

Contents

1	My Pre-court Life	1
1	General	1
2	My Socialisation as a Lawyer	2
2.1	Studies and First Work Experiences	2
2.2	My German Journeyman Travels	3
3	University of St. Gallen	5
4	University of Texas	7
5	EEA Negotiations	7
2	EFTA Court Judge by Chance	9
1	Liechtenstein’s Choice of a Judge	9
2	Between Austin and Geneva	12
3	Flashback: EEA Negotiations	12
3.1	Start in Hotel Löwen in Vaduz	12
3.2	Advisor to the Princely Government	13
3.3	The “Shoals” of the EEA	14
3.4	The First Liechtenstein EEA Referendum	14
3.5	The Second Liechtenstein EEA Referendum	15
3.6	Afterword on the “Shoals”	15
3	The EEA—One Area with Two Courts	17
1	Introduction	17
2	The EFTA Court’s Difficult Birth	20
2.1	The ECJ’s First EEA Opinion	20
2.2	The ECJ’s Second EEA Opinion	21
3	The EEA Judiciary	21
3.1	ECJ	21
3.2	General Court	24
3.3	EFTA Court	24

4	Judges' Background and Independence	26
4.1	General	26
4.2	Official Commitment to Independence and Impartiality	27
4.3	Threat to Independence and Impartiality in Practice	27
4.4	The EFTA Court's Record	30
5	The Backbone of the EEA Agreement	31
5.1	Introduction	31
5.2	Reciprocity	31
5.3	Homogeneity	32
4	The Legacy of the Five-Member Court	39
1	General	39
2	Important Precedents	40
2.1	Access to Justice	40
2.2	Legal Nature of "Advisory Opinions"	41
2.3	Free Movement of Goods	41
2.4	Limits of the Transmitting State Principle	41
2.5	Effect	42
3	Cooperation Between National Courts and Governments	43
4	The Policy of the Three-Member Court	43
5	Resurrection from the Dead	45
1	What to Do if You Have no Cases?	45
2	Succession of Contracts: Part One	46
3	Settling in Luxembourg	46
4	Succession of Contracts: Part Two	48
5	The Beginning of the Dialogue with the EU Courts	49
6	The Member States—An Unholy Alliance	51
1	Introduction	51
2	Iceland	53
2.1	Mixed Economy	53
2.2	National Character	54
2.3	Judiciary	55
2.4	Failed Attempt to Join the EU	56
3	Liechtenstein	57
3.1	Mixed Economy	57
3.2	Customs and Currency Union with Switzerland and EEA Membership	58
3.3	National Character	58
3.4	Judiciary	59

4	Norway	59
4.1	Mixed Economy with High Public Ownership	59
4.2	National Character	61
4.3	Judiciary	69
7	ESA—The Great Negotiator	71
1	General	71
2	ESA as a Prosecutor—A Promising Start	72
3	After 2002: High Fluctuation and Low Action	74
3.1	The Course of Things	74
3.2	Musical Chairs	80
3.3	Oda's Double U-Turn	80
3.4	Competition Law in Particular	83
3.5	National Supreme Courts Disregarding EEA Law	84
4	Persistent Norwegian Dominance	85
4.1	The Facts	85
4.2	An Odd Attempt to Justify	85
4.3	New Rhetoric	86
5	Input in Preliminary Reference Proceedings	87
6	Contribution to ECJ Case Law	88
8	Preliminary References: All Options Open?	89
1	Starting Point: The EU Model	89
2	Complex Situation in the EFTA Pillar	90
2.1	History	90
2.2	Written Law	91
3	To Refer or Not to Refer	92
3.1	The Early Years	92
3.2	Gradual Progress in Iceland and Liechtenstein	93
3.3	Reluctance in Norway	95
4	Legal Nature of the Court's Rulings	96
5	The Role of the Governments	97
5.1	Iceland	97
5.2	Liechtenstein	98
5.3	Norway	98
6	<i>Irish Bank and Jonsson</i>	105
6.1	Restriction of the Freedom to Refer	105
6.2	Lack of Clarity	106
6.3	Limiting the Effects of the Icelandic Appeal System	106
6.4	Background: 2011 Spring Conference	107
7	Conclusions	108

9	A Matter of Interpretation	109
1	Introduction	109
2	Relevant EU Case Law Available	110
2.1	ECJ Judgments	110
2.2	AGs Opinions	111
2.3	GC Judgments	111
3	Extra-Legal Considerations	111
3.1	General	111
3.2	Preunderstanding or Attitude	112
3.3	Strategic Considerations	115
3.4	Institutional Loyalty	116
4	Legal Considerations	116
4.1	General	116
4.2	Teleological Interpretation in Particular	117
4.3	Functional Interpretation in Particular	118
4.4	National Case Law and Academic Literature	119
5	The Accusation of Judicial Activism	120
5.1	General	120
5.2	Bridging the Widening Gap	122
6	Balanced Realism	124
7	My Approach	125
10	War Over Constitutional Principles	127
1	Starting Point: A Dilatory Formula Compromise	127
2	Effect: Deference to State Sovereignty	129
3	State Liability: Making or Breaking the EEA Agreement	129
3.1	Reference of the <i>Sveinbjörnsdóttir</i> Case	129
3.2	Proceedings and Judgment	130
3.3	A Salute from the ECJ	132
3.4	An Extrajudicial Dissent	133
3.5	A Failed Attempt to Turn the Clock Back	134
3.6	Acceptance by National Courts and Governments	135
4	Primacy: Deference to State Sovereignty	136
5	Conform Interpretation	137
11	Two Early Landmark Cases: Veronika's Struggle and Enriched Cereals	139
1	Moonshine and the Consequences	139
2	Veronika's First Arrow	140
2.1	EFTA Court: Norway Is in Breach	140
2.2	Supreme Court: Norway Is in Breach, but Veronika Is Left Out in the Rain	141
2.3	Political Implications	142

3	Veronika's Second Arrow	143
4	Cornflakes Fortified with Vitamins and Iron	144
4.1	A New President	144
4.2	<i>De gustibus non est disputandum</i> —There's no Accounting for Taste	145
4.3	The Kellogg's Ruling	146
5	Other Prior Authorisation Cases	147
12	Fundamental Rights—The EFTA Court Amends the Law	149
1	Norway and Iceland Are Fundamental Rights Societies	149
2	Academic Controversy at the Beginning	150
3	Recognition of EEA Fundamental Rights	151
4	Interim Result	153
5	The EU Charter in Particular	153
13	Putting the EFTA Court on the Map	157
1	My Election as President	157
2	Taking Stock	158
3	Extrajudicial Activities of the Court	159
3.1	General	159
3.2	Regular Activities	160
3.3	Anniversaries	166
3.4	Annual Spring Conference	169
3.5	Publications	170
3.6	Media	171
4	Personal Extrajudicial Activities	173
4.1	Building Networks with EU Protagonists	173
4.2	Positioning the EFTA Court in Luxembourg	175
4.3	Social Life	175
4.4	Teaching	177
4.5	Speaking	177
4.6	The International Competition Law Forum (ICF) in Particular	179
4.7	Publishing	180
4.8	Media	183
14	The Economics of EEA Single Market Law	185
1	The EEA Agreement Has Created a Market	185
2	Competition Economics	186
3	State Aid Economics	188
4	Economics Beyond the Realm of Competition Law	189
4.1	General	189
4.2	Relevance for the EFTA Court	190

15	Fundamental Freedoms and the Cursed Proportionality Test	193
1	Are All Four Freedoms Indispensable?	193
2	The EFTA Court's Approach to Proportionality	194
2.1	Origin and Key Features	194
2.2	Areas of Application	196
3	Some Landmark Cases	196
3.1	Free Movement of Goods	196
3.2	Free Movement of Goods and Freedom to Provide Services	199
3.3	Freedom to Provide Services and Right of Establishment	199
3.4	Right of Establishment and Free Movement of Capital	203
3.5	Free Movement of Capital	205
3.6	General Prohibition to Discriminate	206
4	Does Proportionality Mean Proportionality?	207
4.1	Liechtenstein Courts	207
4.2	Icelandic Courts	207
4.3	Norwegian Courts	208
5	ESA's Position	211
16	Competition Law—A Rare Pleasure	213
1	General	213
2	Limits of Collective Bargaining and Industrial Action	214
2.1	Occupational Pension Insurance Schemes	214
2.2	Dockers' Monopoly	217
3	Judicial Review	219
3.1	Scope	219
3.2	Review of Fines	220
4	Private Plaintiff as Private Attorney General	221
5	Right of Audience for In-House Counsel	222
6	Restriction of Competition by Object	223
7	Other Notable Cases	224
7.1	Protecting Competition Between Airlines	224
7.2	Application of EEA Competition Law to Public Bodies	226
8	Conclusions	228
17	State Aid Control—A More Frequent Pleasure	235
1	EU Law as a Starting Point	235
2	ESA's Approach	236
3	Judicial Review	237
3.1	General	237
3.2	Locus Standi	238
3.3	Substance	244
4	The Court as a Ground Breaker	247
5	Aid to Agriculture and Fisheries	249

18	Secondary EEA Law—A Wide Sphere	251
1	General	251
2	Image of Man in the Internet Age	252
3	Contractual Model	253
3.1	Freedom of Contract and Consumer Protection	253
3.2	Sanctity of Contracts	254
4	Principle of Liability	256
4.1	Liability of a State in a Systemic Crisis	256
4.2	Award of a Public Contract to the Wrong Bidder	256
5	Adjustment of Price for a Mandatory Takeover Bid	256
6	Re-use of Public Sector Information	257
7	Information About Convictions of Legal Persons	258
8	Re-monopolisation of Works That Have Fallen into the Public Domain	258
19	Free Movement of Persons and Social Policy	261
1	Introduction	261
2	Transfer of Undertakings	263
3	Exportability of Helplessness Allowance	264
4	Citizenship Directive	264
5	Working Time Directive	266
6	Other Cases	267
6.1	Safety at Work	267
6.2	Social Security Schemes	268
6.3	Healthcare	269
6.4	Equal Treatment for Men and Women	271
20	Where's the Beef?	273
1	The Origin of the Question	273
2	The Diagnosis	274
3	Limited Interest in the Beef in EFTA Circles	274
4	Remedial Measures	276
21	Judicial Dialogue Between the ECJ and the EFTA Court	279
1	Introduction	279
2	ECJ Going First	281
2.1	EFTA Court Follows the ECJ	281
2.2	EFTA Court Doesn't Follow the ECJ	282
3	EFTA Court Going First	286
3.1	ECJ Follows the EFTA Court Explicitly	286
3.2	ECJ Follows the EFTA Court Implicitly	287
3.3	No Parallel Case Before the ECJ Yet	288
3.4	ECJ Follows the EFTA Court on a Second Attempt	288
3.5	EFTA Court Adjusting Its Jurisprudence to ECJ Case Law	291

4	Excursus: A Fortress Europe in the Field of Financial Services?	296
5	Contradictory ECJ Case Law	297
6	Relevance of ECtHR Case Law	299
7	Important Judgments on Homogeneity	299
8	EFTA Values	301
9	Conclusions	301
22	The Norwegian Social Model on the Brink of a Downfall?	303
1	General	303
2	<i>Pedicel</i> : If All Else Fails, <i>Norsk</i> Will Do It	304
3	<i>Gaming Machines</i> : “As Long as” Means Nothing	305
3.1	The Case	305
3.2	Oral Hearing	306
3.3	Judgment	306
3.4	The Supreme Court’s Judgment	306
4	Ladbrokes: Pick and Choose	307
4.1	The Case	307
4.2	Oral Hearing	307
4.3	Judgment	307
4.4	The Oslo District Court’s Judgment	308
5	Playing the EFTA Court off Against the ECJ	308
6	ESA Remains Inactive	309
7	The Government’s Happiness	310
8	<i>Norwegian Waterfalls - Hjemfall</i> : The Threat to “Us, Our Children and Grandchildren”	311
8.1	Pre-litigation Procedure	311
8.2	Background	311
8.3	Judgment	313
8.4	Consequences	313
23	The Failed Decapitation of <i>Kong Carl</i>	315
1	Conflict with the Court’s Auditors	315
2	Journalists Spice Things Up	316
3	Reappointment Under Unusual Circumstances	318
4	A Not Entirely Unexpected Sequel	321
5	<i>Kong Carl av EØS</i> —A Retrospective	322
5.1	The Article	322
5.2	Össur’s Explanation	324
6	Postlude	324
24	“Room for manoeuvre” for Norway!	327
1	An EEA/EFTA State Against Its Will	327
2	The Sejersted Report	329

2.1	Bombastic Presentation	329
2.2	Positivist Approach and Tunnel Vision	329
2.3	The New Mantra	331
2.4	Praising ESA and Bashing the Court	332
2.5	The Norwegian Social Model Safeguarded	333
2.6	Mainly Harmless. The Norwegian Model in Brussels	333
2.7	Some Are More Equal Than Others	333
2.8	Striking Back	334
3	The Ministry of Foreign Affairs' White Paper	337
4	The Norwegian EEA Commentary	337
25	The <i>Icesave</i> Saga	341
1	The Rise and Downfall of the Icelandic Banks	341
2	Precipitous Application for EU Membership	346
3	Failed Attempts to Find a Political Solution	346
4	<i>Icesave I</i>	349
4.1	Pre-litigation Procedure	349
4.2	Composition of the Court	350
4.3	Oral Hearing	350
4.4	Judgment	351
4.5	Reactions	353
5	<i>Icesave II</i> and <i>Icesave III</i>	356
6	Return to the “ <i>Courant Normal</i> ”	356
6.1	Withdrawal of Iceland’s EU Application	356
6.2	Brits and Icelanders Put <i>Icesave</i> Behind Them	357
26	Gunfight at the Oslo Corral	359
1	The Historic Example	359
2	<i>Høyesterett</i> ’s Reference Boycott	360
2.1	The Facts	360
2.2	The Academic Whisperers	361
2.3	Untenability of the Mechanical Approach	362
3	Open Conflict	363
4	Frontal Attack on the Supreme Court—“ <i>Frontalangrep på Høyesterett</i> ”	365
4.1	First Skirmish in Tromsø	365
4.2	<i>Aftenposten</i> Picks up the Issue	367
4.3	The Nordic Labour Journal Follows Suit	367
5	Chief Justices’ Teatime	368
6	The Oslo Peace Process	369
7	ESA’s Caution	370

27	Working Methods and Judicial Style	373
1	The EFTA Court's Structure	373
1.1	Composition	373
1.2	Cabinet System and Manning Table	374
1.3	Language Regime	374
2	Procedure	374
2.1	General	374
2.2	Assignment of the Case to a Judge Rapporteur	375
2.3	Written Procedure	375
2.4	Report for the Hearing	376
2.5	Applications for Intervention and for Interim Measures	376
2.6	Oral Hearing	377
2.7	Resolving the Case and Delivery of the Judgment	377
2.8	Peculiarities of a Three-Member Court	378
3	Reasoning	378
3.1	Early Considerations	378
3.2	What Has Been Achieved?	380
3.3	Use of <i>dicta</i>	386
4	Correlation Between Style and Content	389
5	Lack of a Dissenting Opinion System	390
28	Attack on the EFTA Court's Integrity	393
1	Introduction	393
2	A Second Term for Judge Christiansen?	394
2.1	Divided Norwegian Administration	394
2.2	A Norwegian Panel Dominated by Bureaucrats	395
2.3	The Norwegian Public Becomes Aware of the Matter	397
3	Abridging a Judge's Term at All Costs	398
3.1	A Cheap Compromise	398
3.2	The Two Other Governments Have Reservations	398
3.3	The Two Other Governments Cave In	398
3.4	The Unlawful Decision	399
4	Courageous Lawyers Stand Up	400
4.1	Complaints by Norwegian Academics	400
4.2	ESA Reacts	402
4.3	The Liechtenstein Court of Appeal Steps In	403
4.4	The Norwegian Judges Association Protests	403
4.5	<i>POLITICO</i> Accuses Norway of Meddling with Judicial Independence	404
5	The Court's Answers	405
5.1	An Absurd Notion of Bias	405
5.2	The Court's Valentine's Day Decision	405
5.3	The President's Washington's Birthday Order	406

6	The Governments Show Little Discernment	406
6.1	The Unheard Call for the Establishment of a Supranational Panel	406
6.2	2017 EFTA Ministerial Meeting in Svalbard	408
6.3	2017 Conference “Norway in Europe”	409
6.4	My Last Speech Before the ESA/Court Committee	409
29	The Commission—The EFTA Court’s Patron Saint?	411
1	The Commission’s Role	411
2	EFTA Court Following the Commission	412
3	Commission Using the EFTA Court as a Testing Ground	413
4	EFTA Court Not Following the Commission	415
5	Nullity Actions Against ESA Decisions	416
6	Result	416
30	Switzerland—From EU-phobia to EU-philia?	417
1	The Start: Defensive Attitude vis-à-vis Supranationalism	417
2	The Failed EEA Attempt and Its Consequences	418
2.1	The Federal Council’s Blunder	418
2.2	Sectoral Institution-Free Bilateralism as an Intermediate Step on the Road to the EU	420
3	Towards Institutionalisation?	424
3.1	2008 Onwards: The EU Pushes for Institutions	424
3.2	2010: A Cautious Opening Towards the EEA?	425
3.3	2011: Piano Piano	427
3.4	2012: The Futile Attempt to Establish a Swiss Pillar	428
4	From 2013 on: Acquiring Passive EU Membership?	430
4.1	General	430
4.2	The ECJ’s Rulings: Not Binding—Or Binding, but Not Final?	433
4.3	Cabinet Politics: The “Non-paper”	434
4.4	The Six Untenable Contentions About the EFTA Institutions	436
4.5	An Irresponsible Use of the “Foreign Judges” Formula	440
4.6	Going Down the Drain Step by Step	441
5	2014: Mass Immigration Initiative	445
6	2015 Onwards: Treading Water	446
6.1	Negotiation for the Sake of Negotiation	446
6.2	Mr. Burkhalter’s Replacement by Mr. Cassis	448
6.3	The EU Playing Hardball	448
6.4	A Sham Arbitration Mechanism?	449
6.5	Lessons to Be Learned	450
6.6	The Berne Gracious Lords	452
6.7	The Crisis of the Swiss Governance System	453

31 Brexit—No to an ‘Ever Closer Union’	455
1 The Inconceivable Happens	456
1.1 A Logical Step?	456
1.2 The Vote of 23 June 2016	457
1.3 Hard Brexit—HM Government’s First Choice	459
2 A Role for the EFTA Court President?.....	460
2.1 Perplexity After the British Leave Vote	460
2.2 What Is the EEA?	461
2.3 My Credo	461
3 My First Brexit Activities	464
3.1 Immediate Reaction	464
3.2 Keidanren	464
3.3 October 2016 in London.....	464
3.4 German-Speaking Countries	465
3.5 Scotland and Wales on Crutches	466
4 Things Heat Up	467
4.1 Summer 2017.....	467
4.2 My September 2017 Trip to London	468
4.3 An Unexpected, Yet Easily Comprehensible Attack	469
4.4 My November and December 2017 Trips to London	471
4.5 The Joint Report of 8 December 2017	472
4.6 Early 2018: Giving Evidence to Both Houses of Parliament	473
4.7 March 2018: Cross Party Event and Lecture at Queen Mary University	474
5 A Largely Domestic Problem?.....	474
5.1 The Start: PM May in the Hands of the Brexiteers	474
5.2 The Failed Snap Election	475
5.3 Labour’s Dilemma	475
5.4 The Usual Mantras	475
5.5 Parliament Speaks up	476
6 The Position of the 27.....	477
7 A Unique Chance for EFTA	478
7.1 General	478
7.2 Norway	479
7.3 Iceland.....	480
7.4 Liechtenstein	481
7.5 Switzerland	481
7.6 Conclusions	482

32	“Two Souls in Europe’s Breast”	483
1	Jacques Delors’ Desire	483
2	Political Integration Versus Economic Integration	484
2.1	Status quo	484
2.2	A Look Back into History	485
3	Common Law and Civil Law	486
3.1	General	486
3.2	Legal Origins Theory	486
3.3	<i>Stare decisis</i> : The Most Important Common Law Doctrine	487
3.4	Von Hayek’s Spontaneous Order Theory Applied to the Law	488
4	Commonalities of the Five Non-EU States	488
4.1	Belief in Free Trade and Open Markets	488
4.2	Notion of the State	489
4.3	Religious Foundations of Capitalism	489
4.4	Legal Systems	490
4.5	Image of Man	492
5	Conclusions	492
5.1	The Five EU Outsiders Ought to Join Forces	492
5.2	What About the Orphaned Insiders?	493
	Epilogue	495
	Bibliography	501