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President of the EFTA Court

Law Society, Competition Section, Annual Dinner, London, 22 November 2017

Mr. Chairman, Ladies and Gentlemen,

it is an honour and pleasure for me to address you on the occasion of the Competition's annual dinner.

I am being accompanied by my wife Doris, a publisher who holds a Ph.D in business administration, and by my Head of Cabinet Michael-James Clifton, an English barrister.

It has been a joy this evening to meet the winners of this year's Horsfall Turner essay prize who I am sure will go far in their legal careers.

We are living in times of Brexit. The first Brexiteer was King Henry VIII.

Let me tell you a story here: When EU leaders met some years ago in Henry's Hampton Court Palace, then PM Tony Blair welcomed them with the sentence:

> "As Henry VIII said to his six wives, 'I won't keep you long!'"

This also applies to me tonight.

I.

Before I turn to substance, let me make a remark in *meis rebus*: What I will state tonight are my own personal views. I do not appear here on behalf of my Court, nor do I speak on behalf of the Governments of the EEA/EFTA States.

There is a reason why I emphasise this.

Some, including certain government people, consider that a European Judge's freedom of speech is restricted, or that he or she ought, even, to coordinate his or her speeches and interviews on Brexit and EEA with the respective Government's policy.

I dismiss this contention. Yes, a judge should not do anything that jeopardises his or her independence or his or her competence to sit in any future cases. However, my views on possbile Brexit solutions do neither of these.

In fact, it is my duty as a Judge and President of the EFTA Court but also as a long-time scholar in European Law, to dispel any misinformation, respond to questions, and provide details that can only be obtained through long experience in the field.

The public in all EEA Contracting Parties, including Britain, is entitled to have an accurate picture of the EEA Agreement and its judicial framework: what it contains, how it works, how it evolves.

II.

My Court has not dealt with a multitude of competition law cases. But it has rendered some important rulings. Let me mention six:

1.

The most famous one was probably *Norway Post*.

The EFTA Court rejected the argument of the EFTA Surveillance Authority ('ESA') and of the Commission that when it comes to complex economic assessment in competition law, they should enjoy a margin of appreciation.

This has been understood as a huge step into the direction of full judicial review of fining decisions of the European competition authorities.

The EFTA Court based itself on the ECtHR's seminal *Menarini* judgment.

Ten years before we had ruled similarly in the *Husbanken* State aid case.

Norway Post has been referred to many times by AGs and the GC, but not by the ECJ.

2.

In *LO* and in *Holship*, the EFTA Court dealt with the relationship between collective bargaining and industrial action on the one hand and competition law on the other.

In *LO* we went against the Commission which wanted us to acknowledge the general immunity of collective agreements from the European competition rules. All we should do, the Commission said, was to carry out a margin of appreciation test.

Concurring with ESA, we held that the national court must carry out a full test.

AGs *Jacobs* and *Poiares Maduro* followed the EFTA Court on this.

In *Holship* we found, i.a., that a priority right of organized dockers to load and unload ships was incompatible with European competition law. The same goes for a boycott that aims at enforcing such a right.

We relied, i.a., on the case law of the ECtHR on the negative freedom of association.

In fact, there is a triangle of European courts when it comes to the interpretation of economic law consisting of the EU courts, the ECtHR and the EFTA Court.

The Norwegian Supreme Court has entirely followed us. But the dockers' union hasn't given in. They have brought the matter before the ECtHR.

I may quote here what PM *Harold Macmillan* said in 1962:

> "The dockers are such difficult people, just the fathers and the sons, the uncles and nephews. So like the House of Lords, hereditary and no intelligence required."

3.

In *Abelia*, the EFTA Court held that whether an in-house lawyer enjoys the right of audience must be assessed on a case-by-case basis, on the facts.

With this, we went a different way than the ECJ in *Prezes*.

To generally deny in-house lawyers the right of audience in my view is both discriminatory and anticompetitive.

4.

In the first *DB Schenker* case my Court restricted the presumption underlying the ECJ's case law that access to documents is not to be granted in antitrust, merger and State aid cases, to the latter two.

5.

In *Wow Air*, a case involving the allocation of take off and landing slots at a congested airport, in my capacity as President, I granted the accelerated preliminary ruling procedure in the interest of the protection of competition and consumers.

6.

In *Ski Taxi*, we had to answer the question of what is the applicable test to determine whether a joint bid for a public contract constitutes an object restriction of competition?

We found that the notion of 'object' concept must be given a narrow interpretation.

A restriction by object may only be assumed for conduct that is "easily identifiable, in the light of experience and economics." With this, we followed AG Wahl in *Cartes Bancaires*.

It is thus not sufficient that the conduct is simply capable of resulting in the prevention, restriction or distortion of competition.

III.

As members of the Law Society's Competition Section, you will observe that these differences in interpretation are not mere nuances. If you will permit me, I think that altogether, our case law is more market oriented than the ECJ's.

And more fact- and effect-based.

IV.

Let me then briefly address the question: What is the relevance of our case law for British courts?

1. *De lege lata*, it may constitute persuasive authority.

A case in point is *Fosen-Linjen* where the EFTA Court held three weeks ago that a simple breach of public procurement law may in itself be sufficient to trigger the damages liability of a contracting authority.

Public procurement law is close to competition law.

Fosen-Linjen puts the EFTA Court at variance with the UK Supreme Court's *EnergySolutions v NDA* judgment and its finding that a "sufficiently serious breach" is required to trigger liability.

Another significant recent judgment is *Vigeland,* in which the UK made submissions. This case, too, has a competiton aspect.

The Court ruled that registration of an art work as a trade mark may contravene accepted principles of morality or public policy.

Copyright protection was said to provide for an incentive to contribute to the enrichment of the economy and of society at large.

Perpetuation of exclusive rights over works of art is not admissible.

This is something, which was raised first in 1774 when Lord Camden held in *Donaldson* v. *Beckett* that

> "*if there be any thing in the world common to all mankind, science and learning are in their nature publici juris, and they ought to be as free and general as air or water."*

2. *De lege ferenda*, I'd like to say the following:

If the UK wants to conclude a deep and special partnership agreement with the EU, it will need to accept a non-British court of law.

Joint committee, arbitration, a common Court EU-U.K. a British Court won't fly. These are the lessons of Switzerland's relationship with the EU.

The EFTA Court is tried and tested. It may be used. Britain could try to "dock" to it.

Docking means that the UK would not have to accept the whole range of single market law.

A future bespoke agreement would be subject to the jurisdiction of the EFTA Court and Britain could negotiate the right to have a Judge on that court, in view of its size perhaps even two Judges.

Docking was proposed by the EU to Switzerland in 2013. It was rejected by the Former Swiss Foreign Minister, but a month ago a new Foreign Minister took office and, as we all know, 'it ain't over till the Fat Lady sings.'

I note that ECJ President Koen Lenaerts shares my view on this.

Such an approach – leaving the EU, but staying in the Single Market is usually referred to as "Soft Brexit."

I said that Henry VIII was the first Brexiteer.

England left the Catholic Church, the European Union of the time, and escaped the jurisdiction of the Pope, but it largely retained the rites.

By docking to the EFTA Court, Britain would also retain the rites, although – as I have shown – in a different form. It would benefit from a jurisdiction which decides swiftly, and which seeks not to advance integration but only to facilitate free trade and up-hold the rules of commerce.

The assertion of the former director-general of the Council's legal service Jean-Claude Piris that "[i]In case of divergence with the EU court on internal market law, the EU court would prevail" (FT of 16 November 2017) does not reflect the law in action.

Moreover, Britain would regain its sovereignty in foreign trade, fisheries, agriculture, justice and home affairs.

V.

Now, I have probably kept you longer than Henry VIII kept his six wives.

Thank you for your attention!