very big issues.

Q969 **Chair:** Mr Sverdrup and Professor Pozdnakova, if the UK were to decide that it would like to be both a member of EFTA and the EEA, do you think that Norway would be happy about that? How would Norway feel about this? Given the arrangement that has existed for some time, if the UK were suddenly to join, what do you think the reaction would be?

Ulf Sverdrup: Let me first say that I am glad to be here, and I am not representing the Norwegian Government.

Chair: No. I understand that entirely.

Ulf Sverdrup: Nor am I representing the Norwegian people as such. The fundamental idea is that the EEA Agreement has worked pretty well for



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Norway in terms of economics and politics. Essentially, it has contributed to the process of Norwegian co-operation and integration with the EU but at the same time not being an EU member.

Two things make Norwegians concerned about bringing the UK in on the EFTA side. The first is that, in EFTA, decisions on adding new legal Acts are done through unanimity. So, if the UK is brought in, it might change the dynamics slightly within EFTA. The second slight concern is that, if the UK uses the EEA as a platform for disintegrating from the EU, that is slightly different from the spirit of the EFTA countries who are using this platform as a form of continuing integration. Those are the two main concerns.

Professor Pozdnakova: I mainly agree with Ulf. An interesting point to make here is that, for now, the EFTA pillar in the EEA has functioned on the basis of a basic agreement between the EFTA member states reaching a diplomatic agreement. If the UK enters the EFTA pillar of the EEA Agreement, we may see some interesting examples of the provisions of the EEA Agreement being used in a completely different way, hypothetically speaking. Some of them have never been enforced by the parties before, but this may change if the balance changes assuming the UK enters the EFTA pillar.

I have never heard or read any statements in Norway saying that the UK is not welcome in the EFTA pillar. In fact, the UK is a very important trading partner for Norway. Hypothetically speaking, not being a politician, I would think that Norway would be interested in finding some kind of arrangement to suit these trading interests. The EFTA Agreement does say that participation in EFTA has to be with consent from all the states, so the UK would have to negotiate with all the four EFTA member states before anything happens.

Chair: Thank you very much, indeed.

Q970 **Mr Rees-Mogg:** In terms of regulations that come through the EEA Agreement, how far can Norway diverge from regulatory alignment with the EU?

Ulf Sverdrup: There are two issues. One is the scope of the agreement. Are there some areas not covered by the agreement? Obviously, we can fully diverge in areas not covered by the agreement. As you are aware, the agreement does not cover all aspects related to agricultural and fisheries policies, the customs union, external trade agreements and so on.

In those areas included in the agreement, we do not have any possibilities of deviating from that. In the EEA Agreement, there is a duty to loyalty, as there is in the EU. Could I just add to what Professor Yarrow said? I do not think it is fully correct, or at least I would not phrase it in that way, to say that they are two different rulebooks. It is the same rulebook, but we have a smaller section of that rulebook.



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At the same time, we have done lots of studies on what we would call room for discretion in national interpretation of rules. If you have a good administration and competence, there are many opportunities to find your way around that legal framework.

Q971 Mr Rees-Mogg: What effect does taking on the smaller rulebook have in other areas, because Norway is not a member of the customs union, but it is tied into a tight regulatory framework? Does this make it harder to get customs agreements with third countries or does it not make any great difference?

Ulf Sverdrup: I should have added one point on discretion. Of course, formally, Norway can, together with all the EFTA countries, reject the adding of a new legal Act, but that is what we call a legal right. It has never been used. We have added around 8,000 legal Acts into the agreement.

On the customs union, when Norway, Switzerland and Iceland enter into free trade agreements with other countries, we can do that alone or together with other EFTA countries. Then we negotiate, basically, on the platform of WTO rules. In many areas, these negotiations enter into the non-tariff barriers that are covered by the EEA Agreement.

Q972 Mr Rees-Mogg: So, the lifting of non-tariff barriers is the particular issue with relation to EEA regulations. You are free to take your tariffs, but because you are brought into at least part of the European Union's rulebook you cannot lift non-tariff barriers that those would create.

Ulf Sverdrup: You are right.

Q973 Mr Rees-Mogg: That must, to some extent, be an obstacle to free trade agreements with third countries.

Ulf Sverdrup: Probably. The Norwegian Government have very different interests from the British, for instance, on free trade on agriculture. We do not want free trade on agricultural products, for instance, but we want massive free trade on fish. These regulations on agricultural products, technical standards and veterinary standards are not that harmful.

Q974 Mr Rees-Mogg: But in terms of new regulations coming in, what influence does Norway have? What are the levels of discussion about new regulations? EFTA has the ability to reject a new regulation, but is it involved in the drawing up of a regulation?

Ulf Sverdrup: Formally, the EEA Agreement allows for members of the EFTA Governments to participate in the commission of the preparatory work of legal Acts. So they are very much involved in those stages. That is the formal involvement. In addition to that, Norway is, of course, a lobby nation, pretty much as I expect the UK will be as well, trying to influence EU developments from the outside. That is one part. Then you have the formal vote in the EEA Council where you can accept or reject. That is pretty much it.



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Q975 **Mr Rees-Mogg:** In terms of specific sectors, how does Norway collaborate with the EU in research and aviation? What agreements do you have in that area? I do not know if anyone else wants to come in on these questions.

Professor Pozdnakova: If I can comment on the research, it is one of the horizontal policies in the agreement. Norway co-operates with the EU on that. I also know that Norway contributes quite a lot to the financial mechanisms for research. Not being fully aware of all the details, this is partly done on a voluntary basis, apparently as a result of political negotiations, which Norway thinks it is good to do.

If I can just supplement a little on the scope of the EEA Agreement and the technical regulations, when it comes to the goods that are covered by the EEA Agreement, according to current detailed rules, Norway can participate, as Ulf pointed out, at the preparatory stages of drafting new EU rules, but basically you are done when the new EU proposals go to the Parliament or the Council. Then Norway has no say, it cannot participate in substantive discussions and it cannot vote.

When it comes to the goods that are not covered by free movement but those in regard to which Norway undertook in the EEA Agreement to gradually liberalise the trade, there are still some essential impacts in the EEA Agreement on this. For example, veterinary and phytosanitary rules are part of the EEA Agreement, and they apply also to the goods that are not covered by the full freedom of movement. When it comes to technical regulations, there are also additions in the form of annexes that would cover the goods that are not subject to full free movement in the EEA.

Q976 **Mr Rees-Mogg:** In this context, what do you think the reaction of Norway would be if the UK joined EFTA, we said that we were going to sign up to the EEA Agreement, but we were going to have greater regulatory divergence rights and we were not going to accept the free movement of people as a particular issue? Do you think that is something that would be acceptable and welcome, or would it be problematic if the UK were to have greater flexibility over regulations than other countries in a similar treaty relationship with the EU?

Ulf Sverdrup: As to the first point regarding EFTA, the UK is already a member of the EEA. There are two ways of being a member of the EEA. You can be on the EU side or the EFTA side. Your question is: what if the UK changes sides? In order to do that, you have to join EFTA. Then you have to sign up to the EFTA Convention. Liechtenstein, Iceland, Switzerland and Norway have to approve that. That will not regulate your relationship with the EU, but it will commit you to entry into EFTA's free trade agreements.

Then the question is: if you want EFTA to regulate your relationship with the EU through the EEA Agreement, you will then have to have the approval of the EU to do that.



As to the final point in your question, is it possible to renegotiate the EEA Agreement to take out the free movement of persons and so on? As it is today, the free movement of persons and all these aspects are part of the EEA Agreement. So, there is, in principle, no possibility of doing what you suggest. However, it might be possible, for instance, to try to renegotiate the EEA Agreement as such, but I do not think all the EFTA countries have a big interest in doing that now.

Q977 Mr Rees-Mogg: Liechtenstein has a specific opt-out from the free movement of people, but it has always seemed to me unlikely that the UK could claim that it was Liechtenstein in these circumstances, because the issues around Liechtenstein are specific to a very small nation.

Ulf Sverdrup: The United Kingdom is a great country with a great history. Liechtenstein is also an interesting country but a small principality. It is not comparable.

Mr Rees-Mogg: I agree with you. Thank you very much.

Q978 Wera Hobhouse: Since the leave debate was very much about sovereignty and the role of our UK Parliament, can I ask about the Norwegian Parliament and the way it can delay, amend or refuse legislation from the EU?

Professor Pozdnakova: As we have already discussed, all the EU legal Acts that are relevant for the EEA Agreement have, first, to be adopted by the EEA Joint Committee in order to become part of the EEA legal order. Norway, of course, participates as one of the EFTA states in the decision making at the EEA level.

When this has been done, it is up to the Norwegian Parliament and the Norwegian Government to take further action in order to take what has become an EEA directive or an EEA regulation into the Norwegian legal order. In this way, the question of sovereignty comes up. At least according to the textbook, Norway has retained full legislative powers in the EEA Agreement. It is just an international agreement—well, sui generis of some kind—but it is an international agreement and not a supranational agreement. It means that it is up to the Norwegian legislator to make a decision concerning that.

If this EEA legal Act is reinforced within the scope of the EEA Agreement, then the Norwegian legislator would be reluctant to say, “No. That would be a breach of EEA obligations.” But the possibility of doing that, like using reservation rights, has been discussed—I wouldn’t say frequently. There are 6,000 to 8,000 legal Acts, and it has come up, maybe, 18 times or so in the Norwegian Parliament with respect to important Acts, but, nevertheless, it is a small number. The Norwegian Parliament can put its foot down and say, “No, we are not going to do that because it is not acceptable.” In practice, Norway would be aware of this new Act coming up long before this would be discussed in Parliament, because Norway participates in expert committees—participates in a sense in the preparation of these Acts.



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Legally and technically, EEA Acts are taken into the Norwegian legal order either by governmental decree—in earlier times it could be an instruction but generally it is a governmental regulation—or they can be taken into the Norwegian legal system by law, by statute. This would be the case where it is an important rule affecting the nation's citizens too much for it to be just a governmental decision. When this is done, then it is part of the Norwegian legal order, meaning that it has direct applicability and primacy over conflicting Norwegian laws. We like this two-stage process.

Q979 Wera Hobhouse: People could see that it is being debated in Parliament and it would be a very transparent process.

Ulf Sverdrup: Obviously, the EEA Agreement has some weaknesses, and one of the biggest weaknesses is poor representation and poor involvement of the Parliament. There are some fundamental aspects related to parliamentary activity that are made more difficult through the EEA Agreement.

First, it is very difficult for the Norwegian Parliament to instruct the Norwegian Government on what it should say or how it should vote in Brussels as it has no vote. Secondly, it is also difficult for the Norwegian Parliament to keep the Government accountable on what they really said, because there are no minutes from a lobbying activity. That is one fundamental weakness.

When it comes to the legal aspect, the legislator, as you said—Parliament—is involved. When it comes to budgetary affairs, Parliament is involved. It allocates money, for instance, to research spending, satellite co-operation and all kinds of programmes. It approves that every year.

As to the public debate, European affairs is not so much discussed in the Norwegian Parliament. Indeed, a study of different Parliaments in Europe comparing their attention and the involvement of the Norwegian Parliament revealed that the Norwegian Parliament discusses European affairs rarely, and, when they do, those meetings are shorter and with less content. So, Parliament is sidelined a bit. Parliament has shifted into Government.

Q980 Mr McFadden: Can I ask you about the trade aspects of the EFTA EEA arrangement? As you will be aware, I think it was you, Professor Yarrow, who said that the customs union is the issue of the moment here. A great part of our debate revolves around having an independent trade policy—the capacity to pursue your own trade agreements. How important has this been for the EFTA countries, and how actively has that freedom been used to reach trade agreements with other countries in the world?

Ulf Sverdrup: Historically, the EFTA countries were primarily concerned about promoting trade among themselves and with the EU. When the EU entered into free trade agreements with countries in east and central Europe after the collapse of the Berlin wall, the EFTA countries started also to sign free trade agreements with them. For quite some time, the



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pattern was that the EU entered free trade agreements with external partners and then EFTA countries joined in afterwards to avoid discrepancies.

Since the Swiss are not part of the EEA, they said that EFTA should do a bit more on the free trade agreement with the rest of the world, particularly when you saw that the world trading system became a bit more like a spaghetti bowl with more FTAs—bilateral free trade agreements.

During the negotiations on the free trade agreement with Mexico, EFTA countries discovered that they could sign these agreements quicker than the EU, a few months in advance. So they started making them a bit more. For instance, we entered into a free trade agreement with South Korea 18 or 20 months before the EU did. In content and scope, they are not that different from the EU's agreements.

EFTA today has around 27 free trade agreements, but they have not been successful in negotiating free trade agreements with what we could call the biggest economies in the world. There is no free trade agreement with Japan, Australia and India, although it is trying to negotiate one. There is also no free trade agreement with the US or Brazil. That is probably because the Norwegians do not want to bring agriculture into the discussions, but that is important for the US, Australia, Brazil and so on.

Q981 Mr McFadden: Do the EFTA countries negotiate these agreements as a block or do the member countries—for example, Norway—negotiate their own bilateral, Norway-to-one-other-country agreements?

Ulf Sverdrup: They have the option. They can do both. There is no obligation to negotiate together. For instance, Iceland entered into a free trade agreement with China, as did Switzerland. Norway is negotiating a free trade agreement with China now. In many other aspects, there are joint EFTA agreements. You have to take into account that these are small countries. Some countries might have been surprised when the European Free Trade Association—EFTA—came along and was only 10 million people. You are not on the demand side all the time.

Q982 Mr McFadden: How much difference do you think these trade agreements have made to the GDP of the EFTA countries?

Ulf Sverdrup: Some economists have tried to model the effects of this, and some of them have rather marginal economic effects. Probably the one with the biggest positive effect was the free trade agreement with South Korea.

Q983 Mr McFadden: Finally, on content, you said that the content was quite close to the content of the agreements that the EU strikes with third countries. Does that mean that they cover, principally, goods and agricultural products but not services?



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Ulf Sverdrup: Yes. I am not an expert on the content on them. I am happy to try to send something to the Committee afterwards. A colleague of mine has written a paper on that.

Mr McFadden: Thank you.

Q984 **Craig Mackinlay:** One of the considerations that we have to wrestle with is the Northern Ireland-Republic border. The Norwegian-Swedish border has potential similarities in that Norway is outside the customs union and Sweden is a fully-fledged EU member. I know that before EU membership, I suppose under the EFTA rules, there had always been a lot of flexibility across that border. When Sweden became a full EU member and Norway remained out, did that change the border in any substantial way, and what does that border really look like today in terms of smuggling? I know, from personal experience, that the cost of alcohol in Norway is significantly more than the cost in Sweden. Are there flows of smuggling across this border, or is it fairly laissez-faire and a bit of, "Well, you gain a bit on that, we lose a bit on the other, and we just muddle along together"? What is the experience of that?

Professor Pozdnakova: I can take at least part of this question. When it comes to the freedom of movement for persons, the biggest impact was not Sweden joining the EU but Sweden joining the Schengen Area. That is what, in a sense, made Norway, as well as Sweden and Finland, join the Schengen Agreement as well to make sure that there is still freedom of movement of persons between the Nordic countries and that it is not messed up in any way by it now becoming an external border for Norway. So, Norway being a member of the Schengen Agreement, it has free movement of persons between Sweden and Finland across the border. There is an external border with Russia.

When it comes to customs and goods, I would think there is a good deal of smuggling going on. As has already been pointed out, the EEA Agreement is not a customs union. But Norway, through the EEA Agreement, which EFTA states committed to, facilitates the customs checks and inspections. Norway has agreements with Sweden and Finland—with the EU, basically—concerning the facilitation of the customs checks and how they do that.

Q985 **Craig Mackinlay:** What does that customs check physically look like? Is there anything really physical at the border, or is it reliant on pre-clearance?

Professor Pozdnakova: When it comes to land—roads—there are checks on some of the roads but perhaps not on others. You can basically drive across the border without being stopped, for example, from Oslo to Stockholm. You can then take a ferry to the EU, like the Baltic states, for example, but there is a requirement to declare the goods that are subject to customs. If you have goods that exceed such an amount or some special goods, you have to make a declaration about it and go to one of



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the customs officers. There are also random checks, so you can be stopped when there is a check going on.

I am not sure that this is part of your question, but an interesting aspect is that in Norway, Sweden and Finland the customs officers co-operate. Swedish officials, for example, can conduct inspections on the Norwegian side of the border.

Professor Yarrow: I believe that there are about 80 border crossings, and I think the number with infrastructure is something like 14. It is less than 20. That gives you an impression of how much is covered with physical infrastructure and how much is not.

Chair: For clarity, it would be very helpful to understand what happens with regard to the position for trucks—for lorries.

Q986 **Craig Mackinlay:** It would seem like a typical problem to solve, but you have obviously solved it. As to the rules of origin, when a good has come into Norway and maybe some manufacturers have it for forward transmission to Sweden, what is the real process? What happens? What does Sweden as an EU member require of you to maintain the rules of origin differences? A really important point is: what percentage of trucks are randomly and physically stopped around that border area?

Ulf Sverdrup: I understand that somebody from the Norwegian customs authorities gave evidence to this Parliament yesterday. They would be the right person to ask; they would know the numbers and all the technical aspects. I don't know if there is somebody from the Norwegian embassy here who might inform you later on about who that was and where they got that evidence.

But you are right: the key aspect is not the persons moving across the border. The key aspect is the lorries and trucks that are crossing. If you go to the border now, you see that the trucks are stopped. They are in a long line to declare their papers, but most trucks can pass through rather rapidly because they have done some kind of electronic declaration up front. That requires a pretty advanced electronic system, combined with a good, trust-based system, with a lot of information about the economic operators. Then, of course, you have these risk-based random checks. That is one thing.

Another thing is that staying outside the customs union also has some implications for consumers because these checks have some costs. They are indirect costs. The Government puts the regulatory burden on businesses and I guess businesses get it back with higher prices. That is one thing.

The other thing is that, if we look into the future, or even currently, as to how business is doing and how you as a consumer are operating, if you click on amazon.com you get your product. That is not true. We as individuals have to declare to customs. If I want to buy some shaving cream from the UK from up the street here on the internet, I will



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probably have to pay double the price, like £15, as a declaration fee because of the VAT at home. You should not look only at VAT at the physical border but outside the customs union. That has huge implications on individuals engaging in that e-based economy.

Q987 Craig Mackinlay: I know it is strange and very little known, but if you do that type of e-commerce in the States you have to do a self-declaration if you buy something in Florida and you live in California, which is a really bizarre system.

Professor Yarrow, do you have any knowledge about the numbers that are getting stopped, and how flexible, frictionless or otherwise this system is?

Professor Yarrow: I do not carry the numbers in my head and it gets harder with age to stay on top of them. I can direct you to a paper, which I do not know whether the Committee members might have seen, for the European Parliament published in November of last year by a gentleman called Lars Karlsson. Does that ring any bells? It is an excellent paper. It is specifically on the Irish border issues, but it is an analysis of modern customs systems. It is another document that probably has not had much publicity because it is very much in line with the UK Government's documents that were issued very early and is rather opposed to the negotiating position of the European Union. I think it is a European Parliament paper that might not want to be advertised by the European side.

It is called Smart Border 2.0 by Lars Karlsson. He was the deputy director general of Swedish customs. The Norway-Sweden border is a case study in this paper. He was also the director general of the World Customs Organization, which is a WTO organisation.¹ It covers 98% of world trade. I think you can take Mr Karlsson as pretty much an authority on these things. You will find he discusses, probably, many of the questions that you would have if you had a lot more time this morning.

Q988 Craig Mackinlay: Finally, very briefly, Mr Sverdrup, you may know the answer to this question. You say that costs are incurred by the consumer via the Government's levies on whatever is required at the border. Do Norwegian consumers benefit from the flexibility that Norway has with having its own tariff rates for things that it buys internationally, perhaps exotic foods that you cannot grow in Norway or that cannot be obtained in the EU at all, so you have the benefit of lower tariffs for certain items that are just not available to other EU members? Is there a counterbenefit for your consumers by having your own tariff rates on certain items? I am thinking about food, footwear and clothing.

Ulf Sverdrup: There is some Norwegian benefit. It is primarily in the Norwegian agricultural and food sectors because they benefit from high entry barriers for other competitors, which consumers and voters seem to be willing to accept. It is slightly the other way round. We expect having

¹ Witness note: The World Customs Organization is a WTO-linked organisation.



higher tariffs than in the EU and to pay higher prices for our agriculture also on imported goods.

Q989 **Mr Whittingdale:** Can I look in a little more detail at the operation of the EFTA Court and the EFTA Surveillance Authority? Could you set out what is the major difference in terms of the powers of the EFTA Court compared with the powers of the ECJ?

Professor Pozdnakova: There are several differences, the obvious one being that the EFTA Court and the EFTA Surveillance Authority can only have competence with respect to the EFTA pillar of the EEA Agreement, while the ECJ and the Commission have competence with respect to EU member states or EU pillar of the EEA Agreement.

When it comes to the EFTA Court, it is a very important institution, which is ensuring the homogeneous obligation of EEA law. What it cannot do, for example—I believe the ECJ can do that—is to rule on a fine for a member state for infringing the EEA Agreement. If Norway is taken to the EFTA Court eventually for an infringement of the EEA Agreement, which has happened several times, the EFTA Court can rule that Norway has violated EEA law and has to comply with it, but it cannot impose any financial penalties for that violation.

Q990 **Mr Whittingdale:** What if Norway says, “We do not agree, so we are not going to do it”?

Professor Pozdnakova: That would still be a violation of the EEA Agreement. That would trigger the mechanisms that can lead to a suspension of the relevant part of the agreement. It can lead, maybe, to a country triggering a safeguards mechanism, but that has not happened. In a sense, Norway has to comply with its obligations because it feels that it is bound by the EEA Agreement.

Another important difference, at least for academics, is that the EFTA Court can issue an advisory opinion on how EEA law is to be understood and interpreted by the national court. Although these opinions are called judgments by the EFTA Court, it is still an advisory opinion. This is by contrast to ECJ preliminary rulings, where, first, there is a duty on the national court to refer the question to the ECJ under certain conditions. The second is that an interpretation of the EU law issued by the ECJ is binding on the national courts. That is not the case with the EFTA Court.

Recently, Norwegian courts have gone even further than that. They have taken a self-standing decision on what EEA law is. They should comply with an EFTA Court ruling, but they make their own analysis of what EEA law is. It has happened that a national court of Norway said, “We do not really agree with how the EFTA Court understands EEA law.” These are quite important differences, I believe.

Q991 **Mr Whittingdale:** When there has been a dispute between the national court and the EFTA Court, what has happened?



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Professor Pozdnakova: Norway has been criticised or the Norwegian courts have been criticised by the judges. In the future, this may lead to Norway being taken to the court again for violation of EEA law. That is basically it.

Q992 **Mr Whittingdale:** I see that the EFTA Court covers complaints about infringement of competition as well as state aid provisions. Does that, therefore, mean that the EFTA Court is ruling on regulatory alignment?

Professor Pozdnakova: The EFTA Surveillance Authority can take decisions in the field of competition and state aid. The undertakings, when it comes to competition, may sue the EFTA Surveillance Authority in the EFTA Court.

Q993 **Mr Whittingdale:** So, in essence, if an EFTA member state wished to diverge in terms of regulatory requirements that apply in the EU, they could be taken to the EFTA Court by the EFTA Surveillance Authority and told that that was a breach and that they had to adopt those requirements; is that correct?

Professor Pozdnakova: Yes.

Q994 **Mr Whittingdale:** We are talking about the theory. Has this happened? How many times has an EFTA country been challenged—Norway in particular?

Professor Pozdnakova: There have been several cases—I do not remember the exact number—where treaty infringement proceedings were brought in the EFTA Court against Norway.

Q995 **Mr Whittingdale:** So, essentially, the suggestion is that by being in EFTA and not in the EU it gives you the freedom no longer to have to follow regulations imposed by the EU; in practice, that is not the case.

Professor Pozdnakova: Can you repeat that?

Q996 **Mr Whittingdale:** The practical consequence is that Norway and other EFTA countries do have to maintain regulatory alignment, because otherwise they will be challenged in a court and told that they have to comply.

Professor Pozdnakova: Yes. That is basically the case.

Ulf Sverdrup: Could I just supplement that? We have to understand that the fundamental idea is that, in areas covered by the agreements, the EFTA countries and the EU countries are supposed to follow the same routes and comply with them in the same manner. Homogeneity is a fundamental principle. Due to the structure of the EFTA Agreement and to the insistence of the EFTA countries to maintain sovereignty, they cannot delegate this to the EFTA Court or to the Commission. That is why they have created this separate arrangement—the EFTA Surveillance Authority. That is like a mini European Commission. The EFTA Court is like a mini European Court of Justice. There are small marginal



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differences. For instance, the Norwegian court is not obliged to refer a case to the European Court of Justice, but it may, can and does ask for an opinion on how the EFTA Court would rule on a question. The national courts in Norway, for instance, refer to EFTA Court rulings, but also to rulings by the European Court of Justice in daily applications. So, in principle, there is no difference in the way that rules are interpreted, and that is how it should be.

Q997 Mr Whittingdale: Is the EFTA Surveillance Authority in Norway perceived to be a body that acts to protect the interests of Norwegian citizens and businesses, or is it seen as basically a creature of the Commission?

Ulf Sverdrup: It is a creature created by the EFTA countries to make sure that the EFTA countries are taking care of the agreement. It is seen as somebody policing a third party—policing, surveilling and monitoring activities. It is seen as a bit of an outside body, although it is composed of people from the EFTA countries; but they are supposed to be neutral and the guardians of the EFTA EEA side.

A fundamental factor, which is probably the biggest hurdle for you in your Brexit discussions, is that in managing your relationship with the EU you probably need to establish some kind of trust. Trust is very difficult to establish. The main way of doing that is through the institutions. We need institutions to manage that kind of trust.

Who is complaining to EFTA or the EFTA Surveillance Authority? Primarily, it is the Norwegian economic operators, who say, "Hey, the Norwegian Government is not complying with EU rules." It is not like a supranational policing of Norway, but it is the operators in the Norwegian market who have some kind of legitimate concerns that they want to protect, or we also want to protect Norwegian interests operating in the EU market.

Q998 Mr Whittingdale: If I wished to make a complaint to the EFTA Surveillance Authority, do those complaints come primarily from Norwegian citizens and businesses, or could they come from businesses in the European Union who might regard Norway's behaviour as unfair competition?

Professor Pozdnakova: It is both. Undertakings in EU member states may be unhappy with how Norway applies its EEA obligations. One of the recent cases was a complaint about the prohibition on foreign fishing companies to catch snow crabs around Svalbard. What happened was that a Lithuanian undertaking complained to the EFTA Surveillance Authority, but that complaint was dropped because Norway has a right under the EEA Agreement to maintain this kind of restriction based on oceanality that was negotiated inside the EEA Agreement. That was not the case to win, in a sense, but that is one of the examples.

Let me make one more comment about the dispute settlements in the EEA. When EU and EFTA countries meet in the EEA Joint Committee



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where they make a decision to take a new EU directive or regulation into the EEA legal order, and there is a disagreement or reservation rights are invoked, and EFTA and the EU do not agree, this disagreement does not automatically go to either the ECJ or the EFTA Court. It has to be settled by the parties. It can eventually be sent to the ECJ if both the EU and EFTA states agree to do that, but there is no binding dispute settlement mechanism for that in the ECJ or EFTA.

Q999 **Chair:** For clarity, if there is an area in which Norway is not complying with the agreement, they are told to comply and they do not, is the sanction available to the EU to say, "In that area"—it could be chemicals, engineering or whatever—"you are losing your access but not all of your access"? Would the sanction apply just in the area that was the matter of dispute? That is just for clarity. Secondly, I wanted to give you, Professor Yarrow, an opportunity to comment on the discussion and the questions that John Whittingdale has just asked.

Professor Yarrow: Can I answer both questions? It is a rather convoluted argument because it is telling people to keep talking to each other and reach compromises. Article 102 of the EU treaty says that if, at the end of that process, you cannot get there, there is a provision—it is only a provision; the EU or any other party, in fact, would not have to take it—to suspend, as it says, "a part of the annex."

That has not happened, so there will be a question of what "a part of" means at some point. Is that a little bit of the annex or a big bit? I think it would be settled on a case-by-case basis. If there was a particular case with particular characteristics, you would probably strike down that part of the annex that was relevant to that, but it is difficult to give a general answer in advance.

On the more general issues, there is a common misunderstanding about what homogenisation and harmonisation means. A lot of regulations are to do with things like product standards, where it is picking a number. That is clear. Since state aids and competition law have been mentioned—and these are my areas—you have to understand that the treaties specify very general things. It is almost motherhood and apple pie. It says, "Don't cartelise. Don't conspire to raise prices," which is article 101 of the EU treaty. Article 102 says, "Do not abuse market power." It is, essentially, "Superman II": with great responsibility comes great power, but it is a very general principle.² That has to be interpreted by the enforcement agencies in individual contexts. They disagree among themselves.

Then it goes to courts, and courts disagree. You will find within the EU system different benches of the European Court disagreeing about the interpretation. You will find different national courts disagreeing about interpretation. Of course, for competition law, enforcement can be

² Witness note: The film being referred to should have been Spiderman II.



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through the national courts. So, it might be a High Court judgment that you are looking at versus some other judgment.

The EFTA Court fits into this pattern. It is one court among many. It is designed under the EFTA pillar arrangement to look like the ECJ. It is at that level of looking at things. All of these things, in the end, when you are talking about sovereignty, come down to power. The difference is that the EFTA Court compared with the national courts of the UK is at the same level.³ There is no supremacy as the ECJ has when it is dealing with European law.

What happens is that you will get different judgments. The same court agrees with itself 10 years ago, in some cases.⁴ There is no way that any of us can help with this, but you get what are called "intense judicial dialogues." Judges at their own seminars will talk about these cases and try to establish why they have reached different judgments and interpretations of homogeneous law on the books. It is a very messy picture. It is a wrong conceptual map to think of "There are the regulations"—at this level anyway. We can talk about what is divergent and what is not divergent, but that is a very contested area.

Chair: That is extremely helpful. Emma Reynolds wanted to come in on this point.

Q1000 Emma Reynolds: The discussion on the detail is very interesting, but the bigger picture, surely, is that Norway and other EEA member states have made the calculation that the economic benefits of market access to European markets outweigh any of the disadvantages, such as cost and loss of sovereignty, of abiding by the rules.

Professor Yarrow: That is exactly right. That is the challenge that comes back if, let's say, there is a national law and then there is some case in the EEA where it goes to the EFTA Court and the EFTA Court makes a judgment that is contradictory to the national law. The issue is—and this is law on the books in the UK—that you have a previous domestic law, but you also have a law that says, "We are committed to the EEA, and, therefore, we are committed to all the obligations of the EEA." There is, therefore, a conflict in national law between two pieces of legislation. These are both pieces of domestic legislation. We are a member of the EEA and then there is the national law concerned with the particular issue. It is for Parliament to resolve that. That is exactly the sort of calculation that is made.

If this matter is of great importance in national legislation, I do not think you would withdraw from the EEA straight out, but you would go back and there would be, again, intense discussion and dialogue to see if there was a way round the problem. At the end of the day, you might decide that the matter was so important domestically that you give one year's

³ Witness note: The EFTA Court is at the same level as the European Court of Justice.

⁴ Witness note: The court can disagree with itself



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notice and leave the EEA. It is at that level. Normally, in these things, what happens is that the EFTA Court judgment would be a little different from the domestic legislation, and you would say, "It's not worth it, because there will be a tremendous fuss and a lot of cost if we don't go with the EFTA case."

Professor Baudenbacher can talk about this because he was the judge in the state liability case where this happened. I do not know whether Norway was happy or not, but Sweden was very unhappy with the judgment of the EFTA Court. After a period of dialogue and weighing up the pros and cons, it changed its domestic law. Ultimately, the power to do that and the final decision rests with the national Parliament. It always does under the EEA.

Ulf Sverdrup: Can I just add one point to what Emma Reynolds said? I think she is right. Norway did a big study, which ran to 1,000 pages, on the economic, political and social impacts of Norway's agreements with the EU. You are right. A short version of the conclusions is that the economic benefits outweigh the costs. It has been good for the economy, not only in the cross-border aspect, but on the intra-Norwegian economy, because the EEA Agreement also regulates intra-Norway economic activity. It is not only on the economic side but also on the political side. We might even add that this is primarily due to the fact that there are no other good alternatives or better alternatives that are politically feasible.

Chair: Richard Graham has a question on this.

Q1001 **Richard Graham:** Mr Sverdrup, in terms of Norway's thinking ahead of what the future relationship with the UK might be, almost a quarter of your exports currently come to the UK. What analysis has been done in Norway of what might happen under different scenarios to that export activity?

Ulf Sverdrup: It is fair to say that a lot of people in Norway regretted the UK leaving the EU because the UK has been a good partner of Norway in the EEA. You have facilitated Norwegian inclusion into a lot of things, and you have also been very good in shaping the developments in the EU in directions that have suited Norwegian interests: for instance, the environment, climate, competitiveness and so on. But put that to one side.

As I understand it from the Norwegian Government, they would like to have, first of all, an ordered Brexit. Secondly, they would like to have as close a relationship with the UK as possible. They want to have something like the EEA, or continue the EEA, or something similar to that. Then, could we add another aspect relating to free trade, for instance, on fish and so on? Norway would be happy to see that.

Then, of course, something that is not dominating the Brexit discussion but is a very important topic relates to security. Our countries' geography is very close; we are concerned about the northern Atlantic, the huge



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nuclear contracts in NATO and its huge possibilities to further promote security co-operation. Norway has a huge interest in the discussions between the UK and the EU on the future security and defence arrangements.

Chair: Thank you. That is very helpful. Joanna Cherry.

Q1002 **Joanna Cherry:** I want to ask a few more questions about the EFTA Court, but before I do that I want to ask something about Norway's fishing and seafood industry. We met with a delegation of Norwegian parliamentarians last week, and one of the issues that came up was the importance of the rules of the single market on food safety for Norwegian fish exports. I understand that about 60% of Norwegian seafood is exported to the European Union; is that correct?

Ulf Sverdrup: It could be, yes. It is massive.

Q1003 **Joanna Cherry:** Can you just explain to us what benefits the fishing industry in Norway gets from having membership of the EEA?

Ulf Sverdrup: As you know, the EEA is not a member of the common fisheries policy. There are things that we are outside of. For instance, it prevents foreigners or non-Norwegians from owning a ship in a Norwegian fishing fleet. It prevents access from other countries into Norwegian waters for fishing. We maintain that with the EEA. The downside or the flip side of this is that we do not have free trade on fish, but the EU and the UK, by the way, because you have also been negotiating on this on the EU side, have been quite clever. So you have really high tariffs on fish that is processed, whereas if you just ship frozen fish the tariffs are not so high. As a result, 10,000 to 12,000 people in Poland are working to process Norwegian salmon, for instance.

Q1004 **Joanna Cherry:** In order to get round those tariffs, Norway, as I understand it, exports the salmon whole to Poland and Germany for processing; is that right?

Ulf Sverdrup: Yes.

Q1005 **Joanna Cherry:** So the processing jobs are not in Norway but in Poland or Germany.

Ulf Sverdrup: Yes. That is one part. The final aspect of the fish is the veterinary and food standards. They are very important. That was not initially a part of the EEA agreement because Norway wanted to take that out. After one and a half to two years, they noticed that a lot of trucks with fish were standing on the border and rotting because some EU countries said they would like to inspect the fish to establish whether it was in compliance with veterinary standards and so on. Then the Norwegians had to join the regulation because otherwise they would be in a very difficult situation. So that is the situation.

Q1006 **Joanna Cherry:** Thank you. That is very helpful.

Let me come back to the EFTA Court. One of you mentioned the president



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of the EFTA Court, Carl Baudenbacher, from whom we will be hearing evidence later this morning. You will be aware that one of the big issues in the UK—one of the big red lines—is leaving the jurisdiction of the Court of Justice. This very much arises from a desire to take back sovereignty.

Carl Baudenbacher has said that from the UK's perspective being in the EFTA Court or subject to the jurisdiction of the EFTA Court will be considerably less onerous than being subject to the Court of Justice. It leaves the EFTA states and their courts with more sovereignty. We have already explored a couple of aspects of that, one being that there are no penalty payments in the case of non-compliance, and a second is that there is no obligation to make references for preliminary rulings.

Let me ask you another question about this. I understand that, where the EFTA Court is concerned, there is no direct effect, such as we have with the EU and no primacy in EEA law. That is correct, is it not? I wondered if you could explain to us in layman's terms what the absence of direct effect and the absence of primacy of EU law means for the legal system within Norway.

Professor Pozdnakova: I can do that, but I would like first to explain the effects of primacy and then discuss how it relates.

Chair: Could you speak up because the acoustics are not very good in this room, for which I apologise?

Professor Pozdnakova: I will, first, comment on the direct effects of primacy and then how it relates to the role and importance of the ECJ. The fact that there is this institutional division into two pillars means that all EFTA states participating in the EEA have to agree in the EEA Joint Committee to take EU secondary directives and regulations in the EEA legal order.

The next step would be to make this EEA Act a part of the Norwegian legal order. This is, basically, an international law question. Norway has a dualistic legal system, just like the UK, meaning that international obligations are a different thing from national law. It means, by contrast to EU law, that new regulations and new directives have to be transposed into the Norwegian legal system, which can be a statute, decree or maybe just saying that Norwegian law is already compatible. They have to be transposed one way or the other before individuals or undertakings can rely on the rights and obligations that are—

Q1007 **Joanna Cherry:** An Act of the Norwegian Parliament.

Professor Pozdnakova: Exactly—a Parliament or a Government.

Q1008 **Joanna Cherry:** Before the law becomes effective.

Professor Pozdnakova: Yes.

Q1009 **Joanna Cherry:** That is the contrast.



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Professor Pozdnakova: This is the starting point. Of course, it is also important to keep in mind that the main agreement where all the freedoms, competition and state aid are concerned, was made part of the Norwegian legal order a long time ago, so it is basically new regulations and directives that can be a problem here, but it has to be an Act of the Norwegian Government or Parliament transposing this EEA obligation into Norwegian law.

With regard to the position of the Norwegian court, it is not the judge just saying, "Okay, this Act wasn't transposed, so I just disregard it." That is not how Norwegian law works. Under the Norwegian legal method, judges would normally try to avoid this conflict by trying to bring EEA law together with national law. It is like EEA conforming to interpretation. So they will try to interpret national law in conformity to EEA obligations, even though this obligation has not yet been transposed. This is, in practice, very important because it helps the Norwegian judiciary to avoid these conflicts with EEA law. Of course, it also means that direct effect and primacy are not absolute or their absence is not absolute in Norwegian law. We have had cases where the wording of existing Norwegian law is so clear that it is not really possible to reconcile this conflict with EEA law. In this case, such a conflict means that Norwegian law will have priority over EEA law.

Q1010 **Joanna Cherry:** You will be aware that in some parts of the United Kingdom there has been a concern about the Court of Justice, which is seen as interfering in domestic law. There is more than one legal system in the UK because Scotland has a separate system. How is the EFTA Court perceived in Norway? Is there that sort of resentment that appears to exist in parts of the UK? Is that present in any way?

Professor Pozdnakova: No, not like you describe.

Q1011 **Joanna Cherry:** Why not?

Professor Pozdnakova: First, the EEA Agreement says that there has to be loyalty to EEA law. If an EFTA Court interprets and applies EEA law in a good way, then it is acceptable for Norwegian courts. The catch is that Norwegian courts take a self-standing assessment of what EEA law is. So, if the Norwegian Supreme Court disagrees with the EFTA Court on a point of EEA law, then it will stick to its own interpretation.

Q1012 **Joanna Cherry:** Would I be right in understanding that, if a Norwegian court makes a reference to the EFTA Court, the result of that reference is not formally binding in the same way that it would be if it came from the Court of Justice to the UK at present? Is that right?

Professor Pozdnakova: Yes.

Q1013 **Joanna Cherry:** I have one very quick question. There has been a lot of debate in the United Kingdom and in the European Union about how we protect the rights of EU citizens living in the UK both when the UK leaves the EU and during the transition period that is under discussion. Could



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any of you see the EFTA Court having any role in the protection of citizens' rights?

Professor Pozdnakova: That is a very good question, indeed. It is not a fully settled question. It presents problems to the Norwegian lawyers when it comes to freedom of movement of persons and EU citizenship, because the EEA Agreement does not include provisions on EU citizenship in the TEF EU. But the EFTA states, the EEA and Norway have implemented the EU Citizens' Rights Directive. In a sense, it is a strange situation. It was difficult politically to take this decision to transpose the EU Citizens' Rights Directive because of the absence of provisions on EU citizenship in the EEA Agreement, but now it has been done.

The problem here could be sticking to the case law of the ECJ that builds directly on this primary EU law. It is a problem for Norwegian courts and it is also a problem for the EFTA Court because it cannot do that. It should build its case law, basically, on the provisions of the directives. This may exclude those cases where individuals derive their rights directly from the treaty obligations on citizenship.

Remarkably, one of the recent cases in Norway, which is still ongoing, is where a Norwegian citizen has moved to an EU state, has lived there for a while but not working, so it is not an employment situation but just freedom of movement. They married a third-country national there and returned to Norway. Does this third-country national have derived rights to get a residence permit in Norway? In principle, the Norwegian law that transposes the directive does not give these rights. An adviser was brought in from the EFTA Court where the court discussed all the complications resulting from the fact that EU citizenship is not really part of EEA law.

Q1014 **Chair:** I don't mean to interrupt but we are very pressed for time. If it is possible for you to send a short note on the detail of this particular case, I think it would be very helpful to the Committee.

Professor Pozdnakova: I am sorry.

Chair: Not at all.

Professor Pozdnakova: The point is that the outcome of that advisory opinion would be to extend the right of the third-country national to remain in Norway beyond what the directive suggested and beyond what Norway had expected it to be.

Ulf Sverdrup: Could I add just one very brief point? You asked about the role of the EFTA Court in regulating the citizens in your exiting or transition agreement. I do not think so. I would encourage the Committee to read opinion 1/1992 of the European Court of Justice and the EFTA Court, because the European Court of Justice will be very careful in, or resistant to, delegating competence that it has to another court.



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Q1015 Stephen Kinnock: I would like to move on to the subject of free movement of people and labour. It is something you hear a lot in the Brexit debate in the UK—that EFTA EEA countries are obliged to accept the European Union’s principle of free movement. Do you agree with that statement, starting with Professor Yarrow?

Professor Yarrow: It depends what you mean by freedom of movement. That is the answer I always give. There is freedom of movement under the Universal Declaration of Human Rights, which we would all tick. There is freedom of movement under the European treaty, which many of us would not tick, and there is freedom of movement under the EFTA EEA Agreement. The point is simply that what you mean by free movement depends on what you are talking about. Who is free or not to do what? There are subquestions that have to be asked.

There is a difference of interpretation in the two. There has to be, because the EEA does not cover citizenship. So, anything that involves a free movement issue where citizenship rights play any role, which, of course, the European Court of Justice does, is out of bounds for the EFTA Court. The courts are creatures of their own treaties, and the treaties are different.

I go back to a point earlier that was made. It is not just that the EEA is a sub-component of the European treaty; it also has some differences, and where the differences occur they are profound. There is a lot of commonality in the detail on the regulation, but the major one is that they have totally different objectives. An interpretation of law has to make reference back to the objectives. If you just look at the two objectives side by side, it is a big rambling set in the EU treaty, but it is a precise economic objective in the EEA treaty.

In the EU treaty, again, at that top level of objectives, you will find freedom of movement. It does not appear at the top level of objectives in the EEA treaty. It is there, but it is there in order to attain the top-level objective. It is what in the trade would be called the proximate objective or, in a wider sense, you might say that the freedom of movement provisions are the means to achieve the primary objective.

Those differences are, potentially, profound in the way the systems can develop. Of course, how things do develop depends on politics and all sorts of things, and we have a particular history of the EEA. If you actually look at it, freedom of movement means different things in the EEA. De facto, the EEA Agreement gives a national Government, if it wants to, much greater power and scope to limit free movement.

One of the conflation in the discussion is what people have a right to do under the EEA and what they have actually done. My problem, when we talk about Norway, is that we talk about what has been done, and we forget that the comparators have to be adjusted for relative powers. So, if Iceland says that it does not have much influence, the relevant comparator is Malta. They are about the same size within the European



system. Malta, no doubt, does not think it is very much of an agenda-setter either. When we are looking at freedom of movement, we have to think of freedom of movement, looking forward, and how that might look in relation to things that the British Government might want to do. It is absolutely clear from the text of the treaty that there is much more scope for domestic freedom of movement under the EEA.

Ulf Sverdrup: There might be some variation, but the basic principle is that there is free movement of persons within the EEA as there is in the EU, not only in legal texts but also in reality. Sixty per cent of migrant workers from other EU countries coming into the Nordic countries have arrived in Norway. Per capita migration in the labour market in Norway is almost as high as in the UK. It has been very successful. It has been good for the Norwegian economy. It has brought in talent, competence and capacity, particularly in a period with high activity in the Norwegian economy. As the Norwegian economy is slowing down, some of these migrant workers are leaving.

Q1016 **Stephen Kinnock:** What you are saying is very useful, but what I am trying to hone in on is this. Are the EEA countries legally obliged to accept free movement of people and labour as it is set out in the European Union's Treaty of Lisbon, or does the EEA Agreement give EEA countries a significant option as set out in the EEA Agreement to diverge from the principle of free movement of labour and people? I am not so much interested in the economic case. I am focusing specifically here on the legal basis that the EEA Agreement gives in contrast to the European Union treaty.

Professor Pozdnakova: The important point here would be that, indeed, EEA law does not have the same concept of EU citizenship as EU law does. It should also have implications in practice. There are no fundamental statutes for EU citizens. Therefore, certain categories of cases should be excluded from this free movement of persons under EU law, but we have seen, in particular, from the EFTA Court that this gap or difference existing between EU law and EEA has somehow been reduced through the practice. The difference is there, but it remains to be seen which way it will develop.

Q1017 **Stephen Kinnock:** I guess the consensus is that the principle is there for divergence, but how you deliver that in practice is a matter of negotiation and politics.

Professor Pozdnakova: Yes. Also, it is a matter of how the EFTA Court applies that and how national courts follow what the EFTA Court thinks.

Q1018 **Stephen Kinnock:** The relevant articles in the EEA Agreement are 112 and 113—112, in shorthand, being described as the emergency brake. I know that this is more in the realms of speculation, but, if the UK were to go down the route of EFTA EEA as the basis for our Brexit settlement, what do you think would be a potential process for the UK to invoke articles 112 and 113? What impacts do you think that might have overall



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on the EFTA EEA group of countries in terms of what the response would be if the UK were to invoke articles 112 and 113?

Ulf Sverdrup: In order to get to that point, you first have to enter EFTA and then enter the EEA.

Stephen Kinnock: Yes, absolutely.

Ulf Sverdrup: Then, basically, you have to say that you are committed to take on the obligation of free movement of persons as in the agreement, and then trigger article 112 as some kind of a security measure.

Stephen Kinnock: Yes; an emergency brake.

Ulf Sverdrup: You are then back to the situation that Cameron negotiated before you had your referendum. What kind of special situation is it now where you can have some negotiations? Are there some special circumstances related to the UK labour market that enable some kind of legitimate claim to pull this security clause? So, you are all the way back to that.

That being said, we have to remember that article 112 is a security clause for some kind of exceptional situation. It is not supposed to last as some kind of permanent thing, so you have to find some kind of transition arrangement and find a solution to that problem. It would be in breach of the spirit of the agreement.

Q1019 **Stephen Kinnock:** Moving slightly off that topic, article 127 of the EEA Agreement says that any country wishing to leave the EEA has to give one year's notice of its wish to depart. The British Government argues that we will automatically leave the EEA when we leave the European Union, but others have argued that the EEA is a stand-alone international treaty and, therefore, in order to leave it we need, specifically, to trigger article 127 in the same way that we triggered article 50. I would be interested in the panel's view on that. If we were to fail to trigger article 127 before 29 March this year, would we be in breach of an international treaty?

Ulf Sverdrup: There might be some others who are more expert on this, but I think this could happen with the UK saying that it has an intention to leave the EEA and then trigger article 127, 12 months before leaving the EU. It could also be that the EU notifies the others to say that one of the parties is going to leave the EU side and therefore they will also leave the EEA. It might be that it is the Commission or the member states in the EU that notify Norway that one of the parties is about to leave. Then there will be a call for a diplomatic conference to try to find out the arrangement. But, as you know, in reality, the European Union and the UK have said that the ways of dealing with the EEA will be done more or less in parallel with the ways of leaving the EU.



Professor Yarrow: Chair, in the words of Mr Davis—and this is quite important—that was then, but this is now. The guidelines given by the EU 27 have shifted position. The proposal now under, if I can use the term, the vassal-state proposal, is that existing agreements, which would include the EEA, will be rolled over through the transition period. Therefore, it appears that the UK status quo, on that basis, which I hope will be challenged, will still be in the EEA and still operating, but what that proposal says is that the UK will not be entitled to take part in any body set up by whatever the relevant free trade agreement is.⁵ That, to me, means that, on the EU terms, the UK cannot participate in the EFTA pillar, and all decisions for the EEA will be made by the EU authorities.

To go back to your freedom of movement question, the difference on articles 112 and 113 between the EEA and the EU treaties is control. I keep coming back to this point about power. All these things reduce to questions of power.

The EEA would give the UK, in the EFTA pillar, the unilateral right to trigger the safeguard measures, and it would also give it the unilateral right to use what I think is the more important freedom of movement provision, which is the first line of article 28(3). That is a more permanent way of dealing with freedom of movement issues. That is a tangent. In the EFTA pillar, the control and sovereignty is with the UK. If, however, we are in the EEA post 29 March next year, under the current EU proposals we will have no power whatsoever.

Chair: Okay. That is pretty clear. I have two other colleagues who want to come in briefly, and we have about five minutes left.

Q1020 **Mr Djanogly:** My question has pretty much been answered, Chair, but I have a brief one, if I may. The EU Commission seemed to be saying that the UK should be looking towards either a Norway option or a Canada option, presumably rather than a stand-alone Swiss option. The general feeling seems to be that their reasoning for that is that they want us to have an institutional context that, presumably, when they say Norway, I assume they are talking about what EFTA EEA would provide. Would you agree with that, and do you think they are right to say that? Would they prefer, for instance, to see Switzerland move that way as well?

Professor Yarrow: They would. They are fairly clear that they would. The difference between the approaches is multilateral versus bilateral. For the European Union, my intelligence is from the people I talk to—it is not ideological—that life would be so much easier if you have these agreements on a multilateral basis where there is an established common process for resolving differences. We look at these things textually and statically, but these are two different ways of co-operating—two different processes. The EEA process is a process that the EU is well familiar with. Like the EU, it is a way of making multiple, multiple compromises and doing it in a low-key way, whereas as soon as you go bilateral, of course,

⁵ Witness statement: The status quo being referred to is the UK status quo.



you are going to have multiple bilaterals. Switzerland will compare its terms with what we would get, and we would compare with Switzerland. It just gets to a mess very quickly. Bilateralism is not the way for the international trading system to go. The EU, for all its sins, is multilateral.

Ulf Sverdrup: Returning to the topic of trust and how to sort out disputes and tensions, you can either find a solution through diplomacy or through some kind of court mechanism. The EU has said very clearly that this bilateral diplomatic approach has come to an end. We think we need a court system. We need not only a court system but also a mechanism to ensure some kind of dynamic evolution.

The EU treats the Swiss model, as you heard yesterday, as an accident. It is not to be replicated. It prefers the Norwegian model. It does mean that it has to be like the EFTA Court. You will be hearing later today from Carl Baudenbacher, and he will, probably, present some kind of solution on the docking in to the EFTA Court, basically creating a bespoke agreement where you innovate somehow and design an institutional framework that both the EU and the UK could be happy with.

Q1021 **Stephen Timms:** We talked this morning about participation in the EEA through the EFTA pillar. Professor Yarrow, is it realistic to consider the UK participating in the EEA through some other route, for example, by establishing a separate UK pillar within the EEA?

Professor Yarrow: It would be possible. It is an international treaty with 32 contracting parties. A lot of lawyers will look at the text and tell you what you can and cannot do. It is an agreement between 32 parties, and those 32 parties can do more or less anything they want with that agreement. It is their agreement. If there was a will, it would be possible to establish a third tier, yes, but you would need consent. You would need 32 ticks to do that.

Q1022 **Stephen Timms:** Do you think that the UK should pursue that or, realistically, is EFTA the possible way in—the realistic way in?

Professor Yarrow: We walk at the moment along cliffs where there are possibilities of a second financial crunch, a transatlantic trade war and so on. I do not think that we should complicate anything as we go forward. The advantage of the EEA is that it has been in place for 25 years. It has a structure, it is ready and it can go on 30 March next year. We do not have to wait for a transitional period. We are there already. We just don't have to leave. It is a simple expediency argument, because we really need to get back to the more fundamental question—I am speaking as a general economist now—of the economy and the risks that the economy faces at the moment. These in contrast are trivial issues.⁶ That is an argument for off-the-shelf, I guess, but so is my suit—or an argument against off-the-shelf maybe.

⁶ Witness note: The issues are trivial in contrast with the other risks faced by the economy.



Chair: That seems a good point on which to end. On behalf of the Committee, can I thank all of you for your evidence, which has been really helpful and informative today? We are exceedingly grateful to all of you for coming. That concludes this session.

Examination of witness

Witness: Professor Baudenbacher.

Q1023 **Chair:** We will now begin our second witness session this morning. Our witness is Professor Carl Baudenbacher, senior judge and president of the EFTA Court. You are most welcome. Thank you very much for coming to appear before the Committee today. We have quite a lot of ground to cover, so succinct answers would be exceedingly helpful.

In the very helpful paper that you have written, you have talked about the docking solution to the question of how we might potentially come up with an arbitration mechanism. It would be very helpful for the Committee if you could briefly set out for us how that would work and why you think it might provide a solution.

Professor Baudenbacher: Thank you very much, Mr Chairman, and ladies and gentlemen. Thank you for inviting me and being prepared to listen to me.

Let me make one preliminary statement. What I am saying here are my own views.

Chair: Indeed.

Professor Baudenbacher: They are not the views of the EFTA Court. The EFTA Court does not have a view on all these matters, but they are still the views of a decision maker and not just of an observer. I have participated in some 260 cases and I have acted as a judge rapporteur in many of the EFTA Court's landmark cases.

Docking was an idea that was proposed to Switzerland by the European Union in 2012-13. It was meant to give Switzerland the possibility of subjecting its bilateral treaties with the European Union to the jurisdiction of the EFTA Court and to the competence of the EFTA Surveillance Authority. That would have meant that Switzerland would not have had to take the whole EEA acquis. In fact, Switzerland does not have an agreement on services. They do not have an agreement on establishment. They do not have an agreement on capital. They do not have common competition rules. They do not have common state aid rules, and yet they proposed to negotiate with the Norwegians, with the Icelanders and with the Liechtensteiners whether they could dock to the two institutions of the EFTA pillar. Obviously, the Union would also have claimed the same, but since it made the proposal it was quite clear that the Union was positive about that.

Q1024 **Sir Christopher Chope:** Why was the Union positive about that?



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Professor Baudenbacher: Switzerland has a peculiar history in European integration, as you are aware. In 1992, the Swiss signed the EEA Agreement, but after a negative referendum they were unable to ratify it. Switzerland and its industry lacked access to the single market, so they negotiated bilateral market access treaties. That was quite burdensome and it took a long time. There was 10 years when Switzerland had zero growth. A lot of economists—I am not an economist, but I can read what they say—linked that to the lack of access to the single market.

After a few years, in 2008, the Union said to Switzerland, “Now you have so many bilateral treaties that in fact you are a hidden passenger, so to speak, in this single market, and we cannot go on with these dispute resolution committees any more, because they are not fast enough and they do not provide enough legal certainty, so you must recognise a court mechanism.”

The Swiss had difficulty familiarising themselves with this idea. In the end, the Union said to them, “Why don’t you make a second attempt to join the EEA as a fully-fledged member?” The Swiss said, “No, we don’t want this.” Then the Union said, “Then you could dock.” That was the background.

Q1025 **Sir Christopher Chope:** How realistic do you think it is that the United Kingdom could join EFTA but not the EEA, and would it then be able to engage in the docking that you have described?

Professor Baudenbacher: Docking is largely uncharted terrain. What we know about docking are these documents from 2012-13. On the one hand, there are a couple of Swiss Government reports where this is mentioned. There is an expert opinion of an elderly public international law professor from Zurich University that discusses it. There is this famous non-paper that has been drawn up by the chief negotiators of the Union and Switzerland in May 2013. This non-paper is officially still secret, although almost everybody knows what is written in it.

This is what we know about docking. It would essentially be for negotiation to find out how far you can go. What I find interesting is that in a presentation of 19 January 2018 docking is also mentioned by the group headed by Mr Barnier.

Q1026 **Sir Christopher Chope:** So you are saying that the EU is almost encouraging the United Kingdom to adopt a Swiss model to join EFTA but not the EEA.

Professor Baudenbacher: EFTA is another matter. Docking would be a partial participation in the EEA. EFTA is something else. I cannot say that they are encouraging it, but the sheer fact that EU people are thinking about keeping Britain in the single market by way of using these EFTA pillar institutions indicates to me that they imply this. They must be aware of the fact that fully-fledged free movement of people is a political



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difficulty for Britain. I think they are aware of this, and yet they are discussing this.

Q1027 Emma Reynolds: Following on from that but from an EFTA point of view, if the UK were to join the EFTA Court, what impact would it have on the court? What would be the benefits or the disadvantages to the court?

Professor Baudenbacher: The benefit for the court? I have been a judge for 22½ years, and for the last 15 years I have been the president of this court. I will give you my personal view on this. The benefit for the court would clearly be that it would become more important. I always felt that it was an important court, but it is still the court of three small countries. With a member state of the size and power of the UK, from my perspective this would clearly be an interesting option.

Q1028 Emma Reynolds: You have suggested that the EFTA states and the EFTA Court have more sovereignty than the parallel in the EU and the European Court of Justice. Can you explain why that is the case?

Professor Baudenbacher: Yes. The sovereignty issue was dear to the heart, in particular, of the Nordic EEA EFTA states, because they come from a very dualistic tradition when it comes to constitutional law. They wanted to avoid, for instance, the EEA Agreement producing direct effect. In fact, the EFTA Court has given an interpretation to protocol 35 where we said no direct effect and no primacy.

In addition to that, the supreme courts in the EFTA states have more sovereignty than the supreme courts in the EU member states, because there is no written obligation on them to refer an unclear question of EEA law to the EFTA Court. In my capacity as the president of the EFTA Court I have always criticised this, but it still remains a fact.

In addition to that, our preliminary rulings are, strictly speaking, not binding on the national court. They are advisory opinions. In reality, they are some sort of sui generis rulings. The national court is not absolutely free to follow or not, because, if they were not to follow, they may run into difficulties from the perspective of homogeneity and of this country's obligations under the EEA Agreement. That is very difficult to enforce. At the end of the day it is quite clear. Both the Supreme Court of Iceland and of Norway have stated that they take our opinions very seriously, but at the same time they are not only entitled but obliged under national law to assess independently whether they will follow them.

Q1029 Emma Reynolds: Is it the case that the EFTA Court and the European Court of Justice are more equal than many suggest? Under the two-pillar system, what would happen if the two courts gave conflicting interpretations of the law? Have there been any instances of this?

Professor Baudenbacher: Yes; that is a very crucial question and a very fair question. I would here probably have to distinguish—I was a professor at the University of Texas for quite some time—as the American legal realists do, between the law on the book and the law in action.



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When these provisions were drafted in 1991-92, everything was done in order to keep the ECJ happy. The ECJ was very reluctant to accept another court on the European scene that would give interpretation to law that is a separate legal order but still identical in substance to EU law. The written rules say, basically, that the EFTA Court shall either follow or take into account relevant ECJ case law. That was written, and that has also prompted the ECJ to say in its second EEA opinion, "We approve this court system; this is okay with us."

In reality, things have developed in quite a different way. First of all, unlike what the drafters have assumed, it is not so that new legal questions go first to the ECJ. In most cases of the EFTA Court, we had to tackle new legal questions where there was no answer by the ECJ in the past. That was already a totally different ball game. The question then arose whether the ECJ would follow us and take us into account. In fact, there is a very intense judicial dialogue going on between the two courts, where the ECJ follows us in many cases. This has been admitted by my counterparts—or now, since one month, my former counterparts—in the presidency of the ECJ on many occasions. If the ECJ goes first, under the homogeneity rules we would follow the ECJ. It is not the purpose of this whole exercise to deviate, cut, cut, cut, but nevertheless in a number of cases the EFTA Court felt, having assessed the facts and the law, that we could go another way. We have done that.

It is possible that in the future the ECJ will follow us. It is also possible—and it has happened in a case concerning food law—that we did not follow the ECJ, and then the ECJ later overruled its previous case law and followed us. That is probably the most important case. That was the Kellogg's Corn Flakes case.

There have been a number of other cases. For instance, when it came to taxation issues, national gambling monopolies or the legal nature of a website, at first the ECJ would not follow us, but then, when it had a second or third chance, it would put itself in line with us.

At the end of the day, it boils down to the more theoretical question, "Could there be some kind of an open clash, and what would happen in the case of an open clash?" The treaty says that there are dispute resolution provisions for this. These provisions have been written by diplomats. If you read them, you can feel that they are more theoretical. In practice, they are hardly operational.

It has been alleged in letters to the editor and in articles in the *Financial Times*, in particular by a former high official of the European Union, that if there is a conflict the ECJ would prevail, but there are no easy answers for this. At the end of the day, in theory, the matter could be submitted to the ECJ, but in order for it to be submitted the EFTA states would have to agree. It is politically difficult to imagine that the EFTA states would agree that the matter goes to the court of the other side, which has already uttered a view on the question.



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The second possibility is that the treaty says the Joint Committee, which is a diplomatic body, will take care of the thing. There, this former high EU official says that the Joint Committee could overrule the EFTA Court judgment. Ladies and gentlemen, I think that is a pretty outrageous statement. This smells of totalitarianism: that three diplomats could overrule the judgment of an independent court of law would go against any tradition of western civilisation. You had the Settlement Act 1701 when Britain was the first country in Europe to recognise judicial independence, at least to a certain extent. In my view, that is totally out of the question.

The third possibility mentioned in the treaty is sanctions. If it comes to sanctions, then it is already very difficult. The basis for good co-operation would already be lacking. I think both sides would think twice before imposing sanctions because of a ruling of an independent court of law.

If we now look at the development and what has been stated by my friends from the ECJ on numerous occasions, the most sustainable mechanism is judicial dialogue, as I have described it. We may change our case law and follow them, but they may also change their case law and follow us. Looking back these 22 years, and having in mind how small we are right now at the EFTA Court, it has worked out in a remarkable way.

Q1030 Emma Reynolds: I have one last question. I take you back to the UK. It was agreed in December that as a last resort, in order to avoid a visible hard border on the island of Ireland, the UK might agree to regulatory alignment in certain areas. Some people have suggested that we should have regulatory alignment on a wider basis in order to have access to EU markets. If we did not join the EFTA Court, what other options of arbitration are available to the UK and the EU?

Professor Baudenbacher: I think I have set this out in the paper I sent you. I have difficulty in seeing a good mechanism of arbitration if you want to stay in the single market. If you want to leave the single market, that is another matter. If you want to stay in the single market, diplomacy will not apply, because the Swiss were told in 2008 that it was over with diplomacy. The Swiss have not been able to conclude one single new market access agreement since 2008, although there is at least one agreement that is fully negotiated and ready for signature in the field of trade—in electricity.

Arbitration has been rejected by the European Union in the case of Switzerland. The Swiss tried that for decades. It is even said in article 111(3) of the EEA Agreement that arbitration can only be held, if at all, on the appropriateness of sanctions but never on substantive EEA law.

In my view, this provision also has a precedential character for other countries that would like to stay in the single market in one way or another. A bilateral court UK/EU is excluded in my view because this court would be above the ECJ. A UK court above the Supreme Court—the



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Swiss tried it in 2012—was rejected. The ECJ is apparently not a solution any more for Her Majesty's Government. Then we have the Ukraine model, which foresees an arbitration tribunal, but every question of European law must be referred to the ECJ, which would decide in a binding way.

There are two options left: either the EFTA Court in one form or the other, or another court modelled on the EFTA Court. There, I may refer to the Bruegel paper, which discusses this partnership idea, but it is quite natural that such a court would have to be a multilateral court. It could not just be a UK court.

Q1031 **Richard Graham:** Can you confirm for us that if we, the UK, wanted to consider the EFTA Court for docking, then we would, first, have to apply to be a member of EFTA, and, secondly, if that was accepted, would we have to apply to use the EFTA Court as a form of docking mechanism in the case of disputes with the ECJ?

Professor Baudenbacher: Not disputes with the ECJ—disputes under your agreements. With regard to your first question and whether EFTA membership would be required in order to dock, that is an unresolved question. Normally you would assume yes, because this is a whole EFTA thing, but it is written nowhere that EFTA membership would be required. You would need the consent of the European Union, and you would need the consent of Norway, Iceland and Liechtenstein. Whether the Swiss would have a say in this, in my view, is not decided.

Q1032 **Richard Graham:** Hypothetically, if it was agreed that Britain could dock with the EFTA Court, would that automatically assume that a British judge, or more than one British judge, would also be part of the EFTA Court?

Professor Baudenbacher: I think that was the idea when this docking solution was proposed to Switzerland in 2012-13—that a Swiss judge would then become part of the EFTA Court and a Swiss college member would become part of the EFTA Surveillance Authority.

Q1033 **Richard Graham:** In your opinion, would the European Union be likely to accept the EFTA Court as the arbitrator of any disputes between the UK and the EU?

Professor Baudenbacher: As I said, given the fact that docking is mentioned in this document of the Commission, I must assume that at least implicitly they have been thinking about it. I am sure they have been chasing every idea and have also been looking into the details. That is how the Commission works, at least in my experience.

Q1034 **Craig Mackinlay:** Professor, did I hear you say correctly that, should we wish to take this route of EFTA membership, it would require the permission of the EU?



Professor Baudenbacher: No, not for EFTA membership. The EU has no say in EFTA membership. For EFTA membership, you would need four votes—the three plus Switzerland.

Q1035 **Craig Mackinlay:** What about EEA membership?

Professor Baudenbacher: Then the EU would have a vote.

Q1036 **Craig Mackinlay:** The EU has a say.

Professor Baudenbacher: Yes, because the EU is a contracting party to the EEA Agreement. EFTA membership would provide you with the opportunity to enter the free trade network of the EFTA states with the rest of the world.

Q1037 **Stephen Kinnock:** Professor, I was wondering if you could give a sense of the role that the overall objectives of the EU treaties as compared with the EEA agreement play in the way that the EFTA arbitration court interprets and acts, as contrasted with the European Court of Justice. Obviously, the overarching aim in the EU treaties is ever closer union of the peoples, whereas article 1 of the EEA agreement is far more focused on commercial engagement and the market. It is probably very much about the way in which the internal market was originally conceived in the 1980s as compared with a much deeper and closer union that has evolved since then. What role does that play in terms of influencing the mindset of the EFTA Court as contrasted with the European Court of Justice?

Professor Baudenbacher: Let me say first that the EEA Agreement is a single market agreement. It has no goal of creating an ever closer union. Political integration is basically excluded. First of all, that means that the common policies are also excluded. I want to emphasise this. Agriculture, fisheries, foreign trade, foreign policy and so on are excluded.

When we talk about fisheries, I just read the other day about the snow crab case. Snow crabs are a very expensive seafood, and EU vessels wanted to catch them in the waters around Svalbard, in the north near Spitsbergen. The EFTA Surveillance Authority said, "No, it is not possible; this is for us." We were also very strict in saying that the catch of fish is outside the scope of the EEA Agreement.

When it comes to your question of how this impacts on the case law of the EFTA Court, first of all, the EFTA Court has been very strict in defining the outer boundaries of the agreement when it comes to agriculture and fisheries. There we did not compromise.

When it comes, for instance, to the interpretation of free movement of goods, competition law or of all sorts of secondary law, I can give you a few examples where I think we were rather market-oriented. When I say "market-oriented," that does not mean we were antisocial—not at all. "Market-oriented" rather means that we were critical of mercantilism and of protectionism.



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For instance, in the Kellogg's Corn Flakes case we did not buy the argument by one of our Governments that they see to it that the children in school get enough iron every morning because they give them a piece of cheese fortified with iron, and once they have enough iron they must not eat Kellogg's Corn Flakes any more. That is a paternalistic approach and we said, "No way." The ECJ overruled its previous case law in the light of this liberal approach by the EFTA Court.

Q1038 Stephen Kinnock: The ECJ overruled on the basis of advice from the EFTA Court.

Professor Baudenbacher: Yes, of use. That was in the early days. We were quoted six times in this judgment. Normally we open a bottle of champagne when they quote us, but that time we could not do it; it would have been too much.

Stephen Kinnock: You popped a cork of Kellogg's instead.

Professor Baudenbacher: When it comes to the judicial review of competition fines, the UK is a leading country when it comes to competition law, practice and economics. The allegation of practitioners until today is that in the European Union the Commission still enjoys quite a margin of appreciation when assessing complex economic questions, whereas we said that there must be full judicial review of competition fines, because we are now talking about hundreds of millions and billions here today.

For instance, there was a famous question whether an in-house counsel should be excluded from representing his own company. Our sister court said that in-house counsel are, by definition, not always independent, and that is why they can never represent a company. We said that we have to look at the case at hand and the concrete circumstances. If the in-house counsel is independent, then it is okay. It is also a cost-saving measure and it is in the interests of fostering compliance that in-house counsel are not excluded here.

There have been other cases in which, at the end of the day, we have been rather market-oriented. Let me give you an example that concerns the United Kingdom rather directly. Last October, we were faced with the question of whether a public authority should be held liable under normal tort rules or under state liability rules if it has awarded a public contract to the wrong bidder. It often occurs that the best bidder does not get the contract but somebody else does, for any kind of reason. The question then is how high the threshold is for a lawsuit when the bidder who deserved to obtain the contract but did not get it wants to sue for damages. The ECJ came up with two conflicting judgments within two months. One Chamber said it was a simple tort law case; the other Chamber said, no, since the state is involved, it is a state liability case, which means that the firm that suffered damage would have huge difficulties in obtaining compensation.



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In this situation, we said that a simple breach must be sufficient because in such a case the state does not act by state authority. It is a simple participant in commercial business. That is clearly a market orientation. The link to the United Kingdom here is that the UK Supreme Court in April of last year had exactly this question. It said, "We see these two conflicting ECJ judgments. We give interpretation to these two, and we think that the one that goes for state liability is the more convincing one." They overruled their own case law.

This is one of the most fundamental questions of modern economic law because we are talking about huge amounts of money at stake. At the end of the day, this is not only about a non-mercantilist model; it is also about avoiding moral hazard. If a civil servant does not risk having something held against them, at the end of the day they can easily give the contract to this or to that. It is a very fundamental question.

Q1039 Stephen Kinnock: You have talked a lot about this issue of the potential conflict between the ECJ and EFTA Court. You pointed out that you were quite surprised that the British Government's paper on dispute resolution only refers to the written law and does not really refer to the continuous dialogue that a number of other eminent lawyers have talked about in terms of the relationship between the EFTA Court and the ECJ.

Obviously, you cannot speak on behalf of the British Government, but can you expand on why you think it was a missed opportunity in that dispute resolution paper not to talk more extensively outside the confines of written law?

Professor Baudenbacher: I can only guess here, but I have years of experience with the Swiss Government. I am a Liechtenstein judge, but I am a Swiss national, and I have been a professor in Switzerland for decades, so I am very familiar with the Swiss situation.

In the case of Switzerland, it was the same. It is very difficult and burdensome to read judgments and to compare them. It is much easier to have a look at the treaty and to say, "Well, there it is stated, and this is one-sided." To analyse case law is quite a challenging thing. That would be my answer. People do not make the effort to really look into these matters. It was the same in Switzerland.

Q1040 Stephen Kinnock: So you think it would be a good idea, in terms of our debate here in this country, to get a better understanding of the dynamics of the interaction between the courts. At the moment, you feel that it is insufficient and that we do not have a sufficient understanding of how it works in practice.

Professor Baudenbacher: It is a complex thing, I admit. It is not easy. You have to invest a lot of time and you have to be experienced in this. Part of my showing up here today is my preparedness to explain these matters. I am not absolutely free to speak about it, but I am outgoing as a judge and I will continue to deal with these questions. At the end of the day, there have always been two structures in Europe since 1960. Even



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under the OEEC in the 1950s there were these two movements: those who wanted to go for political integration—at the time, the six—and then the Brits and the Swiss, who were reluctant. They were hoping that this schism could be avoided in the 1950s.

Then the European Economic Community was set up in 1957 and started in 1958. In 1960, Great Britain took the initiative to set up EFTA with those who did not want to join the community at the time. It was the time of the inner six and the outer seven.

In one way or the other, this way of thinking in categories of free trade and the like has always been there, although most EFTA states joined the European Union in the meantime. There is always this separation between the way of thinking of those further north and those further south. It probably also has to do with the theory of legal origin, religion and the like.

Geneva is located in Switzerland. That is the place where Calvin started his reformation, which then moved over to parts of what is now the United Kingdom and also to the United States. The approach to the economy of the Swiss or the Brits, if I may now say in this general way, or the Americans, is a different one than the approach to money by people further south in Europe.

Q1041 Joanna Cherry: Professor, one of the big concerns in the negotiations between the EU27 and the United Kingdom has been ongoing protection of the rights of EU citizens living in the UK and the rights of UK citizens who are also EU citizens living in other EU countries.

As I understand it, the concept of EU citizenship is very much a concept of the European Union and not one that really exists in the European Economic Area. Can you tell us what role, if any, the concept of citizenship and the protection of citizenship rights plays in the jurisprudence of the EFTA Court?

Professor Baudenbacher: Yes. We have a number of cases involving this citizenship directive. It has been taken over into the EEA agreement by way of a compromise. That means the economic rights derived from citizenship have, as a matter of principle, been taken over but not the political rights.

The EFTA Court, in my view, has not had the right case so far in order to make an elaborate judgment. We had the case of a gentleman from an African country—I do not recall where he was from—who had married a Norwegian woman while living in Spain. The couple then wanted to move to Norway and they were denied access to Norway. The EFTA Court then, by way of filling a gap—you know that judges do that from time to time; they assume that there is a gap in the law, and they think they are entitled to fill the lacuna—ruled that this gentleman would have access to Norway. It was a case that has been blown up by a lot of people in Norway who do not like the EFTA Court. At the end of the day the case is



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as it is. I would say that no general conclusions can be drawn from this case. It was just a matter of reasonableness and decency, in our view, to give this woman the possibility of keeping her husband with her.

I also remember that in the oral hearing I asked the Norwegian Government whether there was any indication of an abuse of law here, and they said there was no indication of abuse. If I remember correctly, we even wrote this into a paragraph of the judgment. There is the reservation of there being an abuse, but you cannot just claim an abuse; you have to prove it.

Q1042 Joanna Cherry: What I am really getting at is that your former colleague, and no doubt very good friend, the Rt Hon Professor Sir David Edwards—a former judge at the Court of Justice—has also been very critical of the UK Government's enforcement and dispute resolution paper. He felt that what the UK Government were focusing on was very much EU law resolving disputes between member states and the EU. But Sir David pointed out that a huge aspect of EU law and the jurisprudence of the Court of Justice is about protecting the rights of individual citizens. Can the same be said of the EFTA Court?

Professor Baudenbacher: The EEA agreement is also a treaty that gives an active role to private operators, not to the same extent as in the European Union. As I explained, they do not have a secured access to the EFTA Court, unlike in the European Union, but private operators play an important role. The EFTA Court has tried to strengthen the position of private operators, not least because in academic circles, for instance in Oslo, there was a tendency to claim that the EEA agreement at the end of the day is a pure agreement on public international law, which would essentially bind the states and what is left for private people is more or less a reflex protection.

At the end of the day, yes, I would say that we also give protection to individual operators, but not to the same extent as in the European Union.

Q1043 Jeremy Lefroy: Professor, there has been some concern mentioned to our Committee about the position of nationals in the EEA states who are living in the UK and UK nationals living in the EEA states and of course Switzerland—effectively the EFTA states. The whole discussion has been between the UK and the EU and their citizens, and the position of Norwegian, Swiss, Liechtensteiners and Icelanders in the UK and vice versa has not been taken into account. Is that something that you or the court are concerned about?

Professor Baudenbacher: No; the court is only concerned about the cases that are being probed before it. This is quite clearly a political issue. If the EFTA states have this feeling, then they have to do something about it, but I cannot make a statement.

Q1044 Jeremy Lefroy: You have not heard anything of that yourself.



Professor Baudenbacher: As a private citizen, yes, I have.

Q1045 **Stephen Timms:** Can I ask you to expand briefly on a point you made a couple of minutes ago? This is a theological question. You suggested that the approach of the EFTA Court reflects the teaching of Calvin. Tell us a little bit more about what in Calvin's teaching is reflected in what the EFTA Court does.

Professor Baudenbacher: No; I did not say that. What I wanted to indicate is that there are certain differences in the way people further north think about how to manage a state and how to manage an economy as compared with people further south. That may have to do, to a certain extent, with Calvinism, because at the end of the day Calvinism taught people that to be wealthy and successful on earth is a good thing because God will be pleased by that. Other religions did not have this approach. You can see that in the way you address these issues in these countries.

If I am correct, there is no notion of state in the Hegelian way in Great Britain, as there is in Germany. There is no notion of "la nation avec toute sa grandeur" as in France. In Britain, it is a rather sober approach. You need a state in order to regulate certain business, and at the end of the day it sits in for a whole civil society and for the social partners to figure out what is the best for them.

I may remind you that Napoleon, allegedly, made fun of Britain by calling the Brits a nation of shopkeepers. Voltaire wrote about the Swiss bankers, "If you see a Swiss banker jumping out of the window, follow him because you can be sure there is some gain you can make." It is a different approach to dealing with the economy.

Q1046 **Craig Mackinlay:** I have a very small point. There has been discussion in the last week, although we do not know how true it is, that if we try to cut and paste some of the existing EU FTAs, and we cut out "EU" and put in "UK," some of the countries may not just accept the cut and paste but want to change it before they would allow a continuing FTA with the UK.

Should the UK join EFTA and be approved by the others, would we then be immediately a party to the EFTA's FTAs with no further complaint by the other contracting countries?

Professor Baudenbacher: Thank you for this question. Essentially, this is a question that is beyond my competence. I know that in certain of EFTA's free trade agreements there are clauses—

Q1047 **Craig Mackinlay:** Which allow extras.

Professor Baudenbacher: Which address this problem. When it comes to a quota, the likelihood is that we still have to negotiate, but, essentially, I think it is foreseen in certain agreements that others may sneak in.

Q1048 **Chair:** I think that concludes the session.



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Professor Baudenbacher: Chair, I found this by coincidence and I have brought it with me. A former lawyer in my Cabinet, a Swedish professor, has published a very short paper on the situation at the border between Norway and Sweden. He says this could be an inspiration for the Irish issue. May I give the Committee this paper?

Chair: You certainly may, and we look forward to reading it. On behalf of the whole Committee, I thank you very much indeed, Professor Baudenbacher, for coming to give evidence today. We appreciate it. It was a great pleasure to meet you last year and you have certainly helped us in our deliberations. That concludes the session.