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19th Annual Burrell Competition Lecture
"Shortcuts in Competition Law"

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Speaker: Professor Carl Baudenbacher, President of the EFTA Court

Introduction

- In Competition law, shortcuts have an important part to play. They can accelerate procedures, enhance predictability and legal certainty, have a deterrent effect, and conserve the resources of the competition authorities and those of the judiciary.

- However, they can also be counterproductive, preventing the achievement of the ultimate goals of efficient use of resources and freedom of economic action. This is especially important in new and growing digital markets.

The EFTA Court

- The EFTA Court deals with EEA Single Market law, which is virtually identical to EU Single Market law. The Court is composed of three judges tasked with the interpretation of the EEA Agreement in cases concerning the three EEA/EFTA States: Iceland, Liechtenstein and Norway.

- The EFTA Court is bound to follow the case law of the ECJ, prior to the signature of the EEA Agreement, and to pay due account of post-signature ECJ case law. However, while there is no corresponding reciprocal obligation on the ECJ, the EFTA Court is the only court of general jurisdiction that the ECJ regularly cites on the context of EU law, with over 230 references having been made to-date. Moreover, in the majority of cases the EFTA Court tackles novel legal questions. In addition, even if ECJ case law exists, the EFTA Court is an independent court. President Baudenbacher observed that, in the last 20 years, the EFTA Court has become 'more self-confident.' The EFTA Court has its own judicial style. The judgments are, as a matter of principle, fact-based.

Shortcuts in Competition law

- President Baudenbacher then turned to the types of presumptions commonly used by the European courts.

- He started by addressing restrictions of competition by object or effect, noting that the EFTA Court's judgment in *Ski Taxi* has given an overview of the categories of agreements which fall under the presumption of restriction by object.[1] He added, however, that the ECJ and the EFTA Court's

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

styles differ greatly, with the latter using a more developed reasoning in justifying the use or not of shortcuts.

- President Baudenbacher pointed to the parallel which can be drawn with *per se* violations and rule of reason violations under the U.S. Sherman Act, noting nevertheless that under Articles 101(3) TFEU/53(3) EEA a violation may be justified.

- The next presumption addressed was that of concerted practices, or causal connection, which the ECJ began to consider as restrictions by object in *T-Mobile Netherlands*.[2] Highlighting this case as the peak of the far-reaching interpretation of by object restriction by the ECJ, with Advocate General Kokott going as far as to equate restrictions by object with *per se* prohibitions, President Baudenbacher raised the question of whether the ECJ case *Cartes Bancaires* and the EFTA Court case *Ski Taxi* may be seen as turning points. In *Cartes Bancaires*, Advocate General Wahl criticized the blurring of boundaries between object and effect.[3] In *Ski Taxi*, the EFTA Court followed his approach, stating, in this respect, that "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."[4]

- As regards antitrust immunity of collective agreements, President Baudenbacher contrasted the formalistic approach taken by the ECJ with the facts-based approach used by the EFTA Court. In *Albany*, the ECJ found that collective agreements aim at improving working conditions and were therefore beyond the reach of European competition law entirely.[5] By contrast, in *LO* the EFTA 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.[6] This was restated in *Holship*.[7]

- Another well-known shortcut has been used by both the General Court and the ECJ when it comes to the standard of judicial review of the Commission's fining decisions. While this may spare resources, it may do so at the expense of undertakings. In *Norway Post*,[8] the EFTA Court held in light of the European Court of Human Rights' judgment in *Menarini*, that it has full review powers and that the EFTA Surveillance Authority does not have any margin of discretion in the assessment of complex economic matters. By contrast, in *Cartes Bancaires,*[9] while it stated a preference for full review, the ECJ made it clear, in paragraph 46, that it is not on the same track as the EFTA Court:

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

- Regarding the topic of access to documents, there is a general presumption in ECJ case law that there is no right to public access to documents in cases concerning State Aid, mergers, or antitrust. The EFTA Court has limited the presumption of 'no access' to State Aid and merger cases, cases in which public access could undermine the purpose of the proceedings. However, such a presumption is not applied in antitrust proceedings.

- In relation to the right of in-house lawyers to represent their company (rights of audience) and the issue of legal privilege, the ECJ is known to have adopted a restrictive approach. President

[2] Judgment in *T-Mobile Netherlands*, C-8/08, EU:C:2009:343.

[3] Opinion of Advocate General Wahl in *Cartes Bancaires*, C-67/13 P, EU:C:2014:1958, point 52.

[4] E-3/16 *Ski Taxi*, cited, para. 61.

[5] Judgment in *Albany*, C-67/96, EU:C:1999:430.

[6] E-8/00, *Landsorganisasjonen i Norge ('LO')*, [2002] EFTA Ct. Rep. 116.

[7] E-14/15 *Holship*, judgment of 19 April 2016, not yet reported; see Eric van Hooydonk, EFTA Court decision on Norway dockers could hit EU ports, https://felixstowedocker.blogspot.ie/2016/06/efta-court-decision-on-norway-dockers.html, visited 2 May 2017.

[8] E-15/10, *Norway Post* [2012] EFTA. Ct. Rep. 248; see already E/4/97 *Husbanken* [1999].EFTA Ct. Rep. 1.

[9] Judgment in *Groupement des cartes bancaires (CB) v European Commission*, Case C-67/13 P, ECLI:EU:C:2014:2204.

Baudenbacher argued that the ECJ is out of touch with reality, suggesting that certain in-house counsel are more independent than external attorneys who have one or two major clients. He cited former ECJ President *Vassilios Skouris* who wrote as early as in 1975 that denying the right of audience to an in-house attorney could amount a discrimination[10] and added that it could also constitute a restriction of competition. In *Abelia*, the EFTA Court held that whether in-house counsel was sufficiently independent to have the right of audience had to be assessed on a case by case basis.[11]

Thoughts on Brexit

- President Baudenbacher began his analysis of Brexit by stating that British influence, and common law thinking, will be lacking in European competition law. He noted that the UK was the main supporter of the Commission's 'more economic approach.' He furthermore observed that, on the other hand, European influence will be lacking in British law. After the adoption of the Great Repeal Bill, the Competition and Markets Authority and the courts will continue to base themselves on UK practice and case law which has developed in a consistent line with EU law. However, since the UK courts will no longer be able to refer any questions to the ECJ, such consistency will inevitably become blurred over time.

- President Baudenbacher then used the example of Switzerland to illustrate what may occur in the UK after a hard Brexit:

    1. In 1995 and 2003, the Swiss legislature decided to align Swiss competition law with European law. In 2003, the Swiss Federal Supreme Court held that autonomously implemented EU law must 'in case of doubt' be interpreted in conformity with European law 'as far as national methodology allows.'

    2. On 13 November 1998, the Swiss Federal Supreme Court held that a non-compete clause between two former partners was a unilateral measure and therefore did not constitute an agreement affecting competition pursuant to Article 4 of the Swiss Cartel Act (CartA).[12] As a result, CartA was deemed to be inapplicable. President Baudenbacher described this as a 'very strange decision.'

    3. In *Swisscom Mobile*, the Swiss Competition Commission (ComCo) had imposed a record fine of CHF 333m for abuse of a dominant position in the wholesale market for incoming telecommunication services. Swisscom Mobile was reproached for imposing unfair termination fees on other telecommunication service providers. On 11 April 2011,[13] the Federal Supreme Court found that in other respects the Swiss legislature distanced itself from the EU model. This warranted autonomous interpretation of the word 'imposition.' Swisscom Mobile thus escaped scot-free.

    4. In Swiss law, the concept 'restriction by object vs by effect' has found expression in the notion of 'qualitative v quantitative appreciability'. In the *Elmex* case, in December 2013, the Federal Administrative Tribunal held that in the case of a contractual prohibition of parallel trade, qualitative appreciability of a restriction of competition is deemed to be established. Whether the restriction is quantitatively appreciable must not therefore be assessed by ComCo. Lobbyists argued that, although under European law a prohibition of parallel trade would qualify as a restriction by object, this was different under Swiss law. On 28 June 2016, the Federal Supreme Court upheld the Administrative Tribunal's judgment.[14] In the parliamentary

[10] Vassilios Skouris, Die Diskriminierung des Syndikusanwalts (§ 46 BRAO) aus verfassungsrechtlicher Sicht', BB 1975, p. 1230 ff.

[11] E-8/13 *Abelia*, [2014] EFTA Ct. Rep. 638; see Carl Baudenbacher/Philipp Speitler, Der Syndikus der Gegenwart – Interessenvertreter oder Anwalt des Rechts?, NJW 2015 I, 1211.

[12] ATF 124 III 495.

[13] ATF 137 II 199.

[14] Swiss Federal Supreme Court, judgment no. 2C_180/2014.

debate, all those who took the floor stated that an EU-compatible solution was warranted. The legislature's goal was clearly to integrate the Swiss economy as far as possible into the European Union economy.[15] It is also possible that the UK might adopt a prosecutorial enforcement model, like in the United States, which could present more flexible solutions. However, parallel competition regimes would also result in parallel investigations and double costs for businesses.

- President Baudenbacher noted moreover that a 'soft Brexit' could be an option for the UK, with EEA membership on the EFTA side, or a similar arrangement. 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 mechanism is, in his view, doubtful. In its biennial conclusions regarding the relations with the EFTA States, the Council of the EU has been explicit that a court will be required – although this need not be the ECJ. However, should an alternative court be envisaged, it should be 'equally independent and impartial' to the ECJ. President Baudenbacher noted in this regard that the European Union had proposed to Switzerland that it 'dock' its bilateral agreements to the EFTA Court's jurisdiction, with Switzerland having its own judge on the bench in such cases. This possibility, he indicated, would be open to the UK, and he highlighted that in the 24 years of the EFTA Court's existence, it was clear that it had been in the EFTA States' own interests to have their 'own' court where a judge from the country concerned sits in every case.

[15] See Laura Melusine Baudenbacher, Schutz von Schweizer Konsumenten vor absoluten Gebietsabreden - Zum BMW-Urteil des Bundesverwaltungsgerichts, Jusletter, May 2, 2016,