

P.R.I.M.E. Finance

Panel of Recognized International Market Experts in Finance

Dispute Resolution under a future UK – EU Trade agreement



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Professor Dr. iur. Dr. rer. pol. h.c. Carl Baudenbacher
Senior Judge of the EFTA Court, President 2003 - 2017
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I. Dispute resolution under a deep and special partnership agreement

Models discussed:

1. Diplomacy

- No more accepted by the EU in the case of Switzerland since 2008. Network of sectoral bilateral agreements.
- Swiss Government proposes ECJ in dispute settlement proceedings (“**binding, but not final**”).

Goal: Most probably creating a point of no return on the way to EU membership.

- Negotiations on a “framework agreement” after four years without a result.

EU has started to play **hard ball** against CH:

- Temporarily refused updating of existing bilaterals.
- Access for Swiss stock exchanges to EU markets only for one year (decision of 21 December 2017) – Compatible with **GATS**?



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Models discussed:

2. Arbitration

- Article 111(3) EEA: Excluded with regard to provisions that are **identical in substance** to EU law.
- Norway is not Canada.

3. Bilateral Court UK-EU

- Rejected by EU in the case of Switzerland.

4. UK Court above the Supreme Court

- Rejected by the EU in the case of Switzerland.



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I. Dispute resolution under a deep and special partnership agreement

Models discussed:

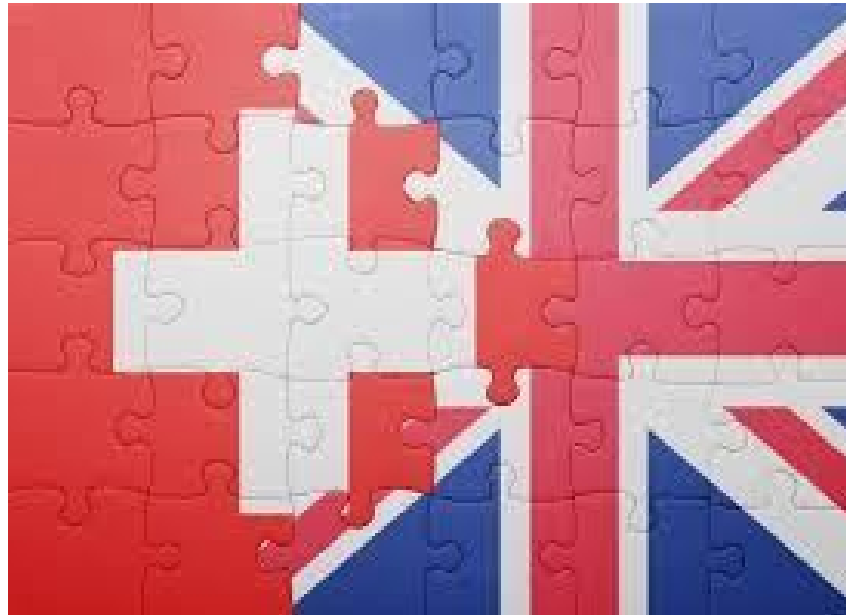
5. ECJ
 - Ruled out by HM Government.
 - Transitional period? Britain outgoing a problem?
6. EFTA Court
 - With one or two British Judges; **passporting rights**.
7. Multilateral court on the model of the EFTA Court



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I. Dispute resolution under a deep and special partnership agreement

Britzerland



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II. The docking solution

- Offered by the EU to Switzerland in 2013; generous offer.
- Rejected by the Swiss Government at the time; Swiss Government was still on an EU track; docking is back on the agenda since December 2017 (new Foreign Minister).
- Docking means that a non-EU country must **not** take **the whole EEA acquis**.
- Switzerland has no agreements concerning **free movement of services**, **freedom of establishment** and **free movement of capital** with the EU.
- Britain wouldn't have full **free movement of persons**.
- Docking discussed by the Commission; favoured by ECJ President Lenaerts.
- A non-EU country may have the right to nominate members of **ESA** and judges of the **EFTA Court**.
- Sovereignty with regard to common policies concerning foreign trade, agriculture, fisheries, foreign policy and currency remains with the non-EU countries.



III. EFTA values in the EFTA Court's case law

1. Enforcing fundamental freedoms

- Strict proportionality test.
- Good for private businesses.

2. Market approach and competition

Examples:

Norway Post (**scope of judicial review** in competition law, no margin of appreciation on complex economic matters), *DB Schenker I* (private plaintiff is benefitting the common good), *Wow Air* (accelerated preliminary ruling procedure in the interest of the protection of competition), *LO* and *Holship* (collective bargaining/industrial action vs. competition law), *Abelia* (right of audience of in-house counsel), *Icesave I* (**no liability of States for deposit guarantee schemes in systemic financial crisis**) *Vigeland* (expiry of copyright and public domain), *Fosen-Linjen* (simple breach of the law is sufficient to trigger **liability** of public procurement authority).



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III. EFTA values in the EFTA Court's case law

3. Image of man similar to the “man on the Clapham omnibus”

Examples:

Inconsult (consumer can be expected to actively contribute to the transfer of information via a website), *Swiss Life* and *Vienna Life* (trade in second-hand life insurance policies is business operation, not consumer transaction), *Matja Kumba* (freedom and sanctity of contract under the Working Time Directive).

4. Efficiency and citizen-friendliness

- Time
- Judicial style comprehensive, pragmatic

5. No ‘ever closer Union.’

6. English is the working language (Karl Kraus).



IV. ECJ and EFTA Court

1. Two pillar system in the EEA
2. Two independent courts and the need for homogeneity
 - No court can overrule the other court's judgments.
 - Role of the European Court of Human Rights (third court).
3. Written EEA rules on conflict are not operational
 - EFTA Court judgments **cannot be overruled** by Joint Committee (see, in particular, *Icesave I*).
 - Jean-Claude Piris' assertion that the ECJ would prevail in case of a conflict is not convincing. That the Joint Committee would overrule the EFTA Court is unthinkable.
 - ECJ will hardly be put in charge (EFTA side would have to agree).
 - Suspension of parts of the EEA Agreement and safeguard measures are no solution.



IV. ECJ and EFTA Court

4. Judicial dialogue is the only solution

- The EFTA Court follows the ECJ in most, but not in all cases.
- The ECJ follows the EFTA Court in many cases
- 200 contested EFTA Court cases so far.
- 238 references by the ECJ, its AG's and the GC in 151 cases.
- Homogeneity is a **process-oriented** concept (Philipp Speitler, Hans Petter Graver, Peter Christian Müller-Graff).



IV. ECJ and EFTA Court

4. Judicial dialogue is the only solution

A certain **systemic competition** may be beneficial (Claus-Dieter Ehlermann).

- The EFTA Court may give in.
- The ECJ may give in.
- The role of AGs.
- The Fosen-Linjen constellation (ECJ split, Supreme Courts of Denmark, Norway, Sweden, UK on the one side, Supreme Courts of Liechtenstein and of Iceland and **EFTA Court** on the other.

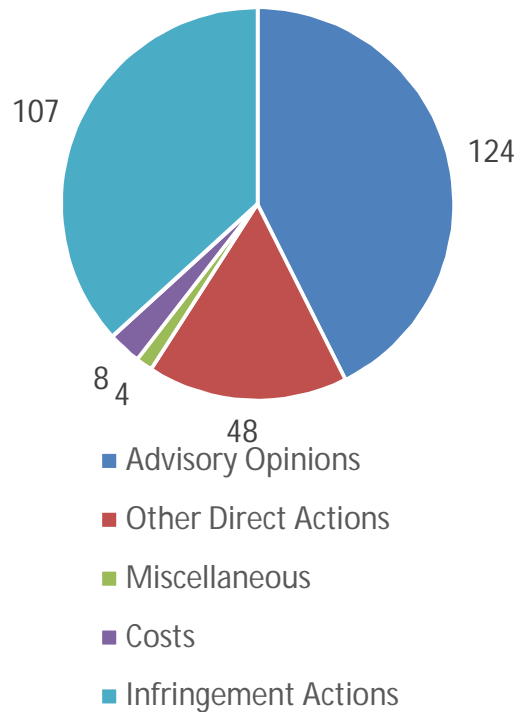
Coercion free discourse (Jürgen Habermas) must be the goal.

Relevance of the **quality of the reasoning** (Carsten Zatschler).

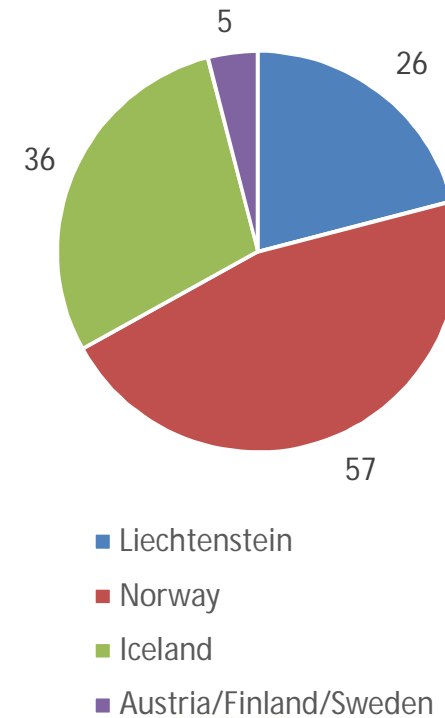


Statistics (October 2017)

I. Total EFTA Court Cases: 291

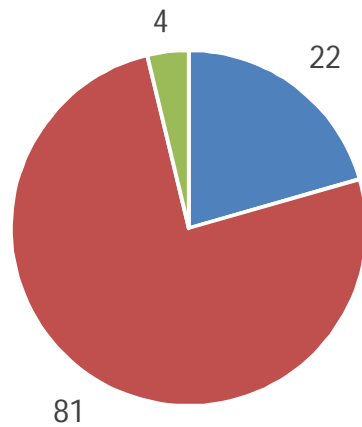


II. Total Advisory opinions: 124



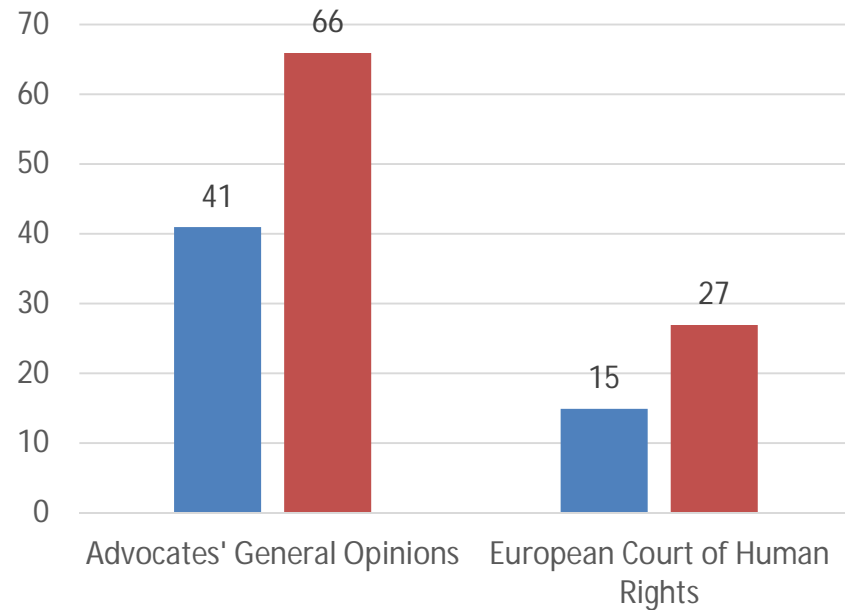
Statistics (October 2017)

III. Total number of infringement actions brought by ESA: 107



- Contested
- Uncontested
- Pending

IV. References by EFTA Court to AGs Opinions and Judgments of the European Court of Human Rights

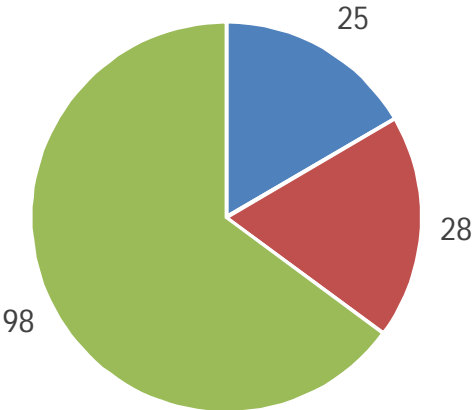


- Cases
- Citations



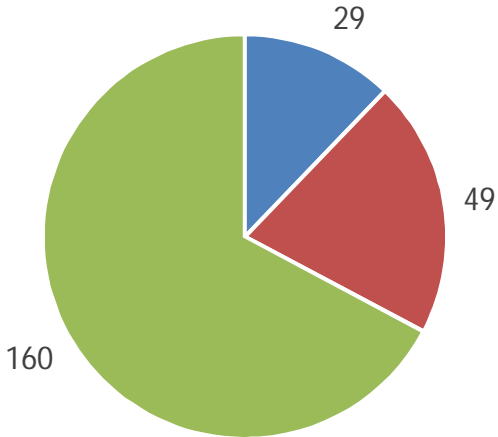
Citations of EFTA Court case law by EU judiciary

V. Cases referring to EFTA Court case law: 151



- Advocates General
- Court of Justice
- General Court

VI. Citations of EFTA Court case law: 238

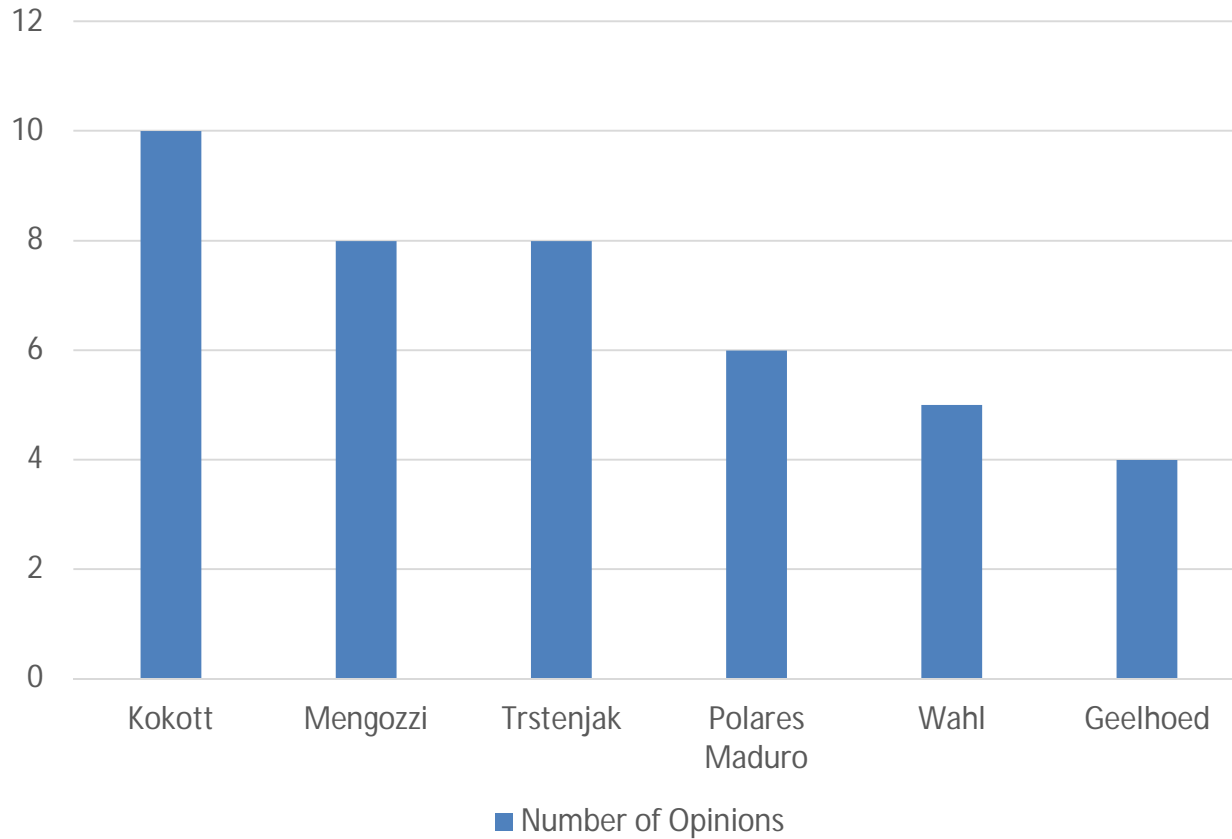


- Advocates General
- Court of Justice
- General Court



Statistics (October 2017)

VII. Citations of EFTA Court case law by Advocates General



Statistics (October 2017)

Citations of EFTA Court case law by European Court of Human Rights

Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia, no. 60642/08, §§ 70 to 73, 94 and 118.



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