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Brexit: Recent Developments – The EEA Option

30 August 2017, RIETI BBL Seminar, Tokyo

A. Introduction

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"Our policy is having our cake and eating it.

We are Pro-secco but by no means anti-pasto".

(*Boris Johnson* to "The Sun" on 30 September 2016.)

A. Introduction

The day the UK leaves the EU,

- it leaves the customs union;
- it leaves the single market;
- it is no more subject to the surveillance of the Commission and the jurisdiction of the ECJ.

HM Government's official position was from the beginning and still is:

Hard Brexit = leaving the single market.

But: What about the Scots, the Welsh, the City of London, industry, the 48 %?

What about the harmony and soft border between the Republic of Ireland and Northern Ireland?

Is it possible for a non-EU State to let its citizens and economic operators participate in the single market (= Soft Brexit)?

And this including “passporting rights” for financial operators?

Yes it is. But let us go step for step.

B. Hard Brexit

I. Bespoke FTA

PM’s Lancaster House and Philadelphia speeches.

British Government wants as much market access for goods and services as possible.

Can a deeply integrated market work without a common court?

British industry is used to having access to a court of law.

Protection against your own government.

II. Arbitration

Brexit White Paper (Annex A) proposes various arbitral mechanisms for dispute resolution.

- CETA,
- EU - CH bilateral agreements,
- NAFTA,
- Mercosur,
- NZ – South Korea FTA,
- WTO.

See also HM Government's paper on "Enforcement and dispute resolution" of 23 August 2017 (which, however, discusses the EFTA Court).

III. HM Government's position after the snap election

Soft Brexit occasionally mentioned.

But the Government sticks to its Hard Brexit approach.

- Leaving the Single Market.
- Arbitration.

The rest of the world is more interesting than the r27 EU; taking back control.

Recently, the Government has to look into an EFTA Court solution.

C. Is arbitration a feasible solution?

I. What does arbitration mean?

- Ad hoc? Weak.
- Permanent, court-like body? Not tested.

Standing limited to States.

No connection between national courts and international arbitration (i.e. no preliminary reference procedure).

Arbitration mechanism above the ECJ?

Cf. Article 218(11) TFEU.

Cf. Article 111(4) EEA.

C. Is arbitration a feasible solution?

II. Market access for non-EU States only with a surveillance and court mechanism? (i)

EU Council conclusions regarding the EFTA States in 2008, 2010, 2012, 2014, 2016/2017:

Market access only with surveillance and Court.

ICE, LIE, NOR fulfil these conditions: ESA and EFTA Court.

Switzerland linked to EU by network of bilateral sectoral agreements without surveillance and court.

II. Market access for non-EU States only with a surveillance and court mechanism? (ii)

Since 2008, no new market access agreement between Switzerland and EU.

EU even refused to have existing agreements updated. Only recently given in (good faith in public international law).

Will the surveillance and court requirement also apply to a bespoke agreement UK - EU after Brexit? Probably.

UK wants to have as much access as possible.

D. The EEA options

I. Joining the EEA Agreement on the EFTA side (i)

The EEA is an extension of the EU single market to the EEA/EFTA States.

The EEA Agreement comprises:

- Fundamental freedoms (goods, persons, sevices, capital),
- Competition and State aid law,
- Harmonised economic law (for ex. company law, labour law, consumer protection law, IP law, public procurement law, banking and insurance law).

D. The EEA options

I. Joining the EEA Agreement on the EFTA side (ii)

The actors of the EEA/EFTA States have access to the single market.

Two pillar structure; EU pillar and EFTA pillar, each with own institutions.

UK is currently an EEA State in the EU pillar.

As regards “passporting rights” see:

E-4/10, E-6/10 and E-7/10 - *Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE v EFTA Surveillance Authority*; E-16/15 *Swiss Life.*

D. The EEA options

I. Joining the EEA Agreement on the EFTA side (iii)

Precondition is EFTA membership.

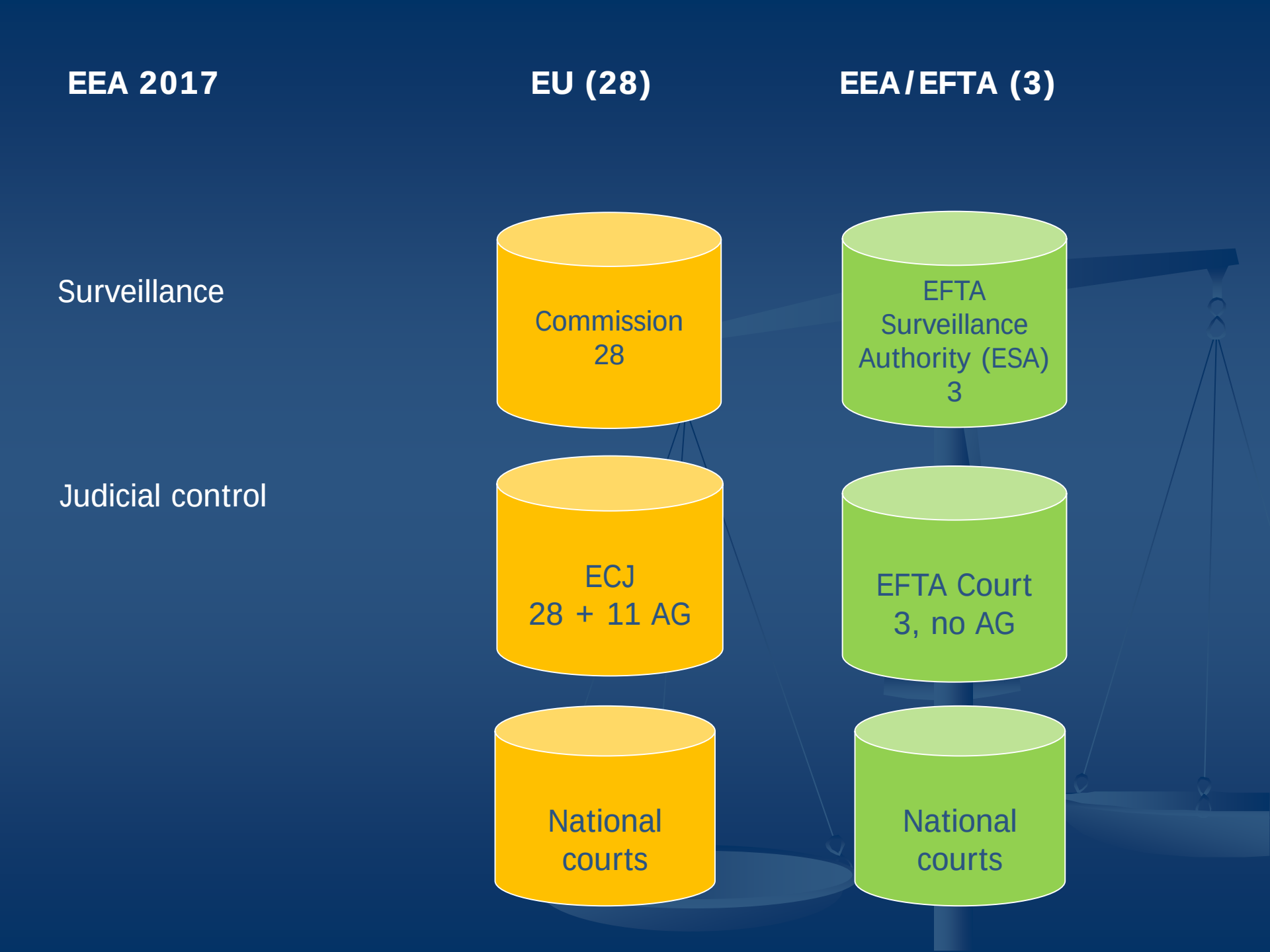
EFTA was founded in 1960 under British leadership.

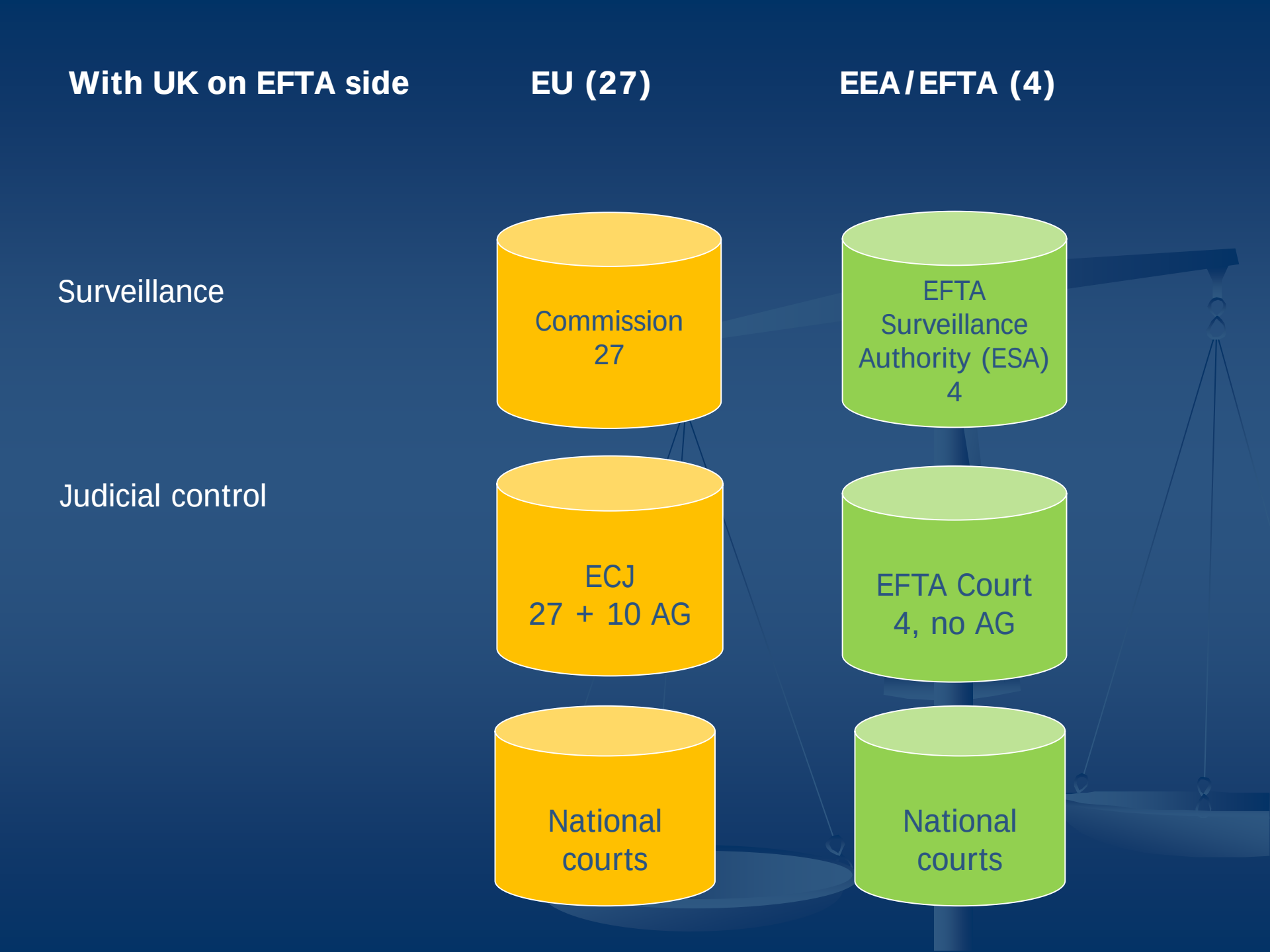
No customs union; network of FTAs around the world.

Current EFTA States Iceland, Liechtenstein, Norway and Switzerland would have to agree.

For EEA accession, agreement of Iceland, Liechtenstein and Norway as well as of the EU would be necessary.

Openness signalled.


EEA 2017
EU (28)
EEA/EFTA (3)
Surveillance
Judicial control
Commission
28
EFTA
Surveillance
Authority (ESA)
3
ECJ
28 + 11 AG
EFTA Court
3, no AG
National
courts
National
courts


With UK on EFTA side
EU (27)
EEA/EFTA (4)
Surveillance
Judicial control
Commission
27
EFTA
Surveillance
Authority (ESA)
4
ECJ
27 + 10 AG
EFTA Court
4, no AG
National
courts
National
courts

D. The EEA options

I. Joining the EEA Agreement on the EFTA side (iv)

A single market is not the same as a customs union.

EEA is no customs union: Sovereignty in foreign trade (as with regard to agriculture, fisheries, taxation, currency) is with the EEA/EFTA States.

EEA/EFTA States have the right to conclude FTAs with third countries.

They may do that as part of EFTA (i.e. including Switzerland) or individually.

Example: FTA Japan –Switzerland.

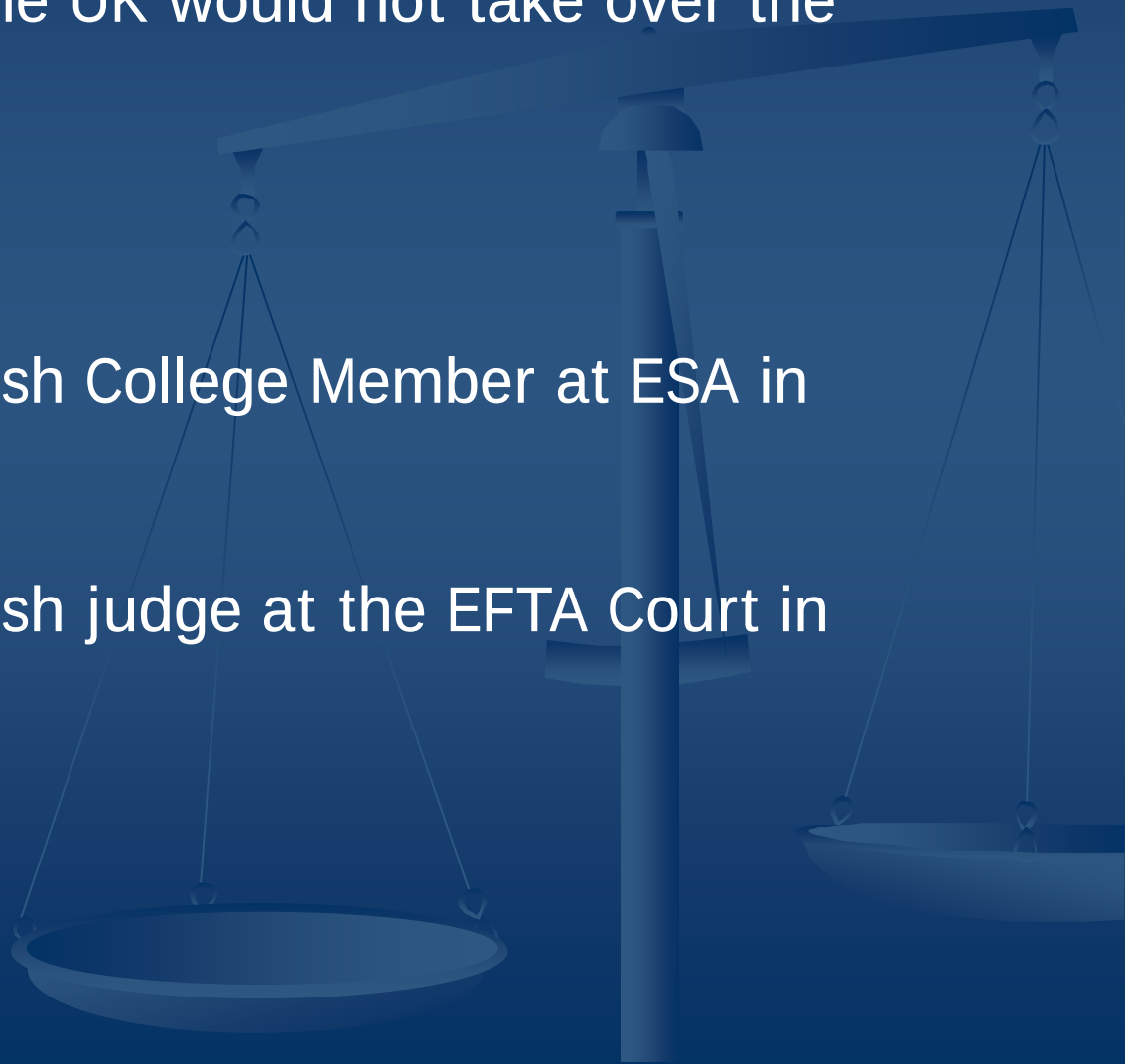
II. Docking to the EEA/EFTA institutions (i)

Docking means that the UK would not take over the whole EEA acquis.

Bespoke agreement.

There would be a British College Member at ESA in British cases.

There would be a British judge at the EFTA Court in British cases.



II. Docking to the EEA/EFTA institutions (ii)

Proposed by the EU to Switzerland in May 2013 (“Non-Paper” of the chief negotiators).

EU said that it was prepared to accept competence of ESA and jurisdiction of the EFTA Court for sectoral bilateral agreements EU-Switzerland.

ESA College Member and a Judge who would sit in cases concerning the Swiss-EU agreements.

Not pursued by Swiss Government for the time being.

“Enforcement and dispute resolution” paper of 23 August 2017 implicitly discusses docking.

III. The EFTA Court as a transitional solution? (i)

NON PAPER ON KEY ELEMENTS LIKELY TO FEATURE IN THE DRAFT NEGOTIATING DIRECTIVES

Jurisdiction of ECJ should be maintained.

"*For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union*." (Para. 32.)

III. The EFTA Court as a transitional solution? (ii)

Would the ECJ itself be impartial?

Would it be acceptable for the UK?

Academic Advisory board at the German Ministry for Economic Affairs and Energy on 28 April 2017:

EFTA and EEA membership for UK as a transitional solution. This would allow the negotiations to last longer than two years.

UK parliamentarians, industry, the City of London, the Governments of Scotland and Wales concur.

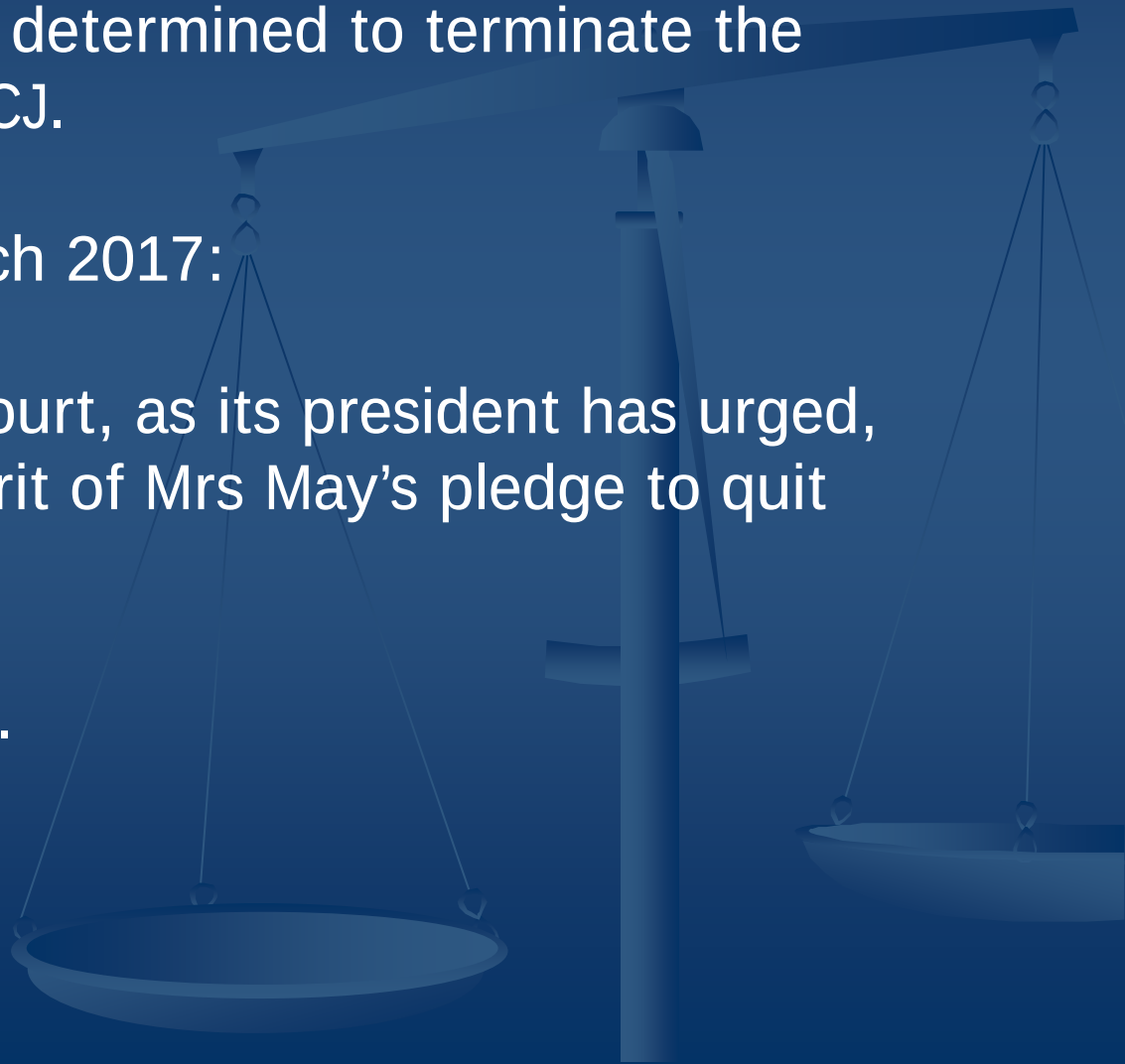
I. The basic question (i)

HM Governement is determined to terminate the jurisdiction of the ECJ.

Economist of 2 March 2017:

"Joining the EFTA court, as its president has urged, would break the spirit of Mrs May's pledge to quit ECJ jurisdiction."

Doubtful contention.



I. The basic question (ii)

The Times of 21 August 2017:

No future trade deal without a mutually agreed forum for dispute resolution.

ECJ is a no go.

EFTA Court leaves sovereignty to national courts.

EFTA Court already exists, no need “to build a new court from scratch with the daunting task of simultaneously satisfying British Eurosceptics and the EU’s remaining 27 states.”

II. Law on the books

EEA law originates from EU law.

Case law shall develop in a homogeneous way.

Securing a level playing field for operators.

Written homogeneity rules:

EFTA Court shall follow or take into account relevant ECJ case law.

No such explicit (behavioural) obligation on the ECJ.

III. Law in action (i)

1. General (i)

EFTA Court going first in most of its cases.

Recent case: Order of the President in E-21/16 *Nobile* (integrity of the Court and independence of the Judges).

Vassilios Skouris in 2014: Symbiotic relationship marked by mutual respect and dialogue which has allowed the flow of information in both directions.

Former Commission DG and WTO AB Chairman *Claus Ehlermann*: Healthy (regulatory) competition.

III. Law in action (ii)

1. General (ii)

288 cases altogether; 210 contested cases.

213 references by ECJ, AGs and GC to EFTA Court case law in 145 cases.

References by Supreme Courts of GER, AUS, CH, and by Appeal Courts of EU States (i.a. England and Wales) and of CH.

140 references of AGs to EFTA Court in 90 cases.

59 references of EFTA Court to AGs in 38 cases.

III. Law in action (iii)

1. General (iii)

Only court of general jurisdiction whose case law is regularly cited by the ECJ in the context of EU law.

AGs as an entrance gate.

Recent examples: Legal situation of a trust (AG *Kokott* C-646/15 *Panayi*); access to the case file (AG *Bobek* C-213/15 P *Commission v. Breyer*): website as a durable medium (AG *Bobek* and ECJ C-375/15 *Bawag*); State aid (AG *Kokott* C-74/16 *Congregación de Escuelas Pías Provincia Betania*).

III. Law in action (iv)

2. Constellations (i)

(a) EFTA Court following ECJ

In cases concerning substantive single market law.

Mostly, but not always.

In E-3/00 *Kellogg's*, the EFTA Court has deviated from C-174/82 *Sandoz* (nutritional need argument in food law). The ECJ has disregarded the opinion of AG Mischo, overruled *Sandoz* and followed the EFTA Court in C-192/01 *Commission v Denmark*.

III. Law in action (v)

2. Constellations (ii)

(b) EU judiciary following EFTA Court

Examples: TV without frontiers; succession of contracts; precautionary principle in food law; taking a ride with an intoxicated driver; repackaging of pharmaceuticals; taxation of outbound dividends; relationship between freedom to provide services and free movement of capital; liability for pain and suffering; website as a durable medium.

In many cases implicitly; role of AG's and of the GC.

III. Law in action (vi)

2. Constellations (iii)

(c) EU judiciary having second thoughts and putting itself in line with EFTA Court (i)

(Role of Advocates General)

Taxation of outbound dividends:

EFTA Court E-1/04 *Fokus Bank* – ECJ C-374/04 *Test Claimants in Class IV* and C-170/05 *Denkavit* – ECJ C-487/08 *Commission vs Spain.*

III. Law in action (vi)

2. Constellations (iv)

(c) EU judiciary having second thoughts and putting itself in line with EFTA Court (ii)

State gambling monopolies:

EFTA Court E-1/06 *Gaming Machines* and E-3/06 *Ladbrokes* –ECJ C-42/07 *Liga Portuguesa* – ECJ C-316/07 *Markus Stoß*.

Concept of a “durable medium” in internet law:

EFTA Court E-4/09 *Inconsult* –ECJ C-49/11 *Content Services* – ECJ C-375/15 *BAWAG*.

III. Law in action (vii)

2. Constellations (v)

(d) EFTA Court adjusting its jurisprudence to ECJ case law

State retail alcohol monopolies:

EFTA Court E-6/96 *Wilhelmsen* – ECJ E-189/95 *Franzén* – EFTA Court E-04/05 - *HOB-vín I*.

III. Law in action (viii)

2. Constellations (vi)

(e) EFTA Court being faced with inconsistent or even contradictory ECJ case law.

E-16/16 *Fosen-Linjen* [pending]:

Is a public body which has unlawfully awarded a contract to a bidder liable for damages under normal liability rules or under the State liability rules?

ECJ C-462/03 *Strabag*: Normal rules.

ECJ C-568/08 *Combinatie*: State liability rules.

III. Law in action (ix)

2. Constellations (vii)

(f) National court of an EU State asking the ECJ to clarify its jurisprudence in light of EFTA Court case law

ECJ *Boehringer Ingelheim I* – EFTA Court *Paranova v Merck* – England and Wales Court of Appeal *Boehringer Ingelheim II* – ECJ *Boehringer Ingelheim*.

Repackager of pharmaceuticals adding his own design to the new boxes.

IV. Relevance of the case law of the ECtHR

Swiss voices in 1992: In case of conflict ECJ - ECtHR EFTA Court must follow ECJ.

This is not what the EFTA Court is doing.

Role of the ECtHR in economic law (property law, unfair competition law, trademark law, competition law, collective bargaining etc.)

18 references to ECtHR judgments in 12 cases.

Several references by ECtHR in 1 case.

Triangle EU Courts – Strasbourg Court – EFTA Court.

I. Judging is no exact science

Room for traditional EFTA values:

- Belief in free trade and market orientation.
- Belief in self-responsibility.

Not the whole French rucksack of the ECJ (no AG, English, judicial style).

Karl Kraus: "*Language is the mother of thought, not its handmaiden.*"

Mature court has more self-confidence; must be convinced.

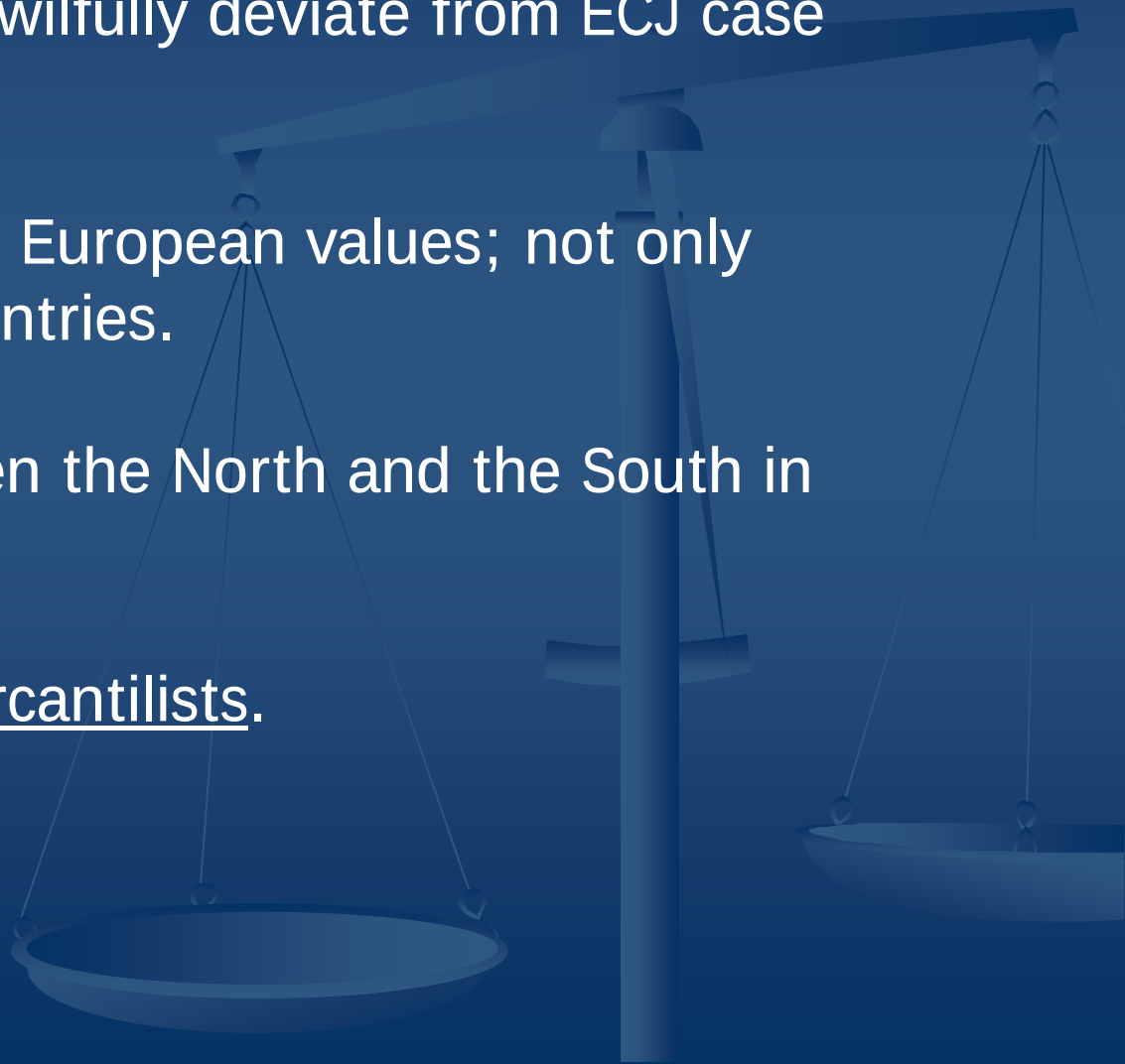
II. The EFTA Court is a European court

EFTA Court will not wilfully deviate from ECJ case law.

But EFTA values are European values; not only present in EFTA countries.

Dividing line between the North and the South in Europe:

Free traders vs. mercantilists.



III. ECJ and EFTA Court condemned to dialogue (i)

Article 105 EEA:

EEA Joint Committee shall act so as to preserve the homogeneous interpretation of the Agreement.

If it does not succeed, Article 111 EEA may apply:

- Contracting Parties to the dispute may agree to request the ECJ to give a ruling on the interpretation of the relevant rules.

- A Contracting Party may either take a safeguard measure or declare the provisional suspension of a part of the Agreement.

III. ECJ and EFTA Court condemned to dialogue (ii)

These provisions are not practical.

Unthinkable that the Joint Committee would, in the event of a divergence in the case law, adopt a decision on the merits.

Unthinkable that the EFTA side would agree to submit a conflict to the ECJ.

Unlikely that the EU would take sanctions because of an EFTA Court judgment. It would lose its face as a community of law.

E-16/11 *Icesave I*.

IV. Homogeneity is a process

Cannot be understood as a snapshot in time.

Many more actors than the ECJ and the EFTA Court.

GC, AGs, national courts, academic literature.

“It’s been working for 25 years and it works perfectly.”

(ECJ President Koen Lenaerts in a radio interview on 17 July 2017 in the Brexit context.)

G. EFTA pillar less onerous than EU pilllar

I. More sovereignty for the States

No direct effect and no primacy; only after implementation in the domestic legal order.

“Obligation of result” (difficult to enforce).

The EFTA Court has furthermore recognised State liability (E-9/97 *Sveinbjörnsdóttir*).

No penalty payments in case of non-compliance with an infringement judgment.

II. More sovereignty for the courts

No written obligation of courts of last resort to refer questions of EEA law (E-18/11 *Irish Bank*: “More partner-like relationship”).

Preliminary rulings not formally binding (“advisory opinions”).

However: Duty of loyalty and principle of reciprocity; right to a fair trial (Article 6 ECHR).

On balance: More flexibility.

First ESA President *Knut Almestad*: EEA Agreement tilted in favour of the EFTA States.

III. Own institutions are an advantage

Law matters, but also people matter.

Judging is no exact science.

Britain (as Norway, Iceland, Liechtenstein) would always have an own actor on the bench (due to the size of the EFTA institutions).

Even under the one-sided current homogeneity rules and as a court of three small countries, the EFTA Court has managed to uphold classical EFTA values.

I. Some landmark cases (i)

E-4/97 *Husbanken* (full judicial review).

E-15/10 *Norway Post* (full judicial review).

E-14/11 *DB Schenker I* (broad public access to documents).

E-8/00 *LO* and E-14/15 *Holship* (collective bargaining/industrial action and fundamental freedoms/competition law; negative freedom of association; full proportionality test; effects-based approach).

I. Some landmark cases (ii)

E-8/13 *Abelia* (right of audience of in-house counsel to be assessed on a case by case basis; fact-based approach).

E-16/11 *Icesave I*: (Liability of banks, not of taxpayers; economics: avoiding moral hazard).

E-4/09 *Inconsult* (consumers can be expected to download or print out a document from the website of a financial services provider).

E-5/15 *Matja Kumba* (fact-based, flexible interpretation of the Working Time Directive).

I. Some landmark cases (iii)

Order of the President in E-18/14 *Wow Air* (accelerated preliminary reference procedure; fostering competition between air carriers).

E-15/15 and 16/15 *Vienna Life* and *Swiss Life* (trade in used ["second-hand"] life assurance policies is not consumer business).

Cases E-3/13 and E-20/13 *Olsen* (Recognition of a trust; tax competition; purely artificial arrangement if there is no other *reasonable* explanation but to secure a tax advantage).

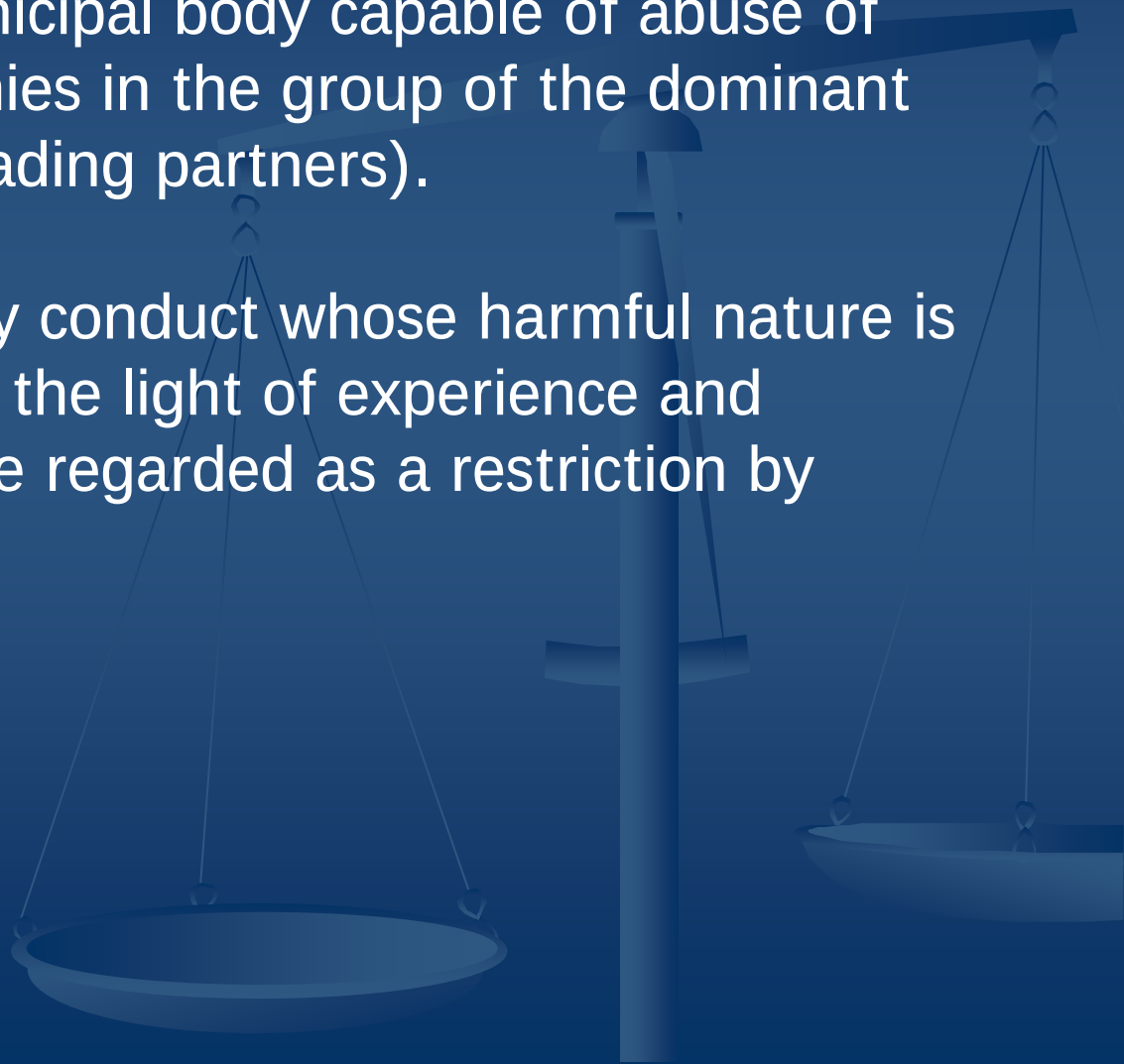
I. Some landmark cases (iv)

E-7/13 *Creditinfo Lánstraust* ("Public sector information is a key resource for industry in the information society (see the Commission's Green Paper, COM(1998)585). A main goal of the European legislature was to put European firms on an equal footing with their American counterparts, which, since the enactment of the Freedom of Information Act in 1966, have benefited from a highly developed, efficient public information system at all levels of the administration.")

I. Some landmark cases (v)

E-29/15 *Sorpa* (municipal body capable of abuse of dominance, companies in the group of the dominant company may be trading partners).

E-3/16 *Ski Taxi* (only conduct whose harmful nature is easily identifiable in the light of experience and economics should be regarded as a restriction by object).



I. Some landmark cases (vi)

E-5/16 *Vigeland* (copyright is an incentive to contribute to the enrichment of society; registration as a trade mark after the expiry of copyright is not in itself unlawful; but it could be contrary to 'accepted principles of morality' where artworks form part of a nation's cultural heritage or act as an emblem of sovereignty).

II. Judicial style (i)

A small court cannot decree; must seek acceptance of his audiences, must justify judgments.

Dealing with all the arguments.

No Advocate General.

No written obligation of courts of last resort to refer and no written obligation of national courts to follow. They must be convinced.

II. Judicial style (ii)

Making a virtue of necessity.

Style has an impact on content.

If you are forced to be comprehensive and to give reasons, you rely less on assumptions, presumptions and fictions.

You decide fact-based and effect-based.

III. Underlying social model (image of man) (i)

Traditional EFTA values are the belief in liberalism, free trade and market orientation as well as in self-responsibility.

No mercantilist tradition in the EFTA States.

As regards the relevance of economics, *John Temple Lang* has written:

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

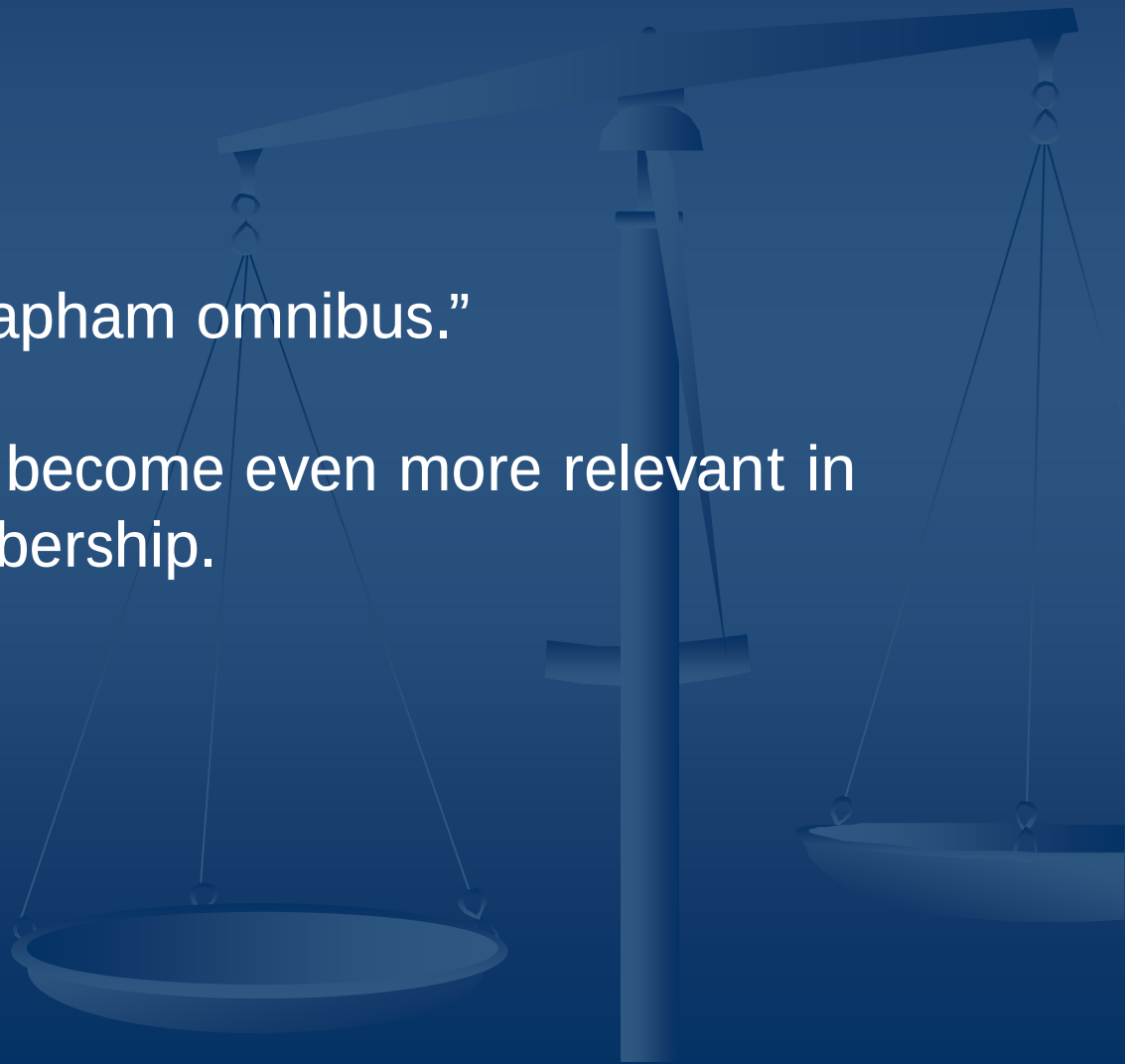
III. Underlying social model (image of man) (ii)

No grand vision.

Pragmatism.

The “man on the Clapham omnibus.”

This thinking would become even more relevant in case of British membership.



I. Other neuralgic points

I. Free movement of persons

II. Co-determination right, but no co-decision right

III. Payments to the EU/its Member States