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The Judicial Dimension of the European Neighbourhood Policy

Carl Baudenbacher



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Views expressed in the *EU Diplomacy Papers* are those of the authors only and do not necessarily reflect positions of either the series editors or the College of Europe.

Abstract¹

In this paper, the expression “neighbourhood policy” of the European Union (EU) is understood in a broad way which includes the members of the European Free Trade Association (EFTA) contracting parties to the European Economic Area (EEA), the EFTA State Switzerland, candidate states, the countries of the European Neighbourhood Policy (ENP), and Russia. The European Court of Justice (ECJ) is the centre of gravity in the judicial dimension of this policy. The innermost circle of integration after the EU itself comprises the EFTA States who are party to the European Economic Area. With the EFTA Court, they have their own common court. The existence of two courts – the ECJ and the EFTA Court – raises the question of homogeneity of the case law. The EEA homogeneity rules resemble the ones of the Lugano Convention. The EFTA Court is basically obliged to follow or take into account relevant ECJ case law. But even if the ECJ has gone first, there may be constellations where the EFTA Court comes to the conclusion that it must go its own way. Such constellations may be given if there is new scientific evidence, if the ECJ has left certain questions open, where there is relevant case law of the European Court of Human Rights or where, in light of the specific circumstances of the case, there is room for “creative homogeneity”. However, in the majority of its cases the EFTA Court is faced with novel legal questions. In such cases, the ECJ, its Advocates General and the Court of First Instance make reference to the EFTA Court’s case law.

The question may be posed whether the EEA could serve as a model for other regional associations. For the ENP states, candidate States and Russia this is hard to imagine. Their courts will to varying degrees look to the ECJ when giving interpretation to the relevant agreements. The Swiss Government is – at least for the time being – unwilling to make a second attempt to join the EEA. The European Commission has therefore proposed to the Swiss to dock their sectoral agreements with the EU to the institutions of the EFTA pillar, the EFTA Surveillance Authority (ESA) and the EFTA Court. Switzerland would then negotiate the right to nominate a member of the ESA College and of the EFTA Court. The Swiss Government has, however, opted for another model. Swiss courts would continue to look to the ECJ, as they did in the past, and conflicts should also in the future be resolved by

¹ High-Level Lecture in the series “The ENP in a Comparative Perspective”, College of Europe, Bruges, 24 October 2013.

diplomatic means. But the ECJ would play a decisive role in dispute settlement. It would, upon unilateral request of one side, give an "authoritative" interpretation of EU law as incorporated into the relevant bilateral agreement. In a "Non-Paper" which was drafted by the chief negotiators, the interpretations of the ECJ are even characterised as binding. The decision-making power would, however, remain with the Joint Committees where Switzerland could say no. The Swiss Government assumes that after a negative decision by the ECJ it would be able to negotiate a compromise solution with the Commission without the ECJ being able to express itself on the outcome. The Government has therefore not tried to emphasise that the ECJ would not be a foreign court. Whether the ECJ would accept its intended role, is an open question. And if it would, the Swiss Government would have to explain to its voters that Switzerland retains the freedom to disregard such a binding decision and that for this reason the ECJ is not only no foreign court, but no adjudicating court at all.

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A. Introduction

The European Union is the most important example of the judicialisation of law worldwide. Political and diplomatic dispute resolution has to a large extent been replaced by court proceedings. The main actor in this is the Court of Justice of the European Union. Moreover, the national courts of the EU Member States are at the same time national and European courts. The ECJ has made this clear in its Opinion 1/09 on the failed patent court where it underlined that both the ECJ and the courts of the Member States are the guardians of the EU legal order.²

EU law, is, however, not only highly judicialised, it is also to a large extent privatised. It endows a special role on private actors, on citizens and business operators who, together with the organs of the European Union, act as law enforcers. That means that the number of EU law enforcers rises beyond measure. A plaintiff who takes a case to court in order to defend his or her private interest at the same time benefits the *bonum commune*. One is almost reminded of the American concept of a private attorney general. The most important means in this context are the principles of direct effect and primacy and the preliminary ruling procedure.³

If we look beyond the boundaries of the European Union, it is fair to say that the ECJ is the centre of gravity in the judicial dimension of the EU neighbourhood policy. I do not use the expression "EU neighbourhood policy" in the way as it is officially used. I understand it in a broad way which includes the EEA/EFTA States, the EFTA State Switzerland, candidate states, ENP states,⁴ and Russia. Switzerland is an EFTA member state but not a contracting party to the EEA Agreement. Its relations with the EU are regulated by bilateral sectoral agreements.

The effective functioning of the judiciary is a prerequisite of the correct application of the rule of law. The reform of the judiciary in the ENP countries could be of practical benefit to the European Union. The Commission notes that the

² Opinion 1/09 of the Court (Full Court) of 8 March 2011 delivered pursuant to Article 218(11) TFEU, 2011 ECR, I-1137, paragraphs 66, 68, 85; see *Carl Baudenbacher*, The EFTA Court remains the only Non-EU-Member States Court, *European Law Reporter* 2011 n 7/8, 236 ff.

³ See most recently *Koen Lenaerts*, How the ECJ Thinks: A Study on Judicial Legitimacy, 36 *Fordham Int'l L.J.* 1302, 1342 f.

⁴ The ENP States are Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestinian Authority, Syria, Tunisia, and Ukraine.

“strengthening of the functioning of the judicial system will also contribute to a better investment climate”.⁵ Specific steps to reform the judiciary in the neighbouring countries are identified in bilateral Action Plans as well as in association agendas.

From the point of view of judicialisation, the innermost circle of integration after the EU itself comprises the EFTA States who are party to the European Economic Area. With the EFTA Court, they have a common court.

B. Homogeneity and uniformity rules

Certain neighbourhood agreements, always in the broad sense of the term, contain special rules whose goal it is to secure a homogeneous development of case law. The basis of this was laid in the Lugano Convention.

For sovereignty reasons, non-EU Member States are only prepared to accept to follow the case law of the ECJ as it stood on the day of the signing of the agreement, i.e. the old case law. New case law may only be taken into account. In theory, there is a clear difference between following and taking into account, although in practice, if a homogeneous area ought to be established, this distinction is probably no longer as important as the drafters of the respective clauses thought.

Under the Lugano Convention we have an interesting situation. As law on the books, homogeneity is a two-way street. It is said that not only should the supreme courts of the EFTA States look to the ECJ and follow or take into account ECJ case law, but the ECJ should also get inspiration from the supreme courts of the EFTA States.⁶ In practice, however, there is basically a “one-way homogeneity”. There is only one

⁵ Communication from the Commission [COM (2004)] 373, ENP Strategy Paper, 16.

⁶ See Recital 6 and Protocol 2 to the Convention and the declarations of the governments of the EC Member States on the one hand and of the EFTA States on the other. Article 1(1) of Protocol 2 to the new Lugano Convention states: “Any court applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention and the instruments referred to in Article 64(1) of the Convention rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities.” The expression “any court” includes the ECJ; cf. *Christian Kohler*, *Dialog der Gerichte im europäischen Justizraum. Zur Rolle des EuGH bei der Auslegung des neuen Übereinkommens von Lugano*, in: Mario Monti/Prinz Nikolaus von und zu Liechtenstein/Bo Vesterdorf/Jay Westbrook/Luzius Wildhaber (eds.), *Economic Law and Justice in Times of Globalisation/Wirtschaftsrecht und Justiz in Zeiten der Globalisierung*, Festschrift für Carl Baudenbacher, Baden-Baden/Vienna/Berne 2007, 141, 151 ff.

single judgment in which the ECJ made reference to the Swiss Supreme Court: In C-394/07 *Gambazzi*,⁷ a case concerning the interpretation of the public policy clause in Article 27(1) of the Brussels Convention, the ECJ mentioned that the parties to the main proceedings referred to a judgment of the Swiss Supreme Court concerning the parallel provision of the Lugano Convention. It held that “[i]n accordance with the declaration by the representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities, it is appropriate that the Court pay due account to the principles contained in that Tribunal fédéral judgment and, in application of Article 1 of Protocol 2 on the uniform interpretation of that convention, the national court is to pay due account to those principles”, something the ECJ subsequently did.

As far as the EEA Agreement and the Agreement of the EFTA States on the Establishment of a Court and of a Surveillance Authority are concerned, we also have a distinction between old and new ECJ case law. But in the practice of the EFTA Court, this distinction has basically been qualified. Here we have a different situation; the other way around than under the Lugano Convention. As law on the books, this is “one-way homogeneity” because the ECJ did not want to oblige itself to take account of the case law of the EFTA Court. Only the EFTA Court is supposed to take into account and to follow the case law of the ECJ. But in practice, homogeneity is a two-way street. I will come back to that.

In addition, there are two sectoral agreements concluded between Switzerland and the European Union which contain homogeneity rules, the Free Movement of Persons Agreement and the Air Traffic Agreement. There again, we have the distinction between old and new case law, but clearly, both in theory and in practice, these homogeneity rules work only in one direction.⁸

An interesting provision can be found in Article 66 of the EC-Turkey Customs Union arrangement.⁹ Provisions of Decision 1/95 establishing the customs union, which are

⁷ 2009 ECR, I-2563, paragraphs 35 ff. The referenced judgment of the Swiss Supreme Court is Case 4P082/2004.

⁸ See *Marc Maresceau*, EU-Switzerland: Quo Vadis?, 39 *Ga. J. Int'l & Comp. L.* 727 ff. (2011).

⁹ Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC).

identical in substance to the corresponding provisions of the EC Treaty, should be interpreted in conformity with the relevant ECJ case law.

If I am correct, there are no homogeneity rules in any other neighbourhood agreement. But that does not hinder courts in those countries from being inspired by ECJ jurisprudence. As I will show, there are certain incentives for these courts to take over that case law.

C. The ECJ and the EFTA Court under the EEA Agreement

I. General

The goal of the EEA Agreement is the extension of the single market law and thereby of the single market to the EFTA States, with the exception of the common policies concerning agriculture, fisheries, taxation, foreign trade and currency. The EFTA Court is a multilateral court which maintains an on-going dialogue with the ECJ. The legal framework is as follows: according to Article 108 EEA Agreement, the EFTA States shall establish an independent EFTA Surveillance Authority and an EFTA Court of Justice. In order to fulfill this obligation, the EFTA States entered the Agreement on the Establishment on such an Authority and such a Court of Justice. There are two homogeneity provisions which are of particular relevance. Article 6 EEA essentially states that the EFTA Court shall follow old relevant ECJ case law. And according to Article 3(2) of the Surveillance and Court Agreement the EFTA Court shall take due account of new relevant ECJ case law. As I said, this distinction between old and new has been qualified in the EFTA Court's case law. This distinction has been invoked by certain governments but the EFTA Court did not follow these suggestions.

As far as the legal nature of the EEA is concerned, I think that the EFTA Court has correctly described it by stating that the EEA Agreement is an international law agreement *sui generis*, which goes beyond a pure free trade agreement (FTA) but not as far as the EU treaties.¹⁰

¹⁰ Case E-9/97 *Sveinbjörnsdóttir*, 1998 EFTA Court Report, 95, paragraph 59, see already Case T-115/94 *Opel Austria*, 1997 ECR, II-39, paragraphs 105 ff.

II. Privatisation of EEA law

The EEA Agreement rests on two pillars: the EU pillar and the EFTA pillar. In both pillars, the law is essentially identical in substance and the EFTA Court's types of procedure are similar to those in the EU pillar. EEA law is privatised in the sense that individuals and economic operators play an important role in its enforcement. As far the EU pillar is concerned, the General Court held early on in Case T-115/94 *Opel Austria* case that Article 10 EEA has direct effect for the purposes of its application in the EU States.¹¹ In the EFTA pillar of the EEA, this is the big bone of contention for the Scandinavian member states. Scandinavians believe in strict dualism, and they would not be amused if the EFTA Court were to say that EEA law also has direct effect in the EFTA pillar. The EFTA Court has taken a middle course on this issue. In its very first Case E-1/94 *Restamark*, the EFTA Court said that EEA rules which have been implemented into the legal orders of the EFTA States are capable of having direct effect.¹² And in Case E-1/01 *Einarsson* we held that implemented EEA rules are capable of having primacy.¹³ Most importantly, the EFTA Court found in Case E-9/97 *Sveinbjörnsdóttir* that there is full EEA State liability.¹⁴ There is an interesting discussion going on right now in Iceland and in Norway on the question of whether in the light of the lack of true direct effect and true primacy, the threshold for State liability should be lower in EEA law as compared to the *Francovich* and *Brasserie du Pêcheur* jurisprudence of our sister court.¹⁵

III. Homogeneity in action

1. ECJ going first

The written homogeneity rules are based on the assumption that the ECJ is the court which decides first. The basic rule is that the EFTA Court follows the ECJ, and we have done so in the area of fundamental freedoms, when it came to, for example, the definition of what constitutes a discrimination or a restriction, or what justification

¹¹ Cited in fn. 9, paragraphs 100 ff.

¹² 1994 EFTA Court Report, 15, paragraphs 75 ff.

¹³ 2002 EFTA Court Report, 1, paragraphs 47 ff., 55.

¹⁴ 1998 EFTA Court Report, 95, paragraphs 60 – 63.

¹⁵ Cases C-6/90 and C-9/90, *Francovich*, 1991 ECR I-5357; Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, 1996 ECR I-1029.

means; we have done this in competition law and in state aid law as well as in harmonised law.

However, law is not an exact science. Even if the ECJ has gone first, there may be constellations where the EFTA Court comes to the conclusion that it must go its own way.

(1) For instance, if the relevant ECJ case law is 20 years old, but there are new circumstances or new scientific evidence, the EFTA Court may come to the conclusion that it is not appropriate to follow it. The classical case is E-3/00 *ESA v. Norway* where the sale of Kellogg's cornflakes fortified with certain vitamins and with iron was banned in Norway.¹⁶ The Norwegian Government argued that there was no nutritional need in the Norwegian population for these cornflakes. They said, we give every school child up to the age of fifteen a piece of goat cheese which is fortified with iron every morning. And then, when they are 15 years old, they have enough iron for the rest of their life. That is why there is no nutritional need in our population. The Government thereby relied on an ECJ precedent from 1983, C-174/82 *Sandoz*.¹⁷ The EFTA Court did not accept the nutritional need argument and held that Norway was in violation of the EEA rules on free movement of goods. One year later the Commission stated in C-192/01 *Commission v. Denmark*, where the facts were very similar the ones in *Kellogg's*, that the EFTA Court's judgment "must be viewed as an element in the development of law. Since the judgment in *Sandoz*, practically 20 years ago, the methods used to determine health risks have undergone considerable changes. The fact that *risk analysis* has become a tool for determining specific health risks means that general health-related decisions, and *inter alia* possible prohibitions, may be taken on an objective, documented basis, taking account of the specific circumstances of each case."¹⁸ The ECJ overruled its own case law and based its judgment on ours making no less than 6 references.¹⁹

(2) Another constellation where we may not just follow ECJ case law is that it leaves certain questions open. Here I cite Joined Cases C-427/93, C-429/93 and C-436/93

¹⁶ *ESA v. Norway*, 2000-2001 EFTA Court Report, 73.

¹⁷ 1983 ECR, 2445.

¹⁸ Cited in the Opinion of AG *Mischo*, 2001 ECR, I-9693, paragraph 79.

¹⁹ *Commission v. Denmark*, 2001 ECR, I-9693, paragraphs 47, 49, 50, 51, 52, 53.

Bristol-Myers Squibb on the repackaging of pharmaceuticals, where the ECJ identified five conditions which, when met by a parallel importer, preclude a trademark owner from objecting to the marketing of a repackaged pharmaceutical product.²⁰ What was not said in this judgment, because it had not been pleaded, was whether a parallel importer and re-packager of pharmaceutical may in certain circumstances add its own design elements to the new boxes. In E-3/02 *Paranova v. Merck* the EFTA Court, upon a reference by the Supreme Court of Norway, essentially answered this question in the affirmative.²¹ We thereby followed a different approach than the Supreme Courts of Germany, Austria and Denmark. This prompted the England and Wales Court of Appeal to refer a fresh case to the ECJ, C-348/04 *Boehringer Ingelheim II*, and to ask, *inter alia*, the following question:

“[D]oes the first condition set out in *Bristol-Myers Squibb* [...], namely that it must be shown that it is necessary to repackage the product in order that effective market access is not hindered, apply merely to the fact of reboxing (as held by the Court of Justice of the European Free Trade Association in Case E-3/02 *Paranova v. Merck*) or does it also apply to the precise manner and style of the re-boxing carried out by the parallel importer, and if so how?”²²

The English judge indicated that he was sympathetic to the EFTA Court’s position. The ECJ followed Advocate General *Sharpston’s* Opinion in concurring with the EFTA Court.²³ The German Supreme Court for its part overruled its previous case law and referred to us in a number of cases without making a request for a preliminary ruling to the ECJ.²⁴

(3) A third constellation where we may not necessarily follow the ECJ is when there is relevant case law from the European Court of Human Rights. There we would not adopt the case law of the Human Rights Court via the mouth of the ECJ but we

²⁰ 1996 ECR I-3457.

²¹ 2003 EFTA Court Report, 101.

²² O.J. C 273/11 of 6.11.2004.

²³ See the reference to paragraphs 41 to 45 of the EFTA Court’s judgment in paragraph 38 of the ECJ’s ruling, 2007 ECR, I-3391; Opinion of AG *Sharpston*, paragraphs 50 - 53; see also the Opinion of AG *Sharpston* in Case C-276/05 *The Wellcome Foundation*, 2008 ECR I-10479, paragraphs 33 - 36.

²⁴ BGH of 14.6.2007 – I ZR 173/04 – *STILNOX*, paragraph 23; 13.12.2007 I ZR 89/05 *Micardis*, paragraph 17; 24.4.2008 – I ZR 30/05 *Lefax/Lefaxin*, paragraph 22.

would directly look to Strasbourg. This my Court did, for instance, in the well-known *Norway Post* case, where it said in all clarity: "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."²⁵ I may add that Advocates General and the General Court have made ample reference to *Norway Post*.²⁶

(4) Finally, there may be a fourth constellation which may be labelled "creative homogeneity".²⁷ In E-5/10 *Dr. Kottke* the Court held that the provision of security may not be required in civil litigation in a manner disproportionately affecting the interests of a non-resident plaintiff in being able to commence legal proceedings.²⁸ That meant that Liechtenstein did not have to abolish its rules on the provision of security by a foreign plaintiff. National courts must in the individual case assess whether it is proportionate to ask for such a payment or not, proportionate with regard to the amount, the period of time and the form. The Commission and the EFTA Surveillance Authority had asked us to find that the Liechtenstein rule had to be abolished.

2. EFTA Court going first

All these cases concerned constellations in which there was previous ECJ case law. But in most of our cases there is no ECJ case law, which means that we have to answer novel legal questions. We enjoy what business administration people would call the "first-mover advantage".

²⁵ C-15/10 *Posten Norge v. ESA*, 2012 EFTA Court Report, 246, paragraph 100.

²⁶ See Advocate General Kokott in C-501/11 P *Schindler*, Opinion of 18 April 2013, paragraphs 25 and 26; Advocate General Wathelet in C-295/12 P *Telefónica v. Commission*, Opinion of 26 September 2013, paragraph 63; GC T-392/08 *AEPI*; T-398/08 *Stowarzyszenie Autorów ZaiKS*; T-401/08 *Säveltäjain Tekijänoikeustoimisto Teosto ry*; T-410/08 *GEMA*; T-411/08 *Artisjus Magyar Szerzői Jogvédő Iroda Egyesülete*; T-413/08 *Slovenský ochranný Zväz Autorský pre práva k hudobným dielam (SOZA)*; T-414/08 *Autortiesību un komunikēšanās konsultāciju aģentūra / Latvijas Autoru apvienība*; T-415/08 *Irish Music Rights Organisation*; T-416/08 *Eesti Autorite Ühing*; T-417/08 *Sociedade Portuguesa de Autores CRL*; T-418/08 *OSA*; T-419/08 *LATGA*; T-420/08 *SAZAS*; T-421/08 *Performing Right Society*; T-422/08 *SACEM*; T-425/08 *Koda*; T-428/08 *STEF*; T-432/08 *AKM*; T-433/08 *SIAE*; T-434/08 *Tono*; T-442/08 *CISAC*, all judgments of 12 April 2013.

²⁷ See with regard to this concept *Christiaan Timmermans*, *Creative Homogeneity, Liber Amicorum in Honour of Sven Norberg*, Brussels 2006, 471 ff.

²⁸ 2009-2010 EFTA Court Report, 320.

Recent “going first” examples are E-1/10 *Periscopos*, the first case in the entire EEA regarding the bid price rules in the Takeover Directive,²⁹ E-16/10 *Philip Morris*, the first case worldwide on a display ban for tobacco products at the point of sale,³⁰ E-4/09 *Inconsult*, the first case in the EEA concerning the legal nature of a website,³¹ E-4/11 *Clauder* on the right to family reunification,³² the first cases in the EEA on the legal consequences of the 2008 financial crisis (E-3/11 *Sigmarsson*,³³ E-18/11 *Irish Bank Resolution Corporation*,³⁴ E-17/11 *Aresbank S.A.*,³⁵ E-16/11 *ESA v. Iceland (Icesave)*,³⁶ E-10/12 *Hardarson*)³⁷.

There is no written obligation for the ECJ to take EFTA Court case law into account. But the ECJ had made it clear from the beginning that it does not consider homogeneity to be a one-way concept. Advocate General *Jääskinen* has recently noted that under the principle of homogeneity it may be necessary for the ECJ to base itself on the case law of the EFTA Court.³⁸ One will remember in this context that ECJ President *Skouris* said at the conference marking the EFTA Court’s 10th anniversary that “ignoring EFTA Court precedents would simply be incompatible with the overriding objective of the EEA agreement which is homogeneity”.³⁹ In fact, the ECJ has followed EFTA Court case law on many occasions. Advocates General play a special role in this, they often have the function of an “entrance door” for EFTA Court case law into the case law of the ECJ.⁴⁰ The General Court too has followed EFTA Court case law in many cases. Altogether there are some 80 cases in which the

²⁹ 2009-2010 EFTA Court Report, 198.

³⁰ 2001 EFTA Court Report, 330.

³¹ 2009-2010 EFTA Court Report, 86.

³² 2011 EFTA Court Report, 216.

³³ 2001 EFTA Court Report, 430.

³⁴ 2012 EFTA Court Report, 592.

³⁵ 2012 EFTA Court Report, 916.

³⁶ Judgment of 28 January 2013, nyr.

³⁷ Judgment of 25 March 2013, nyr.

³⁸ Opinion of 11 July 2013 in Cases C-277/12, *Vitālijs Drozdovs v. Baltikums AAS*, and C-22/12, *Katarína Haasová v. Rastislav Petrik, Blanka Holingová*, paragraph 58.

³⁹ *Vassilios Skouris*, The CJEU and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions, in: Carl Baudenbacher/Per Tresselt/Thorgeir Örlygsson (eds.), *The EFTA Court Ten Years On*, Oxford 2005, 123, 125.

⁴⁰ See lately *Carl Baudenbacher*, The EFTA Court’s Relationship with the Advocates General of the European Court of Justice, *Mélanges en l’honneur de Paolo Mengozzi*, Brussels 2013, 341 ff.

Union courts and the Advocates General of the ECJ have made some 120 references to EFTA Court case law. The last references by the ECJ were made in two cases concerning the Motor Vehicle Insurance Directive in which judgment was delivered on 25 October 2013.⁴¹

D. The ECJ and the courts of other neighbouring countries

I. Switzerland

As far as Switzerland is concerned, I want to discuss the two most important of the 120 bilateral agreements concluded with the EU, the good old Free Trade Agreement from 1972 and the Free Movement of Persons Agreement from 1999. In 1972 seven EFTA States entered FTAs with the European Economic Community (EEC). Today, only the agreement with Switzerland is relevant. This agreement did not have a good start because the Swiss Supreme Court did not understand what it was all about. It was the first high court in the whole free trade area established by these seven bilateral agreements which had to rule on the effect of provisions of this agreement. The court ruled in the famous, and some may say infamous, *Stanley Adams* case that the provision in question (which concerned competition) is not a fully effective legal rule in that it does not directly impose obligations or grant rights.⁴² The FTA was described as a pure trade agreement between governments. In *Omo* it also said that the provisions concerning free trade are not directly effective.⁴³ The Swiss Supreme Court has thereby prevented private operators from taking their cases to court as far as they arise under this agreement.

Within one year the ECJ had the opportunity to answer – and it answered in a very interesting way. In Case 270/80 *Polydor* the ECJ held that the provisions of the FTA must be interpreted in the light of the goals and of the context of that agreement.⁴⁴ These go less far than under the EEC Treaty, and that is why the interpretation may differ. That was clearly meant to be an answer to the narrow-mindedness of the Swiss Supreme Court in the *Omo* case. With this, the ECJ kept the EFTA States and their

⁴¹ C-277/12, *Vitālijs Drozdovs v. Baltikums AAS*, Judgment of 24 October 2013, nyr, paragraph 38; C-22/12, *Katarina Haasová v. Rastislav Petrik, Blanka Holingová*, Judgment of 24 October 2013, nyr, paragraph 47.

⁴² ATF 104 IV 175.

⁴³ ATF 105 II 49.

⁴⁴ 1982 ECR 329.

actors at distance without putting EEC integration at risk. In Case 104/81 *Kupferberg* the ECJ made the Swiss Supreme Court look bad by ruling that provisions of the FTA may have direct effect in Community law.⁴⁵ This made the ECJ look good, but in view of *Polydor*, it did not have a lot of consequences. Since the scope of the rules of the FTA may be narrower than in EU law, there is less that could be relied on before national courts.

The Free Movement of Persons Agreement (FMPA) was concluded in 1999, i.e. almost ten years after the rejection of the EEA by the Swiss people and cantons. Direct effect is recognised in Switzerland. The Supreme Court follows old ECJ case law as well as new ECJ case law. Swiss authors have concluded that the FMPA is an integration agreement, and since Switzerland has recognised direct effect and the Supreme Court follows the ECJ's case law, *Polydor* cannot apply to this treaty.⁴⁶ The ECJ did not follow this logic. It fully applies *Polydor* to the Free Movement of Persons Agreement,⁴⁷ and in a way I think this is a consequence of the Swiss Supreme Court never having overruled *Omo*. And not only does the ECJ apply *Polydor* to the FMPA, it also applies it to the Air Traffic Agreement (ATA).⁴⁸

For the sake of completeness, I may mention that ECJ case law is also influencing the jurisprudence of the Supreme Court as well as that of other federal courts and even of cantonal courts when it comes to the interpretation of autonomously implemented EU law. There is, however, no clear line. The individual Divisions of the Supreme Court and of the other courts, respectively, have their own methodological approach. Depending on the circumstances, the text, the history, the scheme or the

⁴⁵ 1982 ECR 3641.

⁴⁶ See, for instance, *Astrid Epiney*, Zur Bedeutung der Rechtsprechung des EuGH für die Anwendung und Auslegung des Personenfreizügigkeitsabkommens, ZBJV 151, 2005, 1 ff.

⁴⁷ Cases C-351/08 *Grimme*, 2009 ECR, I-10777, paragraphs 27-29 ; C-541/08 *Fokus Invest AG*, [2010] ECR, I-1025, paragraphs 26-32; C-70/09 *Hengartner and Gasser*, [2010] ECR, I-7233, paragraphs 41-43; similar remarks can be found in the ECJ's order in Case C-476/10 *projektart* of 24 June 2011, 2011 ECR I-5615, paragraph 37, although this case was dealt with under the EEA Agreement and had no implications for Switzerland. See, i.a., *Laura Melusine Baudenbacher*, Das Personenfreizügigkeitsabkommen EU-Schweiz ist doch kein Integrationsvertrag, ELR 2010, 34 ff.; *Id.*, Gar lustig ist die Jägerei - aber für Schweizer ist sie teurer als für andere, ELR 2010, 280 ff.

⁴⁸ Case C-547/10 P. *Swiss Confederation v. European Commission*, judgment of 7 March 2013, nyr.; see *Christa Tobler*, Luftverkehrsrecht: Auslegung des Luftverkehrsabkommens EU-Schweiz - Keine Anwendbarkeit der Dienstleistungsfreiheit, Europäische Zeitschrift für Wirtschaftsrecht 2013 432 ff.; *Laura Melusine Baudenbacher*, EuGH überträgt die *Polydor*-Rechtsprechung auch auf das Luftverkehrsabkommen, European Law Reporter 2013 179 ff.

purpose of the norm may tip the balance. That means that the maxim of method pluralism or of "principled lack of principle" will also be relevant when it comes to the interpretation of autonomously implemented EU law. This is in clear contrast to the approach of the courts in the EU and the EEA (dynamic interpretation and interpretation according to the *effet utile*).⁴⁹

II. Ukraine

Ukraine is part of the ENP, as understood in the formal sense. Article 9 of the Ukrainian Constitution provides that "international treaties that are in force, agreed to be binding by the Parliament of Ukraine, are part of the national legislation of Ukraine". The Constitutional Court endeavours to interpret the provisions of the Constitution in line with international and European legal standards by applying the EU *acquis* as a persuasive source of law.⁵⁰

Ukraine was the first country of the former Soviet Union to conclude a Partnership and Cooperation Agreement (PCA) with the EU. It thereby also accepted a soft commitment to "*endeavour to ensure* that its legislation be gradually made compatible with that of the Community" (Article 51 PCA). As far as case law is concerned, the Constitutional Court aims to interpret the provisions of the Constitution in line with international and European legal standards by applying EU *acquis* as a persuasive source of law. In *Person v. Kiev City Centre for Social Assistance*, the Administrative Court of the Kiev District imported the principle of legal certainty from ECJ case law and made reference to the ECJ's judgment in the Case 41/74 *van Duyn v. the Home Office* judgment.⁵¹

Ukrainian administrative courts also appear to justify the application of ECJ case law by the need to follow Human Rights Court case law. In the *Tsesarenko* case, the Administrative Court of the Kiev District stated that the principle of the rule of law must be applied in line with Human Rights Court case law as emphasised in the Law of Ukraine "On the Enforcement of the Judgments and the Application of the Case-

⁴⁹ See *Carl Baudenbacher*, *Swiss Economic Law Facing the Challenges of International and European Law*, ZSR 2012 II, 419, 626 ff.

⁵⁰ *Petrov/Kalinichenko*, *The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine*, *International and Comparative Law Quarterly*, 60, April 2011, 325.

⁵¹ *Petrov/Kalinichenko*, 349; see 1974 ECR, 1337.

Law of the European Court of Human Rights".⁵² And some Ukrainian courts justify their references to EU law by the already mentioned soft approximation clause in Article 51 of the PCA.⁵³

The importance of Ukraine's soft approximation commitments was emphasised by the District Administrative Court of Kiev in *the Person v. State Agency in nationalities and religions* case.⁵⁴ The court referred to the Ukrainian law "On the Concept of State Programme for Adaptation of Ukrainian Legislation to the Legislation of the European Union", and stated that the aim of adapting Ukrainian legislation requires its alignment with EU *acquis* which covers primary and secondary law and ECJ case law. The judgment *inter alia* mentions EC Directive 2004/83 of 29 April 2004 "On minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of European Court of Human Rights" as a relevant guideline for the court.⁵⁵

Currently, Ukraine is the first of the Eastern Partnership countries to take the next step, namely the conclusion of an Association Agreement with the European Union. According to Article 153(2) of the relevant text, legislative approximation shall be carried out in consecutive phases: "In this process, due account shall be taken of the corresponding case law of the European Court of Justice and the implementing measures adopted by the European Commission as well as, if this should become necessary, of any modifications of the EU *acquis* occurring in the meantime." Moreover, the European Commission shall notify without undue delay Ukraine of any modifications of the EU *acquis*.⁵⁶

III. Russia

Russia does not participate in the European Neighborhood Policy and is not considering applying for EU membership in the foreseeable future. But it is, in the

⁵² Law No.3477-IV of 23 February 2006.

⁵³ *Petrov/Kalinichenko*, 348.

⁵⁴ Judgment of 22 May 2008, No. 4/48.

⁵⁵ *Petrov/Kalinichenko*, 348.

⁵⁶ <<http://static.euractiv.com/sites/all/euractiv/files/EU%20Ukraine%20Association%20Agreement%20English.pdf>>, visited on 12 November 2013.

words of the Commission, “a key partner of the EU in its immediate neighbourhood”.⁵⁷ The EU’s influence on the Russian judiciary is exercised mainly through judicial cooperation in civil and criminal matters. An interesting point is that a major incentive for Russian judges to apply the EU *acquis* stems from the EU-Russia Partnership and Cooperation Agreement. The fact that the European Court of Justice and the General Court are rather open-minded when it comes to the interpretation of provisions of that agreement may prompt Russian judges to rely on ECJ case law.

The probably most important case in which the European Court of Justice contributed to this climate is Case C-265/03 *Simutenkov*.⁵⁸ Russian footballer Igor Simutenkov played in Spain and challenged the regulations of the Spanish Football Federation. The ECJ found that Article 23(1) of the Partnership and Cooperation Agreement has direct effect so that individuals to whom that provision applies are entitled to rely on it before Member States’ courts. Article 23(1) PCA reads: “Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.” Russian subjects were also treated in a favourable way by the General Court in Case T-348/05 *JSC Kirovo-Chepetsky Khimichesky Kombinat v. Council*. There, a Russian company obtained the annulment of a Council regulation imposing a definitive antidumping duty on imports of new types of certain products without undertaking appropriate antidumping investigations.⁵⁹

Let me say again that the recognition of provisions of the PCA as directly effective in EU law by EU courts may encourage Russian courts to grant EU subjects similarly favourable treatment.

⁵⁷ Communication from the Commission [COM (2004)] 373, ENP Strategy Paper, 3.

⁵⁸ Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, O.J. 1997 L 327/3.

⁵⁹ 2008 ECR II-159.

In fact, Russian courts treat the EU-Russia PCA as an international agreement which contains self-executing rules within the Russian legal order. Nevertheless, it would be premature to state that Russian courts consistently and systematically refer to the provisions of the PCA. In *Nalchinsky Zavod Poluprovodnikovykh Priborov v. Custom Office of Kabardino-Balkaria*, the Federal Commercial Court of North-Caucasus District confirmed on appeal level that Russia is not bound by the EC Treaty but, at the same time did not exclude the possibility of applying provisions of the EC Treaty if it follows from the objectives of the EU-Russia PCA.⁶⁰

IV. Turkey

As far as Turkey is concerned, I would like to mention the famous *Sevince* case,⁶¹ where the ECJ held that it had jurisdiction to examine questions relating to the agreement between the EC and Turkey. The Ankara Agreement was found to be an integral part of Community law and many of the provisions of the Ankara Association law have been found to have direct effect.

In Case C-221/11 *Demirkan v. Germany*, the ECJ was asked to give a preliminary ruling on the question of whether the EEC-Turkey Association Agreement was in conflict with a visa requirement for Turkish nationals wishing to enter Germany to visit relatives. It found that the Ankara Association law does not include rights of service recipients and, consequently, the standstill clause in question did not apply with respect to them. According to the Court, service recipients were included in the freedom to provide services under EU law because of the encompassing nature of the internal market. Therefore, Turkish nationals do not have the right to enter the territory of an EU Member State without a visa in order to obtain services. The ECJ held that unlike the EU Treaties, the EEC-Turkey Association has a purely economic purpose, the Association Agreement and its Additional Protocol being intended essentially to promote the economic development of Turkey. The development of economic freedoms for the purpose of bringing about freedom of movement for persons of a general nature (workers, establishment, services) which may be compared to that afforded to EU citizens under the EU Treaties is not the object of

⁶⁰ Judgment of 2 July 2003, paragraphs 16 and 17.

⁶¹ C-192/89, 1990 ECR I-3461.

the Association Agreement.⁶² It also found that the Association Council which is required to determine the timetable and rules for the progressive abolition of restrictions on freedom of establishment has not, to date, adopted any measures which would suggest that substantive progress has been achieved towards the realisation of such freedom. At the time of the signing of the Ankara Agreement, nobody realised the impact it would have on the migration and residence rights of Turkish citizens in what is now the European Union.

The *Demirkan v. Germany* case also highlights that Turkey and the EU have not acted on their obligation from the Association Agreement to determine a timetable for the progressive abolition of restrictions on freedom of establishment and on freedom to provide services. As the Association Agreement has reached its 50th anniversary this autumn, it would be an appropriate and politically important gesture to finally act on this overdue legal commitment. In general, the EU and Turkey are linked by the Customs Union Agreement which entered into force on 31 December 1995, pursuant to the 1963 EU-Turkey Association Agreement, which aims at promoting trade and economic relations. There is also the important element of persons under Association Council Decision 1/80, which is, however, less far-reaching than in the customs union.

There does not seem to be a single case so far in which a Turkish court has made reference to the case law of the ECJ. But in its 2008 judgment in the *AK Party* case, that is the ruling party in Turkey, the Constitutional Court made strong reference to the ambition of that party to harmonise Turkish legislation with the EU system.⁶³ I may also add that after the 2004 constitutional reform, there are now references to the European Convention of Human Rights in the case law of the Turkish courts.⁶⁴

⁶² See also Press release No 114/13 in Case C-221/11: "Turkish nationals do not have the right to enter the territory of an EU Member State without a visa in order to obtain services."

⁶³ See *İhsan Dağlı*, *AK Party Survives Closure Case: What Is Next?*, SETA Policy Brief, August 2008, No. 19.

⁶⁴ See <[http://www.europarl.europa.eu/RegData/etudes/note/join/2008/406976/EXPO-DROI_NT\(2008\)406976_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2008/406976/EXPO-DROI_NT(2008)406976_EN.pdf)>, visited on 12 November 2013.

E. Judicialisation of the Switzerland-EU bilateral agreements?

I. Creation of a Swiss pillar rejected by the EU

Some eight years ago, the European Union started to call on Switzerland to agree to an institutionalisation of its bilateral agreements. These treaties have so far been dealt with by Joint Committees, which means by way of diplomatic tools. That may work or it may not work. The European Union is unhappy about the actual situation, in particular in view of legal certainty. The EU asked, on the one hand, for an accelerated adoption of new EU law, the integration of new EU law into the existing bilateral agreements, and for the homogeneous interpretation of these treaties. On the other hand, the EU demanded the establishment of a surveillance and a judicial mechanism for the bilateral agreements. Switzerland first made a proposal which everybody knew would not fly. On 15 June 2012, the Federal Council offered to establish a Swiss pillar with a Swiss surveillance authority overseen by the Swiss Federal Supreme Court. That was rejected by the European Union in December 2012.⁶⁵

II. Political dispute settlement with the help of the ECJ instead of judicial law enforcement?

This year, the Swiss Government launched a new proposal to solve its institutional differences with the EU which was quite unique, also with regard to the procedure which was followed. The two chief negotiators together wrote a confidential so-called "Non-Paper". In this Non-Paper, they essentially identified two options: either that Switzerland should "dock" to the EFTA Surveillance Authority, with a Swiss College Member, and to the EFTA Court, with a Swiss Judge, or that Switzerland should accept the competence of the other party's court, the ECJ, in dispute settlement cases. Accelerated adoption of new law and homogeneous interpretation would no longer be a problem; the Swiss Government declared that it was willing to accept that at least for future EU law. Of the two surveillance and court models, the EU favoured the first, but the Swiss government opted for the second.⁶⁶ It is clear that no Swiss judge would be able to sit on the ECJ.

⁶⁵ See *Christa Tobler*, Die Erneuerung des bilateralen Wegs: eine wachsende Annäherung an den EWR in den zur Diskussion gestellten Modellen, Jusletter of 3 June 2013.

⁶⁶ See for the following, e.g., *Christa Tobler*, Die flankierenden Massnahmen der Schweiz in einem erneuerten System des bilateralen Rechts, Jusletter of 30 September 2013.

In the public debate of the last six months, the Swiss Government has essentially described its position in the following way: if Switzerland and the EU would not agree on a certain question arising from a bilateral agreement in the competent Joint Committee, each side could unilaterally ask the ECJ for an “authoritative” interpretation of the relevant EU law as incorporated into the bilateral law. The Foreign Minister even speaks of an “advisory opinion”. In his view, the decision-making power would remain with the competent Joint Committee. He therefore claims that despite the absence of a Swiss judge the ECJ would not be a foreign court for Switzerland. It would in fact not be an “adjudicating court” at all, because it would not – in the eyes of the Minister – properly decide. (At the same time, the Minister claims that in case of docking to the EEA/EFTA institutions the EFTA Court would be a foreign court because it would have decision-making power and Switzerland could only nominate one of several judges.) The President of the Swiss Confederation stated that the ECJ would only be “heard”, but would not have the power to decide.⁶⁷

If the ECJ’s answer would be positive for Switzerland, the Government argues, the EU would feel bound by it. If it would be negative for Switzerland, the Swiss Government would retain the freedom to vote against it in the Joint Committee. If it would do so, it would risk the termination of the agreement in question. However, the Swiss Government has three hopes. First, it starts from the premise that the Commission would refrain from unilaterally invoking the ECJ. Second, it assumes that after a negative decision by the ECJ it would be able to negotiate a compromise solution with the Commission without the ECJ being able to express itself on the outcome. Third, it assumes that if ever it should come to a ruling that is not in favour of Switzerland, the EU would refrain from actually applying any sanctions (e.g. not insisting on the termination of the agreement).

In the Government’s view, this model has the further advantage that there would not be any formal monitoring by a surveillance authority and thus there would be no judicial infringement proceedings. There would only be the dispute settlement mechanism which means that Switzerland could not be sentenced. If Switzerland

⁶⁷ <<http://www.srf.ch/news/schweiz/maurer-glaubt-volk-im-kampf-gegen-fremde-richter-geeint>>, visited on 12 November 2013.

would dock to the EFTA/EEA institutions, which necessarily would include a surveillance mechanism, it would risk being sentenced by the EFTA Court.

In order to eliminate the docking solution, the Government gave a description of the functioning of the EEA institutions which does not hold water.

The first argument is that judgments of the EFTA Court in infringement cases are not binding on the EU. This contention is based on a lack of understanding of the concept of validity. Judgments of the EFTA Court are, like the judgments of the ECJ, valid and have legal force for the parties involved. Nobody can challenge this force. To give an example, when the EFTA Court dismissed the action brought by the EFTA Surveillance Authority against Iceland in *Icesave*, the case was over, also for the European Commission which had supported the EFTA Surveillance Authority as an intervener on behalf of the EU. *The Wall Street Journal* stated correctly: "The ruling of the EFTA Court is final and can't be appealed."⁶⁸ For the sake of order, I may add that if the ECJ in a later case would come to a different interpretation, this would not change the legal force of the EFTA Court's judgment.

The second argument goes that if Switzerland were to be sentenced by the EFTA Court, the dice would be cast ("*la messe serait dite*"). The ECJ on the other hand would not sentence Switzerland, but just give an interpretation of the relevant provisions of a bilateral treaty. Switzerland would retain the freedom to opt against that interpretation in the competent Joint Committee.⁶⁹ Upon closer inspection, one discovers that quite the reverse is true. If Switzerland were to disregard the decision of the ECJ, this would lead to the termination of the respective bilateral agreement. If an EFTA State does not implement a judgment which the EFTA Court has rendered in infringement proceedings, there is no such consequence.

The third argument is that Switzerland would risk being sentenced by the EFTA Court, whereas the EU would remain unchecked. This is based on a misunderstanding of the two-pillar structure of the EEA. If Switzerland were to dock to the EEA/EFTA institutions, the EU Member States would be subject to the monitoring of the Commission and

⁶⁸ <<http://online.wsj.com/news/articles/SB10001424127887323375204578269550368102278>>, visited on 15 October 2013.

⁶⁹ <<http://www.blick.ch/news/politik/es-gibt-keine-fremden-richter-id2481020.html>>, visited on 1 November 2013.

the Commission would eventually bring them before the ECJ. The fact that the Commission in the past has not been overly keen to go after EU Member States which in Switzerland's view were in violation of a bilateral agreement, must be seen against the background that on the Swiss side there is no surveillance mechanism at all. There is, however, at least one case where on the EU side the procedure was applied in all its stages, namely *Case C-360/95 Commission v. Spain*, concerning the bilateral Insurance Agreement (establishment of insurance companies).⁷⁰

Allegation four is that if the EFTA Court were to decide in favour of Switzerland in an infringement action brought by the EFTA Surveillance Authority, the EU could and would start dispute settlement proceedings under Article 111 EEA. This is an ivory tower argument. It has not happened in 20 years. If the EU had ever wanted to start dispute settlement proceedings, *Icesave* would have been the case because in *Icesave* the Commission made the first formal intervention on the side of the EFTA Surveillance Authority in the history of the EEA. The EFTA Court dismissed the EFTA Surveillance Authority's action. For the sake of completeness, I add that under EEA law, the ECJ can only be invoked by both parties.

The fifth argument is equally unconvincing. The Government claims that its approach avoids the creation of a surveillance body.⁷¹ To this I reply that since the Commission would be able to unilaterally invoke the ECJ in the case of a conflict, Switzerland would in truth be monitored by the Commission without there being a Swiss Commissioner. This would also mean no procedural guarantees and little transparency.

F. Conclusions

In the European Union, courts and private operators play a significant role. The influence of politicians and of diplomats has thus been reduced. The judicialisation and privatisation of law have been exported to the EEA/EFTA States. In the case of the EEA, there is a regular judicial dialogue between the ECJ and the EFTA Court.

⁷⁰ 1997 ECR, I-7337.

⁷¹ <<http://www.tagesanzeiger.ch/schweiz/standard/100-neue-Ueberwacher-fuer-die-Schweiz/story/11163947?track>>, visited on 1 November 2013.

The courts in the ENP States, Turkey and even Russia are looking to the ECJ. The ECJ for its part encourages these courts to take into account its case law by showing open-mindedness concerning the issue of direct effect of the respective agreements.

Swiss courts are looking to the ECJ (occasionally also to the EFTA Court).⁷² But for the most part, the 120 bilateral agreements concluded with the EU are being administered by Joint Committees, where decisions can only be taken by consensus. However, as the Council of the EU has noted in December 2012, “by participating in parts of the EU internal market and policies, Switzerland is not only engaging in a bilateral relation but becomes a participant in a multilateral project”.⁷³ Despite the EU’s calls for institutions, the Swiss Government hopes to continue its bilateral approach without judicialisation and without a role for private operators. Conflicts should in its view be resolved by political means with the help of the ECJ which is the court of the other party. The ECJ would, upon unilateral request of one side, give an “authoritative” interpretation of EU law as incorporated into the relevant bilateral agreement. The decision-making power would, however, remain with the Joint Committees where Switzerland could say no. In Opinion 1/91, the ECJ stated that it is only prepared to give preliminary rulings to courts of third countries if it is guaranteed that its answers will have binding effect.⁷⁴ In the Non-Paper the ECJ’s decisions are described as “contraignants” which in English means binding. The Swiss Government seems to think that the ECJ will, in the context of dispute settlement proceedings, be satisfied with this. Whether this is true is, however, an open question. If it should be so, the Government would have to explain to the Swiss voters that Switzerland retains the freedom to disregard such a binding (“contraignante”) decision and that for this reason the ECJ is, from the Swiss perspective, not only no foreign court, but no adjudicating court at all.

⁷² ATF 139 I 72 *PubliGroupe*, considerations 2.2.2., 4.4.

⁷³ Council conclusions on EU relations with EFTA countries of 20 December 2012, paragraph 33, <http://eeas.europa.eu/norway/docs/2012_final_conclusions_en.pdf>, visited on 1 November 2013.

⁷⁴ 1991 ECR, I-6079, paragraph 65.

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