



ENP IN A COMPARATIVE PERSPECTIVE

HIGH-LEVEL LECTURE

THE JUDICIAL DIMENSION OF THE EUROPEAN NEIGHBOURHOOD POLICY

PROF. DR.DR. CARL BAUDENBACHER, PRESIDENT OF THE EFTA COURT OF JUSTICE

THURSDAY 24 OCTOBER 2013, BRUGES

Summary of the high-level lecture, Department of EU International Relations and Diplomacy Studies, College of Europe, Bruges, 24.10.2013

Prof. Dr.iur. Dr.rer.pol. h.c. Carl BAUDENBACHER, President of the EFTA Court

This high-level lecture was the first event in a series of conferences and lectures in the academic year 2013-14 which, with the financial support of the European Commission, is devoted to the '[ENP in a comparative perspective](#)'. The initiative aims at a comparison of different co-operation schemes that the European Union has in place with partner countries in order to put the European Neighbourhood Policy (ENP) into context and to draw lessons for this policy from the experience of other third countries.



The Rector of the College of Europe, **Professor Jörg Monar**, welcomed the audience and made some introductory remarks about the events series. This lecture focused in particular on the relationship between the judicial systems of the European Economic Area (EEA) and the EU, and the lessons and implications for possible judicial integration in the ENP and beyond.

Professor Sieglinde Gstöhl, Director of the Department of EU International Relations and Diplomacy Studies, introduced the high-level speaker.

Professor Carl Baudenbacher briefly set out the EU judicial order and its interaction with courts in third countries. He underlined that private actors, by the means of direct effect, primacy and the preliminary reference procedure, play a central part in the development of EU-level case law. Member State courts perform a dual role, applying both national law and interpretations of EU law made by



Brugge

College of Europe
Collège d'Europe



Natolin

Department of EU International Relations and Diplomacy Studies
Dijver 11 BE-8000 Brugge T +32-50-47.72.51 F +32-50-47.72.50
ENPComparativePerspective@coleurope.eu
www.coleurope.eu/ENPComparativePerspective

the European Court of Justice (ECJ). The ECJ is the centre of gravity of this judicial system, the mechanics of which are at work also – although to very different degrees – in the interaction between the ECJ and the courts in third countries in the EU’s neighbourhood. The neighbourhood can be understood in the broader sense as encompassing the states of the European Free Trade Association (EFTA), the candidate countries, the ENP countries and Russia. This judicial interaction creates greater legal certainty and helps to foster a stable investment climate of mutual benefit to the EU and its neighbours.



Professor Baudenbacher moved on to consider those EU agreements with third countries which contain rules for ensuring a homogenous interpretation of law relevant to the agreement. He cited the Lugano Convention, the EEA with EFTA’s own Surveillance Authority and Court of Justice, the EU-Switzerland bilateral agreements on the free movement of persons and on air traffic, as well as the EU-Turkey Customs Union. In practice, he argued, ensuring

homogeneity is nearly always a ‘one-way street’ whereby the ECJ’s interpretations are followed by third country courts, and not vice versa. The degree to which ECJ case law is in fact taken into account by the other courts varies considerably, as illustrated by the following cases.

The EFTA Court, a multilateral court like the ECJ, engages in continuous exchange and judicial dialogue with its EU counterpart. Professor Baudenbacher highlighted examples in which the ECJ had relied on EFTA Court interpretations in its own case law, and where the EFTA Court had further developed case law that had been left open by the ECJ. In some cases, the EFTA Court interpretations were taken up by EU Member State national courts before the ECJ has pronounced itself on a question, giving rise to what Professor Baudenbacher called ‘first mover advantage’ for the EFTA Court. Altogether, he argued, the ECJ-EFTA Court relationship is marked by a degree of genuine judicial ‘cross-fertilisation’.



Looking to the EU's eastern neighbourhood, Ukraine's courts have to some degree respected the 'soft commitment' to work towards legislative compatibility with the EU *acquis* set out in the 1996 EU-Ukraine Partnership and Cooperation Agreement. By contrast, judicial interaction is much less developed with Ukraine's northern neighbour Russia, which is outside the framework of the ENP and has a *sui generis* relationship with the EU. As for Turkey, legally linked to the EU by the 1963 Association Agreement and 1995 Customs Union Decision, its courts have scarcely made reference to EU law and case law, although they do recognise the case law of the European Court on Human Rights.



With regard to the EU-Switzerland bilateral agreements, Professor Baudenbacher explained that the Swiss Federal Supreme Court has chosen a particular approach in its interpretation of the autonomously implemented EU law, taking into account a wide range of factors from which has evolved a body of 'Swiss-European law', a practice differing from that of the EFTA Court. He commented on the topical proposals of the Swiss government on the question of Switzerland's future judicial relationship with the EU. He explained that the current proposals envisage the ECJ acting as an arbiter with the power to provide an 'authoritative interpretation' in case of a dispute. The EU for its part would no doubt consider the ECJ's interpretation binding, while Switzerland would still hope to negotiate a political compromise, although the ECJ's interpretation would give grounds for the EU to retaliate in case of Swiss non-compliance. He argued that replacing an infringement procedure by a political dispute settlement appears unlikely to attract support from the EU and particularly the ECJ.

The lecture was followed by a stimulating question and answer session in which members of the audience *inter alia* asked questions about the Swiss proposals, the practice of including provisions in international agreements to rule out any direct effect, the effectiveness of so-called 'soft law', and the influence of EFTA Court judgments in areas where the ECJ has been relatively silent, such as social provisions for foreign citizens. After the high-level lecture, participants were invited to a reception in order to continue their discussions.



Brugge

College of Europe
Collège d'Europe



Natolin

Department of EU International Relations and Diplomacy Studies
Dijver 11 BE-8000 Brugge T +32-50-47.72.51 F +32-50-47.72.50
ENPComparativePerspective@coleurope.eu
www.coleurope.eu/ENPComparativePerspective



Prof. Dr.iur. Dr.rer.pol. h.c. Carl Baudenbacher is President of the EFTA Court of Justice since 2003 and Judge of the EFTA Court since 1995. Dr. iur. University of Berne (1978, summa cum laude); Habilitation University of Zürich (1983); Chair of Private, Commercial and Economic Law at the University of St. Gallen HSG (1987-2013); Founder and Chairman of the St. Gallen International Competition Law Forum (ICF); former Visiting Professor of European and International Law at the University of Texas School of Law; former Member of the Supreme Court of the Principality of

Liechtenstein; and Member of the Advisory Board of the University of Texas School of Law Center of Global Energy, International Arbitration and Environment Law. He is the author of over 40 books and over 180 articles on European and international law, law of obligations, labour law, law of unfair competition, antitrust and state aid law, company law, intellectual property law, comparative law and the law of international courts and tribunals.



Brugge

College of Europe
Collège d'Europe



Natolin

Department of EU International Relations and Diplomacy Studies
Dijver 11 BE-8000 Brugge T +32-50-47.72.51 F +32-50-47.72.50
ENPComparativePerspective@coleurope.eu
www.coleurope.eu/ENPComparativePerspective