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Shortcuts in Competition Law

Speech given on Monday, 6 March 2017, as the 19th Annual Burrell Competition Lecture of the Competition Law Association at the Honourable Society of Gray's Inn, London. The Lecture was chaired by James Flynn QC, Chairman of the Competition Law Association.

Mr Chairman, ladies and gentlemen,

Queen *Elizabeth I*, a patron of this Inn, is said to once have argued that:

"If we still advise we shall never do."[1]

Our role as judges and lawyers, however, dictates that we shall advise and do. Let us see how much we advise and achieve before the end of this evening.

A. Introduction

I start with some remarks on the notion of shortcuts. Shortcuts are routes more direct than those ordinarily taken, but sometimes a shortcut takes us in the wrong direction, we end up lost and take a lot longer to arrive at our final destination. Essentially this holds true also in competition law.

In competition law, shortcuts may accelerate procedures. This is regularly set out in opinions of Advocates General. They speak of how important shortcuts are in shortening procedures, and enhancing predictability and legal certainty. They note that shortcuts have a deterrent effect, conserve the resources of the competition authorities and of the judiciary. It is beyond doubt that without shortcuts competition policy could not be conducted in an efficient manner. However, shortcuts can also be counterproductive, they may prevent the achievement of the ultimate goals of the

[1] In a letter to Sir Henry Sidney of 1565, see: *Lucy Atkin*, Memoirs of the Court of Queen Elizabeth, Vol. 1, Sixth Edition, Longman, Hurst, Rees, Orme, Brown and Green (1826) p. 403.

efficient use of resources and freedom of action: this is especially important in digital markets.

There are countless shortcuts in European competition law. In addition to those referred to in this lecture, the following may be mentioned: affectation of inter-State trade; parental liability and predatory pricing.

B. The EFTA Court

I. A Court of general jurisdiction

I shall address the case law of the European Union Courts, but also the case law of my Court. So let me give you a very short introduction into the EFTA Court. The EFTA Court is a court of general jurisdiction dealing with EEA Single Market law in cases concerning the three current EEA/EFTA States Iceland, Liechtenstein, and Norway. EEA Single Market law is essentially identical to EU Single Market law.

Our task is the interpretation of the EEA Agreement in cases concerning the three EEA/EFTA Countries.[2] The EEA is not a customs union.[3] The EEA/EFTA States have kept their sovereignty in foreign trade.[4] The same goes for agriculture, fisheries, taxation, and currency. Our working language is English. It is not real English, it is EFTA English, but we try. And I may remind you of the famous saying of *Karl Kraus* that "Language is the mother of thought and not its handmaiden."

II. Homogeneity

An important principle of EEA law is homogeneity. EU law and EEA law are two separate legal orders that are largely identical in substance. There must be a level playing field for all operators, whether in the EFTA pillar or in the EU pillar. In theory, this has been resolved in a one-sided way. The rules say that we are bound to

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[2] *Baudenbacher*, "The EFTA Court: Structure and Tasks", in The Handbook of EEA Law (ed. Carl Baudenbacher, 2016), 139 et seqq.
[3] *Norberg and Johansson*, "The History of the EEA Agreement and the First Twenty Years of Its Existence", in The Handbook of EEA Law (ed. Carl Baudenbacher, 2016), 3, 7-8.
[4] Ibid., 7-8.

follow or to take into account the case law of the ECJ, but there is no corresponding obligation for the ECJ. However, in the 23 years of the Court's existence, things have developed in quite a different way. Firstly, in the majority of cases, we have to tackle novel legal questions. We call this the "going first constellation," and some say that we have a "first mover advantage." Secondly, even if there is ECJ case law, my court is an independent court of law. If I look back on these 23 years, we have become more self-confident than we were at the beginning. If you are more than 20 years old, you will not want to decide *contre-coeur*. The written homogeneity rules have become of more limited relevance, a point expressed, for instance, by the then President of the ECJ, *Vassillios Skouris*, who wrote in the festschrift marking my Court's 20th anniversary two-and-a-half years ago:

> "The long-lasting dialogue between the EFTA Court and the CJEU has allowed the flow of information in both directions. Ignoring EFTA Court precedents would simply be incompatible with the overriding objective of the EEA Agreement, which is homogeneity. […] The symbiotic nature of the relationship has contributed to the successful development of the EEA Single Market. Both courts stand as examples for each other thus depicting mutual respect, strengthening the rules of homogeneity and representing a high level of appreciation. Cooperation between the two was built on strong foundations which have stood the test of time."[5]

III. EFTA pillar is less onerous than EU pillar

The EFTA pillar is less onerous on the States and national courts than the EU pillar. There is no EU-style direct effect and no primacy in our setup. EEA law only produces direct effect and primacy after implementation into the domestic legal order. There is an obligation of result in this regard, but that has proven to be more a political declaration. No penalty payments can be imposed in case of non-compliance with an infringement judgment. There is no written obligation of courts of last resort to make a reference to us. We have stated in E-18/11 *Irish Bank* that our relationship with the national

[5] *Skouris*, "The Role of the Court of Justice of the European Union in the Development of the EEA Single Market: Advancement through Collaboration between the EFTA Court and the CJEU", in The EEA and the EFTA Court (ed. The EFTA Court, 2014) 3-13, 12.

supreme courts is more partner-like than the relationship between the ECJ and the national supreme courts of EU Member States.[6] Our preliminary rulings are not formally binding on the referring court; we call them "judgments" in the rubrum and "advisory opinions" in the operative part. However, national courts are still bound by the general duty of loyalty and the principle of reciprocity.[7] On balance there is also considerable flexibility on this point. The first President of the EFTA Surveillance Authority, *Knut Almestad*, has said the EEA Agreement is, in all these matters, tilted in favour of the EFTA States.[8]

IV. Competition case law

In the field of competition law, many of you will be familiar with the Court's *Norway Post* judgment, which was rendered in an action for nullity. The EFTA Surveillance Authority ('ESA') had found that Norway Post had abused its dominant position and imposed a fine.[9] My Court has furthermore dealt with a series of cases concerning public access to documents that were seized by ESA in a dawn raid.[10] We have also given a number of important preliminary rulings in this area. I always emphasise that competition law is certainly something for specialists, but it must be seen from a broader perspective. It is part of economic law and must be seen as such.

C. Restriction by object

I. General

Let me then turn to a first shortcut, the problem of restriction by object. Article 53(1) EEA Agreement prohibits all agreements

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[6] E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, para. 57.
[7] *Magnússon,* "On the Authority of Advisory Opinions", Europarättslig tidskrift, (2010), 528, 540.
[8] *Almestad*, "Reflections on the Postal Service Directive and the EEA Review", in Judicial Protection in the European Economic Area (ed. EFTA Court, 2012), 77, 81 et seq.
[9] E-15/10 *Norway Post* [2012] EFTA Ct. Rep. 248.
[10] E-14/11 *DB Schenker v ESA* (*DB Schenker I)* [2012] EFTA Ct. Rep. 1181; E-7/12 *DB Schenker v ESA* (*DB Schenker II),* [2013] EFTA Ct. Rep. 359; E-5/13 *DB Schenker v ESA (DB Schenker V)* [2014] EFTA Ct. Rep. 306; Order of the President of 24 March 2015 in E-22/14 *DB Schenker v ESA* (*DB Schenker VII),* [2015] EFTA Ct. Rep. 352.

between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement. The provision mirrors Article 101(1) TFEU.

In order to be regarded as a restriction of competition by object, an agreement must, according to the ECJ's case law, by its very nature, in light of its specific legal and economic context, reveal a sufficient degree of harm to competition. When determining that context, the nature of the goods and services affected must be taken into account, together with the real conditions of the functioning and structure of the market or markets in question.

Advocate General *Trstenjak* said in *BIDS* that a restriction by object is difficult to grasp and, in fact, that may well be the case.[11] The EFTA Court, in its recent judgment in E-3/16 *Ski Taxi*, gave an overview of the categories of agreements that have been held to constitute restrictions by object: horizontal agreements to set prices; market-sharing agreements; agreements to restrict capacity; exclusive purchasing agreements; agreements to exchange price information; vertical agreements involving resale price maintenance; the prohibition of parallel trade; and a clause in a distribution contract whereby distributors are prohibited from selling certain products on the internet.[12] *Ski Taxi* concerned the submission of joint bids by actual or potential competitors. Following the Court's judgment, the case is now pending before the Supreme Court of Norway.

I may add here that our judicial style is quite different from the judicial style of our sister court, the ECJ. Consisting of only three judges and without an Advocate General, we cannot decree in the tradition of the French administrative courts; we have to give reasons. We must try to convince our audiences that we've got it right. One may say that we have made a virtue of necessity.

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[11] Opinion of Advocate General *Trstenjak* in *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.* ("*BIDS*") C-209/07, EU:C:2008:467, point 47.

[12] E-3/16 *Ski Taxi,* judgment of 22 December 2016, not yet reported, paras. 46-55.

II. Twin concepts in American law

There are, as you know, twin concepts under the Sherman Act. There are *per se* violations and rule of reasons violations. *Per se* violations require no further analysis of the effects or intentions behind the anticompetitive practice. They are automatically illegal. They cover activities such as geographic market division, price fixing or horizontal market agreements between competitors. Many of these could be seen, therefore, as parallel to certain substantive legal presumptions in EU competition law. The former Director General of DG Competition, *Alexander Italianer*, in a lecture at the Fordham Antitrust Conference, spoke of the "transatlantic twin concepts of '*per se* v rule of reason' and 'restriction by object v by effect'," but he has also pointed to the differences.[13] Under Article 101(3) TFEU, a violation may be justified.

III. Presumption of concerted practices

The next shortcut I want to mention is the presumption of concerted practices, also called the presumption of causal connection. This evidentiary presumption has far-reaching consequences. It is based on the likelihood that an undertaking which has participated in concerted practices and remains active on the market will use the information obtained from competitors to define its market conduct. This is deemed to be the case if such contact was established even on a single occasion. There is no need to consider the long-term market conduct or the regularity of such practices.

It must be noted that in the early years of integration, the presumption of concerted practices did not exist. In Case 48/69 *ICI v Commission*, dyestuff producers around Europe carried out three separate but identical price increases in different countries of the Community.[14] Advocate General *Mayras* argued that unlike agreements by object, concerted practices had to be analysed in view

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[13] *Italianer*, "Competitor agreements under EU competition law, 40th Annual Conference on International Antitrust Law and Policy", Fordham Competition Law Institute, New York, 26 September 2013, available at http://ec.europa.eu/competition/speeches/text/sp2013_07_en.pdf (visited on 23 March 2017).

[14] Judgment in *ICI / Commission,* Case 48/69, EU:C:1972:70, para. 87.

of their market effects.[15] Those effects will serve as evidence as to whether there was indeed a concerted practice harming competition. The effects showed that there was a concerted practice which had harmed competition.[16] The parallel conduct in raising prices could not be explained by the market structure.[17] The ECJ followed the Advocate General.[18] I may add that British and Swiss companies were involved in the dyestuff cartel. Neither countries were EEC Member States, and in order to establish jurisdiction the ECJ relied on the single economic entity doctrine.[19] The fact that the ECJ did not embrace the effects doctrine had to do with the UK's strong views on the territoriality principle.

However, in later cases the ECJ started to deal with concerted practices under the 'by object' standard. In C-8/08 *T-Mobile Netherlands*, representatives of five Dutch mobile telephone operators had discussed the reduction of standard dealer remunerations for post-paid subscriptions, which was to take effect on or around 1 September 2001.[20] Confidential information came up in the discussions during that meeting. The referring Dutch court had doubts as to whether it was correct for the Dutch Competition Authority to have failed to consider the effects of the concerted practice and whether there was a causal connection between the concerted practice and the market conduct of the operators in question.

Following Advocate General *Kokott*'s opinion, the ECJ held that "an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object."[21]

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[15] Opinion of Advocate General *Mayras* in *ICI / Commission,* Case 48/69, EU:C:1972:32, page 671.
[16] Judgment in *ICI / Commission,* cited above, paras. 120-124.
[17] Ibid., paras. 113-119.
[18] Ibid., paras. 64-68.
[19] Ibid., paras. 131-135.
[20] Judgment in *T-Mobile Netherlands* C-8/08, EU:C:2009:343, para. 12.
[21] Opinion of Advocate General *Kokott* in *T-Mobile Netherlands,* C-8/08, EU:C:2009:110, point 41.

IV. T-Mobile Netherlands as the peak of the far-reaching approach

T-Mobile Netherlands may be dubbed the peak of the far-reaching interpretation of by object restriction. Advocate General *Kokott* called the prohibition of restrictions by object a "*per se* prohibition of such practices."[22] This characterisation is inaccurate inasmuch as, contrary to the US, none of the discussed presumptions refer to strictly illegal conduct, immediately and directly prohibited by the law. Nonetheless, it can be difficult to rebut the presumptions under Article 101(3) TFEU, which in practice leads to the same result as in American law.

V. *Cartes Bancaires* and *Ski Taxi* as turning points?

The question arises whether *Cartes Bancaires* and our *Ski Taxi* judgment are some sort of turning points. Advocate General *Wahl*, a specialist of competition law, heavily criticised the ECJ's stand in his Opinion in Case C-67/13 P *Cartes Bancaires* ('C.B.') and asserted that the case law has contributed to blurring the boundaries between object and effect.[23] In point 51 of his opinion he states:

> [It is] "difficult to distinguish how the examination of the context advocated by the Court, which consists in evaluating the risk of competition on the market in question being eliminated or seriously weakened, having regard, in particular, to 'the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned', differs from the examination of possible anticompetitive effects."[24]

The General Court had held that, since the list in what is now Article 101 TFEU was not exhaustive, no strict interpretation of the concept of infringement by object was warranted.[25] It is to be noted that the Commission had very much welcomed the General Court's judgment. However, the ECJ found that the General Court had erred

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[22] Ibid., point 43.
[23] Opinion of Advocate General *Wahl* in *Cartes Bancaires,* C-67/13 P, EU:C:2014:1958, point 52.
[24] Ibid., point 51.
[25] Judgment in *Cartes Bancaires,* T-491/07, EU:T:2012:633, paras. 124 and 146.

in finding that the concept of restriction of competition must not be interpreted restrictively.[26]

On a general level, Advocate General *Wahl* wrote that the formalistic approach is "conceivable only in the case of (i) conduct entailing an inherent risk of a particularly serious harmful effect or (ii) conduct in respect of which it can be concluded that the unfavourable effects on competition outweigh the pro-competitive effects. To hold otherwise would effectively deny that some actions of economic operators may produce beneficial externalities from the point of view of competition. In my view, it is only when experience based on economic analysis shows that a restriction is constantly prohibited that it seems reasonable to penalise it directly for the sake of procedural economy."[27]

He continued:

> "Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition."[28]

This formulation was in substance taken over by my court in *Ski Taxi*, where we said:

> "Only conduct whose harmful nature is easily identifiable, in the light of experience and economics, should be regarded as a restriction of competition by object."[29]

This fact-based approach stands in contrast to what Advocate General *Trstenjak* stated in *BIDS*, namely that no obvious restriction of competition is required and "classification as a restriction of competition by object cannot depend on whether that object is clear

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[26] Judgment in *Cartes Bancaires,* C-67/13 P EU:C:2014:2204, para. 58.
[27] Opinion of Advocate General *Wahl* in *Cartes Bancaires,* cited above, point 55.
[28] Ibid., point 56.
[29] *Ski Taxi,* cited above, para. 61.

at first sight or becomes evident only on closer examination of the circumstances and the intentions of the parties."[30]

It remains to be seen what conclusions the ECJ will reach in *Intel*[31] after Advocate General *Wahl* took the view that the General Court erred in law when considering that 'exclusivity rebates' can be categorised as abusive without an analysis of their capacity to restrict competition depending on the circumstances of the case.[32]

D. Antitrust immunity of collective agreements

I. ECJ *Albany* and related cases

My next example concerns the antitrust immunity of collective agreements. In *Albany*[33] and in related cases, the ECJ found that collective agreements aim at improving working conditions and were therefore beyond the reach of European competition law entirely.[34] In contrast to Advocate General *Jacobs*, the ECJ did not examine the limits of such immunity. Advocate General *Jacobs* had concluded that, in all the systems examined - and he had made a broad comparative study including US law - collective agreements are, to some extent, sheltered from competition law, but that such immunity is not unlimited.[35]

In Case E-8/00 *LO*, the Commission urged us not to look into the limits of collective bargaining.[36] The Commission Agent was a well-known lawyer. After the hearing, I asked him who had instructed him and he told me that he had received his instructions from DG Social Policy. This is a general problem. Who is the Commission? Who instructs the Commission? One sometimes has a sense that much depends on coincidence. The Commission, in the early years

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[30] *Opinion* of Advocate General *Trstenjak* in *BIDS,* cited above, point 47.
[31] Appeal brought on 28 August 2014 by *Intel Corporation* in Case C-413/14 P (pending) against the judgment of the General Court (Seventh Chamber, Extended Composition) delivered on 12 June 2014 in Case T-286/09: *Intel Corporation v European Commission.*
[32] Opinion of Advocate General *Wahl* in *Intel Corporation Inc. v Commission*, C-413/14 P, EU:C:2016:788, point 106.
[33] Judgment in *Albany*, C-67/96, EU:C:1999:430, paras. 59-60.
[34] Ibid., paras. 59-60.
[35] Opinion of Advocate General *Jacobs* in *Albany*, C-67/96, EU:C:1999:28, points 80-112.
[36] E-8/00 *Landsorganisasjonen i Norge ('LO')* [2002] EFTA Ct. Rep. 116, para. 56.

of the EFTA Court, considered that since there is no advocate general position at the EFTA Court they had to take on that responsibility. I have even seen a memorandum to this effect. I have my doubts whether this is quite accurate as the Commission often pursues its own goals. Having said that, I want to emphasise that the participation of the Commission in our cases it of utmost importance.

II. EFTA Court *LO* and *Holship*

In our 2002 *LO* judgment, we reproduced *Sir Francis Jacobs'* statement, almost verbatim - the ECJ had disregarded his argument – and we also took from him that the good faith of the parties in concluding and implementing a collective agreement must be taken into account.[37] A few years later, another Advocate General, *Poiares Maduro*, made reference to us on that very point in the well-known *Viking Line* case.[38] My Court held that the analysis of a collective agreement should take into consideration not only the effects, but also the aggregate effects of its provisions, rather than considering them individually. Separate provisions functioning together may, in aggregate, have the object or effect of restriction of competition within the meaning of Article 53 EEA. It is immaterial that it cannot be established that any individual provision has that effect.[39]

In a recent case, E-14/15 *Holship*, we were on the same line and considered the aggregate effect of the collective agreements' provisions, holding that:

> "it is not sufficient that a measure of industrial action resorts to the legitimate aim of protection of workers in the abstract. It must rather be assessed if the measure at issue genuinely aims at the protection of workers. The absence of such an assessment may create an environment where the measures allegedly taken with reference to the protection of workers primarily seek to prevent undertakings from lawfully establishing themselves in other EEA States."[40]

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[37] Ibid., para. 56.
[38] Opinion of Advocate General *Maduro* in *Viking Line*, C-438/05, EU:C:2007:292, footnote 24.
[39] *LO*, cited above, paras. 77-79.
[40] E-14/15 *Holship*, judgment 19 April 2016, not yet reported, para. 125.

We played the ball back to Advocate General *Poiares Maduro* by citing points 67 *et seq.* of his *Viking Line* opinion.[41] For a small court, it is quite important to enter into a dialogue with different judicial players, not only with the European Union courts, but also with the Advocates General.

The Supreme Court of Norway followed our *Holship* judgment with 10:7 votes.[42] The minority did not contest our legal assessment, but believed that we had misunderstood a factual circumstance.[43] The Supreme Court of Norway rejected the contention that it had to follow the ECJ's judgment in *Albany* rather than the EFTA Court's judgment *Holship* on the basis of homogeneity.[44]

E. Standard of judicial review

I. Case law of the EU courts

A well-known shortcut has been taken by both the General Court and the ECJ when it comes to the standard of judicial review of the Commission's fining decisions. This certainly spares the courts' resources, but it may be at the expense of undertakings.

II. Case E-4/97 *Husbanken II*

The EFTA Court held early on, in 1998, in the State aid case E-4/97 *Husbanken II* that, essentially, full review of the EFTA Surveillance Authority's decision was necessary.[45] The case was about a state guarantee provided for a publicly-owned housing bank. The guarantee clearly constituted State aid, but ESA said it was justified on the basis that it was a service of general economic interest.[46] The financial services in question constituted 'trade' within the State aid rules. However, ESA had not gone into depth on the condition of trade; it merely stated that even if it cannot "be excluded that the

[41] Ibid., paras. 40 and 125.
[42] Norwegian Supreme Court, judgment 16 December 2016, HR-2016-2554-P, (sak nr. 2014/2089).
[43] Ibid. (Dissenting vote of Justice *Indreberg* and six concurring justices), paras. 138-201.
[44] Ibid., paras. 92-93.
[45] E-4/97 *Norwegian Bankers' Association / ESA (Husbanken II*), [1999] EFTA Ct. Rep. 3, para. 70.
[46] Ibid., para. 10.

measures under consideration may affect trade between Contracting Parties, in practice such trade effects are likely to be only limited."[47]

Moreover, ESA had not considered "to the extent necessary" which market was relevant in this case or whether there were alternative means less distortive to competition than those applied. ESA had not carried out a proper analysis of the costs and benefits of the State aid nor had it made "a proportionality test to assess whether the required balance has been struck between the common interests of the Contracting Parties to the EEA Agreement and the legitimate interests of Norway."

The Court annulled ESA's decision holding that "[t]hese questions call for complex analyses and assessments which the Court cannot carry out but which must be done by the EFTA Surveillance Authority" which "by not carrying out the tests described, [had] wrongly interpreted and applied Article 59(2) EEA."[48]

III. Case E-15/10 *Norway Post*

I mentioned the *Norway Post* case about the abuse of a dominant position. We relied on the European Court of Human Rights' *Menarini* judgment and held that:

> "Article 6(1) ECHR requires that subsequent control of a criminal sanction imposed by an administrative body must be undertaken by a judicial body that has full jurisdiction. Thus, the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision […]. Therefore, when imposing fines for infringement of the competition rules, ESA cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review."[49]

[47] Ibid., para. 68.
[48] Ibid., para. 70.
[49] E-15/10 *Norway Post,* [2012] EFTA. Ct. Rep. 248, para. 100.

We continued:

> "Although the Court may not replace ESA's assessment by its own and, accordingly, it does not affect the legality of ESA's assessment if the Court merely disagrees with the weighing of individual factors in a complex assessment of economic evidence, the Court must nonetheless be convinced that the conclusions drawn by ESA are supported by the facts."[50]

Most commentators felt that both the dictum and tone of our judgment differed from what the ECJ had been doing.[51]

Let me add three remarks here. Firstly, ESA and the Commission were opposed, for obvious reasons. Secondly, it has become clear that EEA homogeneity is not only a matter between us and the ECJ, but it must take into account the third court, the European Court of Human Rights. Thirdly, several Advocates General,[52] the Swiss Federal Administrative Tribunal,[53] and the Swiss Federal Supreme Court[54] have followed our approach. The ECJ has not, and its current

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[50] Ibid., para. 101.

[51] E.g. *Barbier de la Serre*, "A lesson on judicial review from the other European Court in Luxembourg", Kluwer Competition Law Blog, 27 April 2012, available at http://kluwercompetitionlawblog.com/2012/04/27/a-lesson-on-judicial-review-from-the-other-european-court-in-luxembourg/ (visited on 20 March 2017); *Bronkers and Vallery*, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and which Role for the Courts after *Menarini*", European Competition Journal (2012), 283 et seqq.; *Temple Lang*, "Judicial Review of Competition Decisions under the European Convention of Human Rights and the Importance of the EFTA Court: the *Norway Post* judgment", 37 European Law Review (2012) p. 464 et seqq.; *Morgan de Rivery/Lagathu/Chassaing*, "EU Competition Fines and Fundamental Rights: Correcting the Imbalance", European Law Reporter 7/8/2012, p. 190 et seqq.; *Bellamy*, "ECHR and competition law post Menarini: An overview of EU and national case law", e-Competitions N°47946 (5 July 2012); *Laura Melusine Baudenbacher*, Aspects of Competition Law Enforcement in Selected European Jurisdictions,

[52] Opinion of Advocate General *Wathelet* in *Telefonica SA*, C-295/12 P EU:C:2013:619, points. 63, 110-117; Opinion of Advocate General *Wahl*, in *Deutsche Bahn AG et al.*, C-583/13 P, EU:C:2015:92, points 45-47.

[53] Swiss Federal Administrative Tribunal B-8399/2010, judgment of 23 September 2014, para. 3.2; Swiss Federal Administrative Tribunal B-3332/2012, judgment of 13 November 2015, para. 3.11.3; Swiss Federal Administrative Tribunal B-506/2010, judgment of 19 December 2013, para. 6.1.3; Swiss Federal Administrative Tribunal B-463/2010, judgment of 19 December 2013, para. 6.3.

[54] BGE 139 I 72 S. 80.

President, *Koen Lenaerts*, said at the last Berlin Competition Conference two years ago they will never do that, they will not go with us on this path. So there is a difference between our approaches.

F. Public access to documents

I. General presumption in ECJ case law

According to ECJ case law, there is a presumption against public access to documents in cases concerning State aid, mergers and antitrust.[55] In our *DB Schenker I* case, the Commission submitted that since there was a need for a coherent interpretation and application of the rules on public access to documents and the provisions governing the cartel procedure to which the requested documents belong in both EEA pillars, such a general presumption must also be deemed to exist in the EFTA pillar.[56] ESA concurred.

However, the EFTA Court held that the presumption of no access would be limited to State aid and merger cases because, in such cases, public access would undermine the purpose of the proceedings. However, the presumption is not applied in antitrust proceedings.[57] As regards the rationale for this approach, the Court stated:

> "The private enforcement of [Articles 53 and 54 EEA] ought to be encouraged, as it can make a significant contribution to the maintenance of effective competition in the EEA […]. ESA's and the Commission's view that follow-on damages claims in competition law cases only serve the purpose of defending the plaintiff's private interests cannot be maintained. While pursuing his private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest. This thereby also benefits consumers."[58]

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[55] Judgment in *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paras. 78-99.
[56] E-14/11, *DB Schenker v ESA* (*DB Schenker I)* [2012] EFTA Ct. Rep. 1181, para. 111.
[57] *Ibid.,* para. 133.
[58] *DB Schenker I*, cited above, para. 132, see also E-7/12 *DB Schenker v ESA* (*DB Schenker II),* [2013] EFTA Ct. Rep. 359, para. 139, and E-5/13 *DB Schenker v ESA (DB Schenker V)* [2014] EFTA Ct. Rep. 306, para. 134; Order of the President of

If you hear this, you may be reminded of the figure of the private attorney general of American Law. Interestingly, our concept was taken over by Advocate General *Kokott* in *KONE*[59] and by the General Court in *Akzo Nobel*[60] and then *Evonik Degussa*.[61] I note that *Sir Nicholas Forwood* sat in those two cases. Referring to the EFTA Court, the General Court held:

> "[T]he right to obtain compensation for loss caused by a contract or conduct liable to restrict or distort competition can make a significant contribution to the maintenance of effective competition in the European Union […] and thus contribute to the protection of the public interest."[62]

G. Alleged lack of independence of in-house counsel

I. Fictions in ECJ case law

As regards the issue of legal privilege and the right of in-house lawyers to represent a company, the ECJ is known to have adopted a restrictive approach. In *Akzo Nobel*[63] and then in *Prezes*[64], the ECJ established that:

> "the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers."[65]

This is actually not a presumption, but a fiction. The Commission stated before the EFTA Court in *Abelia,* following a question from the bench, that the case law of the EU courts

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24 March 2015 in E-22/14 *DB Schenker v ESA* (*DB Schenker VII),* [2015] EFTA Ct. Rep. 352, para. 49.

[59] Opinion of Advocate General *Kokott* in *Kone et al.*, C-557/12 EU:C:2014:45, paras. 21-30, 58-70.

[60] Judgment in *Akzo Nobel,* T-345/12, EU:T:2015:50, para. 125.

[61] Judgment in *Evonik Degussa* v *Commission*, T-341/12, EU:T:2015:51, para. 158.

[62] Judgment in *Akzo Nobel,* cited above, para. 84.

[63] Judgment in *Akzo Nobel,* C-550/07 P, EU:C:2010:512, paras. 40-51.

[64] Judgment in *Prezes*, C-422/11 P, EU:C:2012:553, paras. 33-36.

[65] Judgment in *Akzo Nobel,* cited above, para. 44. See regarding the right of audience judgment in *Prezes*, cited above, para. 24.

> "cannot be read as testing the actual level of independence but, instead, as providing for an absolute rule with no consideration given to whether any particular individual would actually be influenced by a link to the litigant."[66]

That is rather far-going, and ESA concurred with this statement.

II. Facts-based approach of the EFTA Court

Abelia concerned the right of audience. The Court held that the

> "decisive factor is whether the relationship, regardless of its type, between the lawyer and his client is such as to put into doubt the independence of the lawyer."[67]

If an in-house counsel is sufficiently detached from the represented legal person, that should not dictate the automatic inadmissibility of the representation. The question must be decided on a case-by-case basis. ESA's and the Commission's assertion that the application should be declared inadmissible because of lack of independence was rejected.

This would also, if my court were to be consistent, apply in a case concerning the legal privilege.

Here, again, I would make three points. Firstly, there are in-house counsel who are much more independent than external attorneys who have one or two large clients. Secondly, the denial of rights of audience to in-house counsel has an unpleasant historical background: at the time of the Weimar Republic, attorneys in private practice had complained to the Government that in-house counsel were taking a large part of the legal services cake, to no avail. However, when *Adolf Hitler* came to power, the Nazis realised that a large percentage of in-house lawyers were Jews. In February 1934, in-house counsel were banned from exercising rights of audience. Thirdly, and very interestingly, excluding in-house lawyers from the right of audience amounts to discrimination. This was correctly stated by *Vassilios Skouris* in the early 1970s, when he was an

[66] E-8/13, *Abelia,* [2014] EFTA Ct. Rep. 640, para. 38.
[67] Ibid., para. 47.

assistant at a German university.[68] It also constitutes a restriction of competition.

H. Conclusions

An overly formalistic approach to shortcuts is hardly compatible with modernisation and with what the Commission has called the "more economic approach". The question arises whether the EU courts have ever distanced themselves from structural thinking (structure–conduct–performance paradigm) which might be characterized as 'pre-conciliar' competition law. The case law on restriction by object is based on judgments such as *Consten and Grundig v Commission*, which dates from 1966.[69]

However, it seems that the tide is now turning. I refer to Advocate General *Wahl's* opinion in *C.B.*, the EFTA Court's judgment in *Ski Taxi* as well as the ECJ's *C.B.* judgment. Nevertheless, the integration goal will remain; the prohibition of parallel trade and resale price maintenance will continue to constitute restrictions by object. This follows from the two-goal approach of European competition law.

The Court has not followed the presumption of the ECJ and the Commission against public access to documents, nor the ECJ's approach concerning the right of audience. As regards the antitrust immunity of collective agreements, the Court has emphasised that the aggregate effect of the agreement's provisions must be taken into account, and that immunity is not unlimited.[70]

The ECJ said in *C.B.* that the standard is now full review, although in that case, as in others, our sister court makes it clear that it is not on the same track as the EFTA Court by stating:

> "[A]lthough the Commission has […] a margin of assessment with regard to economic matters, in particular in the context of complex economic assessments, that does not mean […] that the General Court must refrain from reviewing the

[68] *Skouris*, "Die Diskriminierung des Syndikusanwalts, Betriebsberater (§46 BRAO) aus verfassungsrechtlicher Sicht", Betriebsberater (1975) 1230 et seqq.
[69] Judgment in *Consten and Grundig*, Case 56/64, EU:C:1966:41.
[70] *LO*, cited above, paras. 77-79.

Commission's legal classification of information of an economic nature."[71]

I. Encore: Brexit

I. General

Now, without you having requested it, let me give an encore on the topic *de jour*: Brexit. British influence will be lacking and will be sorely missed in European law following a hard Brexit. The UK has been the main supporter of the Commission's more economic approach, focusing on consumer welfare, on the facts, and on economic analysis. Only three days after the Brexit referendum, French President *François Hollande* said that EU competition law could be adapted with a view to promoting growth, investment and employment.[72]

On the other hand, European influence will be missing from British law. After the enactment of the Great Repeal Bill, the authorities and the courts will continue to base themselves on UK practice and case law, which has developed in line with EU law. However, since UK courts will no longer have the possibility of referring any questions to the ECJ, or to indeed my court, such consistency will inevitably be blurred and be lost over time.

II. The Swiss experience

1. Starting point

It is helpful to look at the Swiss experience, because Switzerland is in a comparable situation as the UK would be after a hard Brexit. Between 1995 and 2003, the Swiss legislature decided to align the country's competition law with European law. The Swiss Federal Supreme Court in 2003 even said that autonomously implemented EU law must, in case of doubt, be interpreted in conformity with European law, before adding the caveat, "as far as national

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[71] Judgment in, *Cartes Bancaires,* cited above, para. 46.

[72] *Nikpay*, "Now what? Competition law post-Brexit, Competition Policy International", 13 July 2016, available at https://www.competitionpolicyinternational.com/now-what-competition-law-post-brexit/ (visited on 14 March 2017).

methodology allows."[73] This would probably also be the case in the United Kingdom.

In fact, the case law goes from one extreme to the other. In 1998, the Swiss Federal Supreme Court held that a non-compete clause between two former partners was unilateral and therefore did not constitute an agreement affecting competition pursuant to Article 4 of the Swiss Federal Act on Cartels ('CartA').[74] As a result, the CartA was deemed to be inapplicable.[75] The Swiss Federal Supreme Court reached this unusual conclusion because it interpreted the new CartA in light of the old Federal Constitution.[76]

Much more severe was the *Swisscom Mobile* case, in which the Swiss Competition Commission ('ComCo') had imposed a record fine of CHF 333 million on *Swisscom Mobile* for abuse of a dominant position in the wholesale market for incoming telecommunication services.[77] *Swisscom Mobile* was reproached for having imposed unfair termination fees on other telecommunication services providers. Article 7(2)(c) CartA is virtually identical in substance to Article 102(2)(a) TFEU.

However, the Swiss Federal Supreme Court found that, in other respects, the Swiss legislature had not fully taken over the EU model.[78] Therefore, an autonomous interpretation of the word "imposition" was said to be required.[79] The court opted for rather strict interpretation of the notion of "imposing" which allowed it to rule in favor of the State-owned monopoly. The judgment was rendered with three against two votes. The majority were judges from the anti-European Swiss People's Party.

Now, in the last case, the Swiss Federal Supreme Court again acted in a pro-European way. In Swiss law, the concept of restriction by object versus by effect has found expression in the notion

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[73] BGE 129 III 335 p. 350.
[74] BGE 124 III 495.
[75] BGE 124 III 495, p. 495-500.
[76] BGE 124 III 495 p. 498.
[77] Press Release, 16 February 2007, available at https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-10863.html (visited on 14 March 2017).
[78] BGE 137 II 199, 210.
[79] Ibid.

qualitative versus quantitative appreciability. The Federal Administrative Tribunal held in its *Elmex* judgment of December 2013 that in the case of a contractual prohibition of parallel trade, qualitative appreciability was deemed to be established.[80] Whether the restriction is also quantitatively appreciable therefore need not be assessed by ComCo. While the case was pending before the Swiss Federal Supreme Court, lobbyists argued that although under European Law a prohibition of parallel trade such as the one at stake in the case would qualify as a restriction by object, this was different under Swiss law. However, on 28 June 2016, the Swiss Federal Supreme Court upheld the Administrative Tribunal's judgment.[81] In fact, all those who had taken the floor in Parliament during the debate on the CartA had expressed the clear wish that Switzerland should be more integrated into the economy of the European Union. Again, the decision was taken with three against two votes. The chamber sat in a different composition.[82]

III. Soft Brexit?

The negotiating position of Her Majesty's Government is that it wants a "clean break" from the EU. This means that the UK is also planning to leave the Single Market. The signs point towards a hard Brexit. But "it ain't over 'til the fat lady sings." Whether the UK will be able to conclude a deep integration FTA in the areas of goods and services with the EU without a court, but only an arbitration tribunal, is an open question. Even for a bespoke agreement, an arbitration mechanism may not be good enough. Few people know that in

[80] Swiss Federal Administrative Tribunal, Case B-506/2010, judgment of 19 December 2013.
[81] Swiss Federal Supreme Court, Case 2C_180/2014, judgment of 28 June 2016.
[82] Ibid.

2008[83], 2010,[84] 2012[85], 2014[86], and again in 2017[87], the EU Council contended in conclusions concerning the EFTA States that third countries may only obtain market access for their industry if they accept a supranational surveillance and court mechanism.

The question may thus pose itself whether a soft Brexit might be an option with EEA membership on the EFTA side, or a similar arrangement. As regards the EFTA Court, let me emphasize that despite the EEA homogeneity rules we have been able to uphold fundamental EFTA values such as market orientation and a liberal image of man: not so much the German image of man, which implies utmost protection of consumers, but more the man on the Clapham omnibus. I have sought to show today how the EFTA Court takes a facts-based approach in competition law. *John Temple Lang*, whom many of you know, observed that we are particularly good at dealing with economics.[88] As I said, we have a different judicial style from our EU sister court, and we do not carry a French rucksack.

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[83] Draft Council conclusions on EU relations with EFTA countries, 5 December 2008, available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016651%202008%20REV%201 (visited on 14 March 2017).

[84] Council conclusions on EU relations with EFTA countries, 3060th GENERAL AFFAIRS Council meeting Brussels, 14 December 2010, available at https://eeas.europa.eu/sites/eeas/files/council_iceland.pdf (visited on 14 March 2017).

[85] Council conclusions on EU relations with EFTA countries, 3213th TRANSPORT, TELECOMMUICATIONS and ENERGY Council meeting Brussels, 20 December 2012, available at http://eeas.europa.eu/archives/docs/norway/docs/2012_final_conclusions_en.pdf (visited on 14 March 2017).

[86] Council conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, General Council Meeting, 16 December 2014, available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf (visited on 14 March 2017).

[87] Council conclusions on EU relations with the Swiss Confederation, General Council Meeting, 28 February 2017, available at http://www.consilium.europa.eu/en/press/press-releases/2017/02/28-conclusions-eu-swiss-confederation/ (visited on 14 March 2017).

[88] *Temple Lang*, "Competition Law: The Brussels Perspective", in The Handbook of EEA Law (ed. Carl Baudenbacher, 2016), 544.

Ladies and Gentlemen, I started my lecture with a quote from Queen Elizabeth I. Let me end by noting that the Virgin Queen is also known to have said,

> "The stone often recoils on the head of the thrower."

That leaves me no option but to open the floor to discussion and hope whatever stones I have thrown at you during these 45 minutes are not too heavy when they come back in my direction. Thank you very much.