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De-Risking Brexit

FMLC Spring Colloquium
The U.K. after Brexit, 3 March 2017

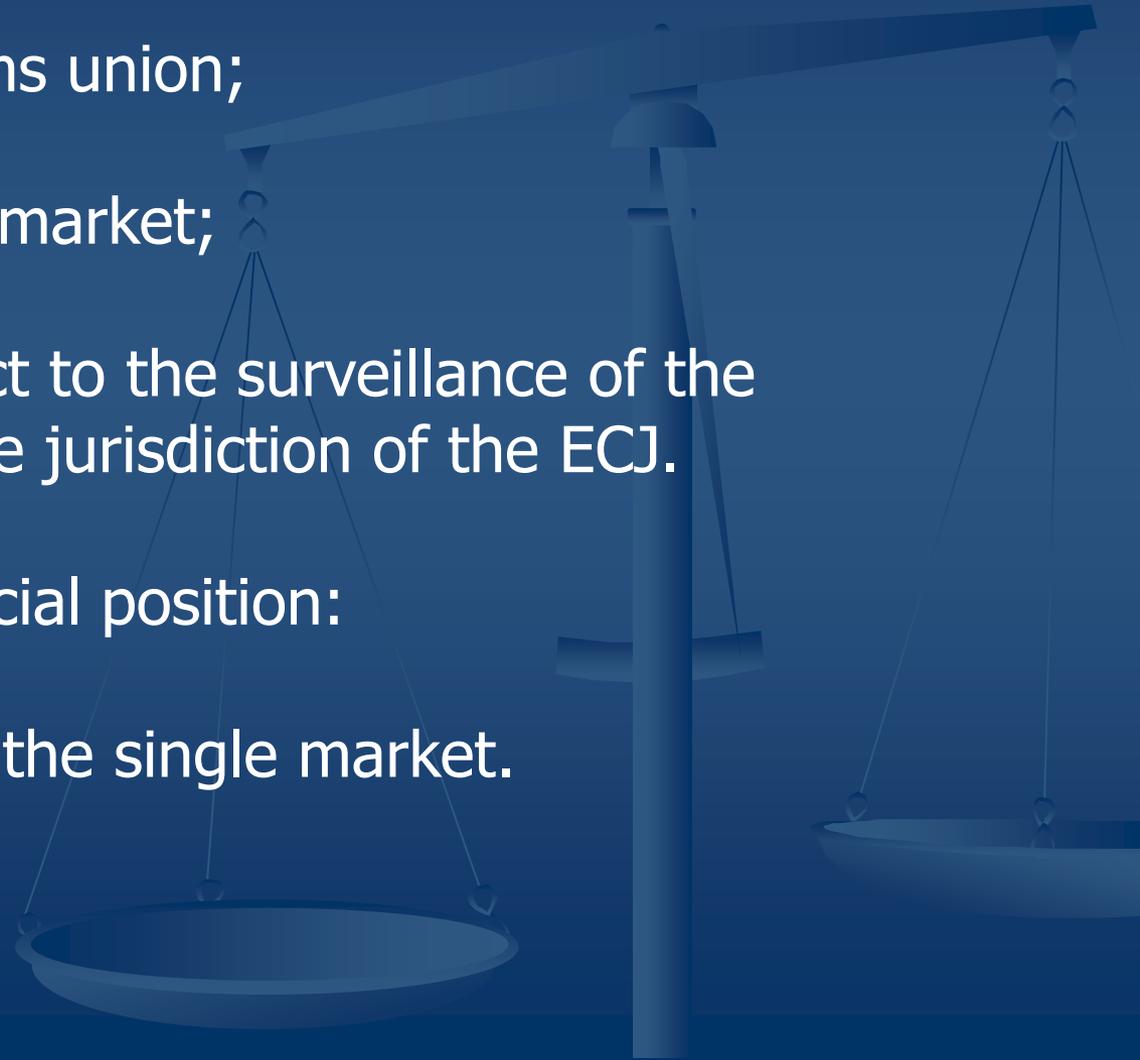
A. Introduction

The day the UK leaves the EU,

- it leaves the customs union;
- it leaves the single market;
- it is no more subject to the surveillance of the Commission and the jurisdiction of the ECJ.

HM Government's official position:

Hard Brexit = leaving the single market.



A. Introduction

But: What about the Scots, the Welsh, the City of London, industry, the 48 %?

What about the harmony and soft border between the Republic of Ireland and Northern Ireland?



A. Introduction

Is it possible to leave the EU but stay in the single market?

Is it possible for a non-EU State to let its citizens and economic operators participate in the single market?

And this including “passporting rights” for financial operators?

Yes it is.



B. The options

I. Joining the EEA Agreement on the EFTA side (i)

The EEA is an extension of the EU single market to the EEA/EFTA States.

The EEA Agreement comprises:

- Fundamental freedoms,
- Competition and State aid law,
- Harmonised economic law.



B. The options

I. Joining the EEA Agreement on the EFTA side (ii)

The actors of the EEA/EFTA States have access to the single market.

Two pillar structure; EU pillar and EFTA pillar, each with own institutions.

UK and Ireland are currently EEA States in the EU pillar.

As regards “passporting rights” see:

E-4/10, E-6/10 and E-7/10 - *Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE v EFTA Surveillance Authority*; E-16/15 *Swiss Life*.

B. The options

I. Joining the EEA Agreement on the EFTA side (ii)

Passporting is only available within EU and EEA.

Precondition is regulatory homogeneity.

Using the EEA Agreement for passporting would de-risk Brexit.

E-4/10, E-6/10 and E-7/10 - *Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE v EFTA Surveillance Authority*; E-16/15 *Swiss Life*.

EEA 2017

EU (28)

EEA/EFTA (3)

Surveillance



Judicial control



With UK on EFTA side

EU (27)

EEA/EFTA (4)

Surveillance

Commission
27

EFTA
Surveillance
Authority (ESA)
4

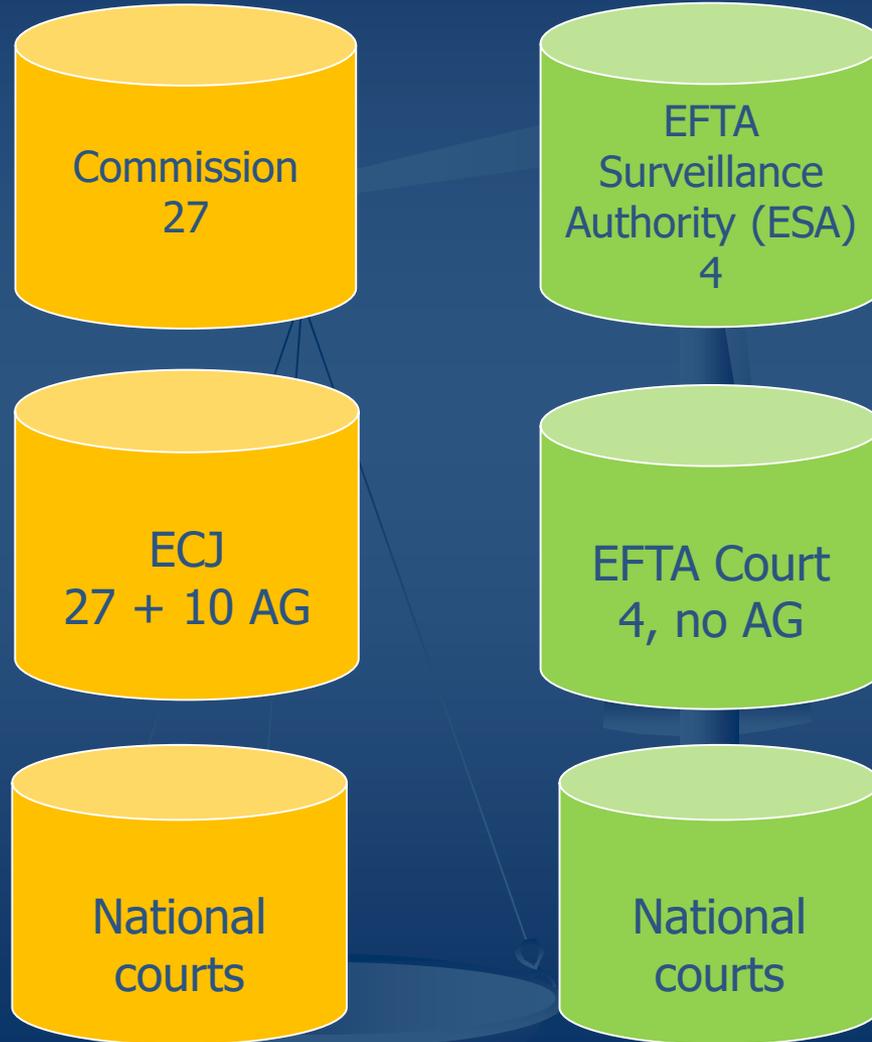
Judicial control

ECJ
27 + 10 AG

EFTA Court
4, no AG

National
courts

National
courts



B. The options

I. Joining the EEA Agreement on the EFTA side (iii)

A single market is not the same as a customs union.

The EEA is no customs union: Sovereignty in foreign trade (as with regard to agriculture, fisheries, taxation, currency) is with the EEA/EFTA States.

EEA/EFTA States have the right to conclude FTA's with third countries.

They may do that as part of EFTA (i.e. including Switzerland) or individually.

B. The options

I. Joining the EEA Agreement on the EFTA side (iv)

Ireland and Northern Ireland should examine the principle of **parallel marketability** which governs the import, export and marketing of certain goods on the Liechtenstein market.

FL is an EEA/EFTA State and part of the Swiss customs territory.

The marketing of goods on the Liechtenstein market is allowed as long as they comply either with the EEA or with the Swiss legislation.

A market surveillance and control system aims at preventing the circumvention of Swiss law.

B. The options

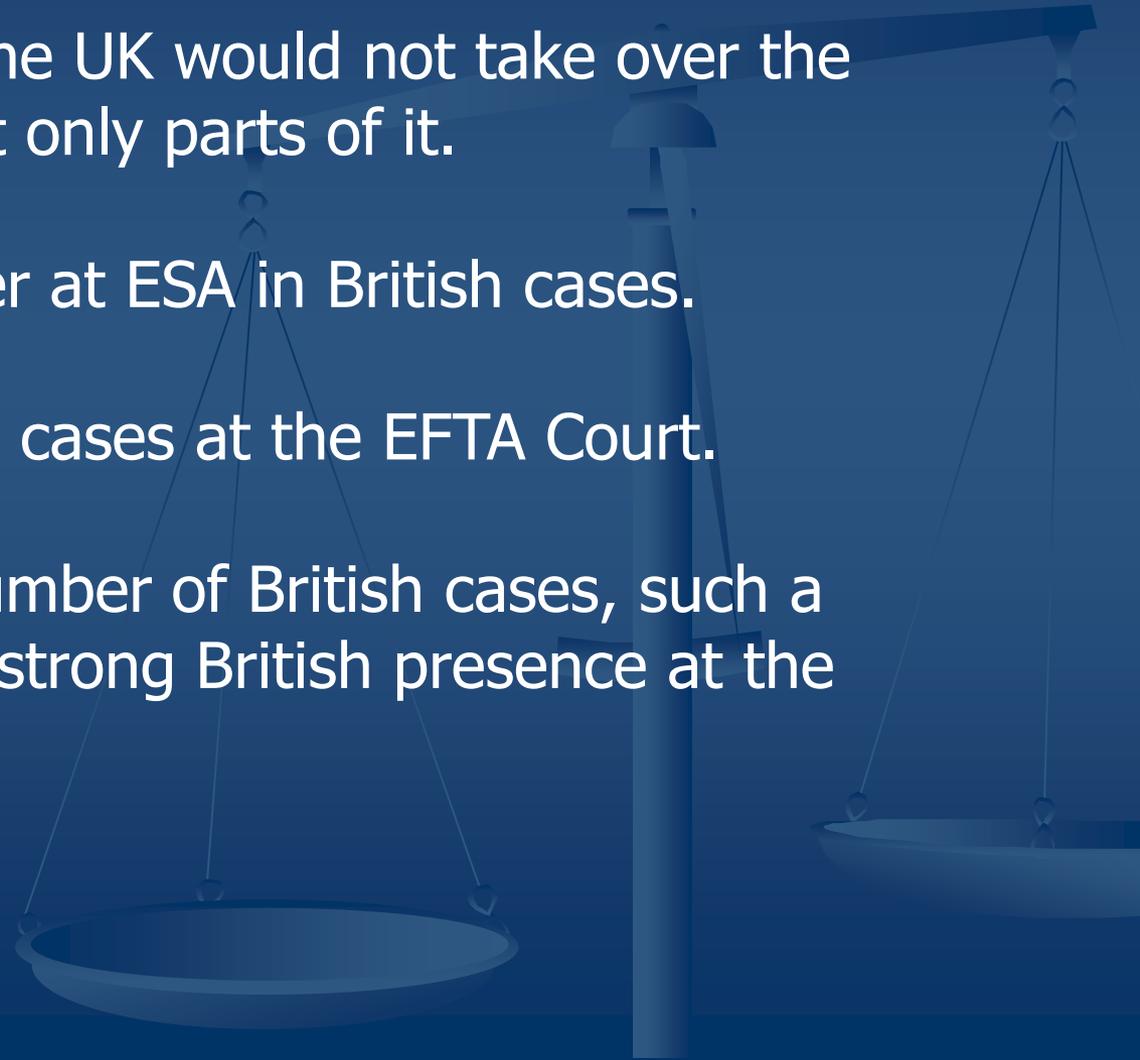
II. Docking to the EEA/EFTA institutions (i)

Docking means that the UK would not take over the whole EEA acquis, but only parts of it.

British College Member at ESA in British cases.

British judge in British cases at the EFTA Court.

Given the probable number of British cases, such a solution would give a strong British presence at the EFTA Court.



B. The options

II. Docking to the EEA/EFTA institutions (ii)

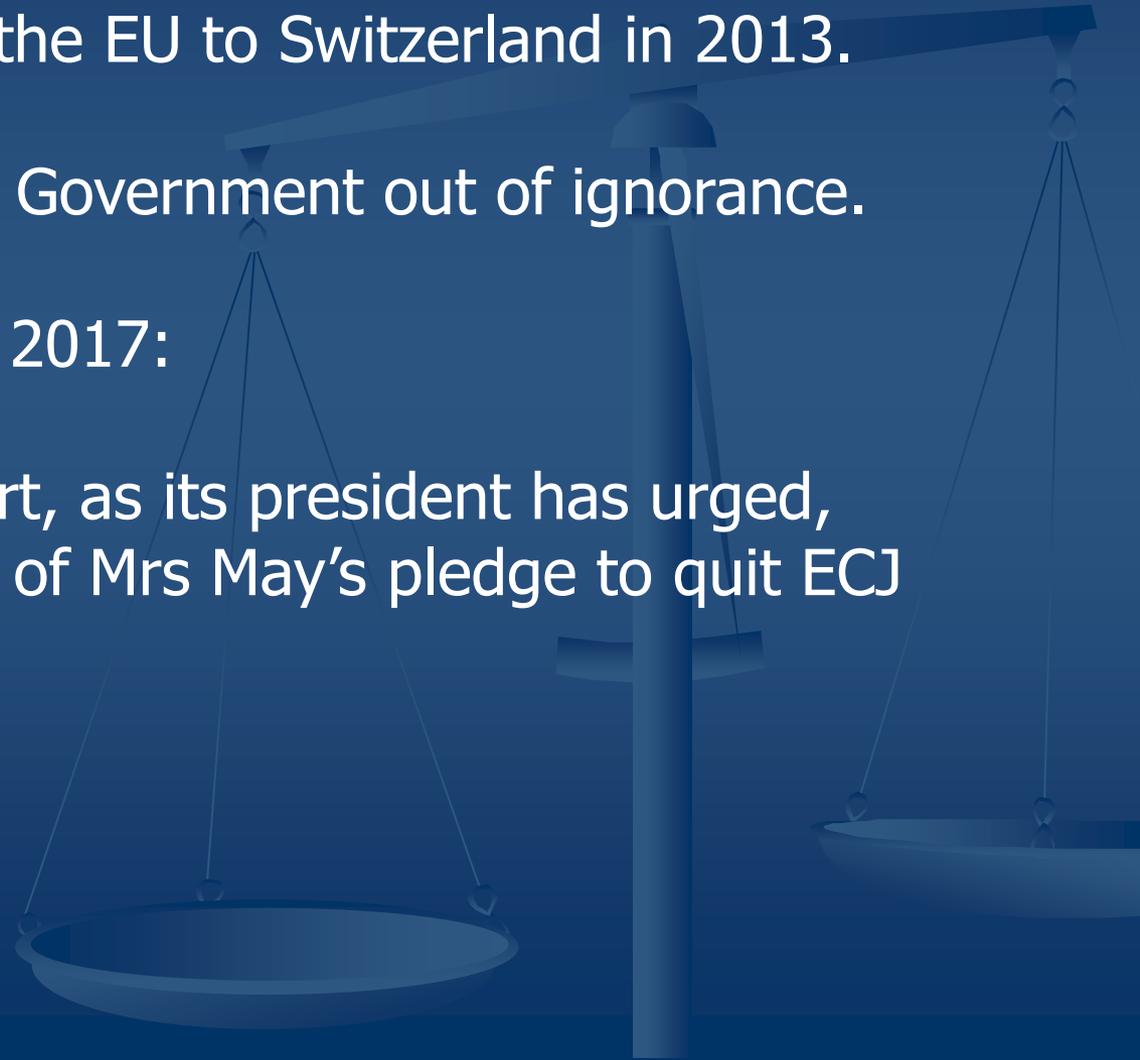
Docking proposed by the EU to Switzerland in 2013.

Rejected by the Swiss Government out of ignorance.

Economist of 2 March 2017:

“Joining the EFTA court, as its president has urged, would break the spirit of Mrs May’s pledge to quit ECJ jurisdiction.”

Doubtful contention.



B. The options

III. The EFTA Court as a transitional solution? (i)

NON PAPER ON KEY ELEMENTS LIKELY TO
FEATURE IN THE DRAFT NEGOTIATING
DIRECTIVES

Jurisdiction of ECJ should be maintained.

"For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union." (Para. 32.)

B. The options

III. The EFTA Court as a transitional solution? (ii)

Would the ECJ itself be impartial?

Would it be acceptable for the UK?



C. Dispute resolution after Brexit

I. Rejection of the ECJ (i)

PM's Lancaster House and Philadelphia speeches.

Fear of "foreign judges," like in Switzerland.

Irrational.

Historically, the "foreign judges" formula in Switzerland was just a jurisdictional rule.

But severe criticism of the ECJ also by others (*Dieter Grimm*: Illegitimate seizure of power; *Roman Herzog*).

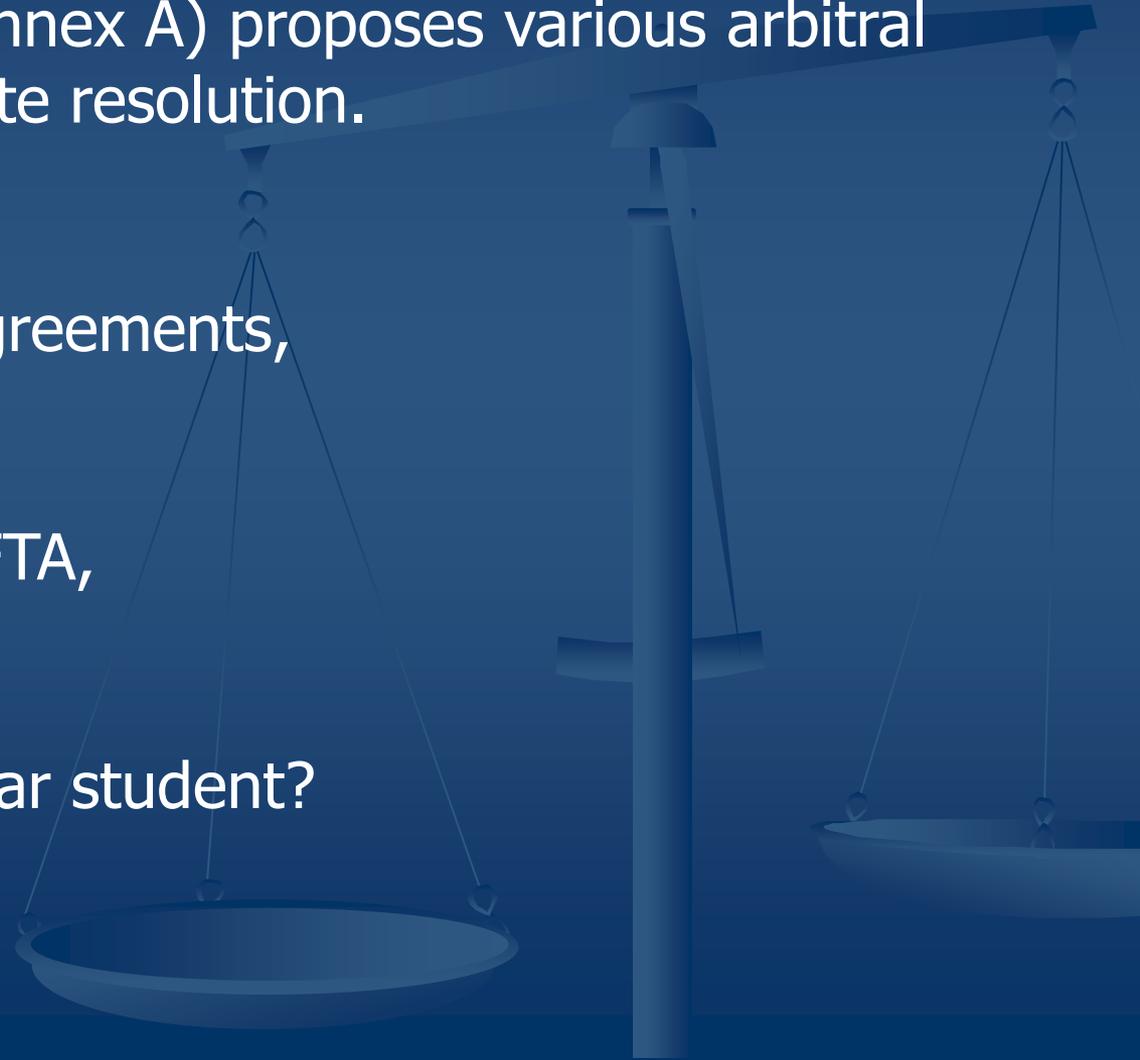
C. Dispute resolution after Brexit

I. Rejection of the ECJ (ii)

Brexit White Paper (Annex A) proposes various arbitral mechanisms for dispute resolution.

- CETA,
- EU - CH bilateral agreements,
- NAFTA,
- Mercosur,
- NZ – South Korea FTA,
- WTO.

Compiled by a first year student?



C. Dispute resolution after Brexit

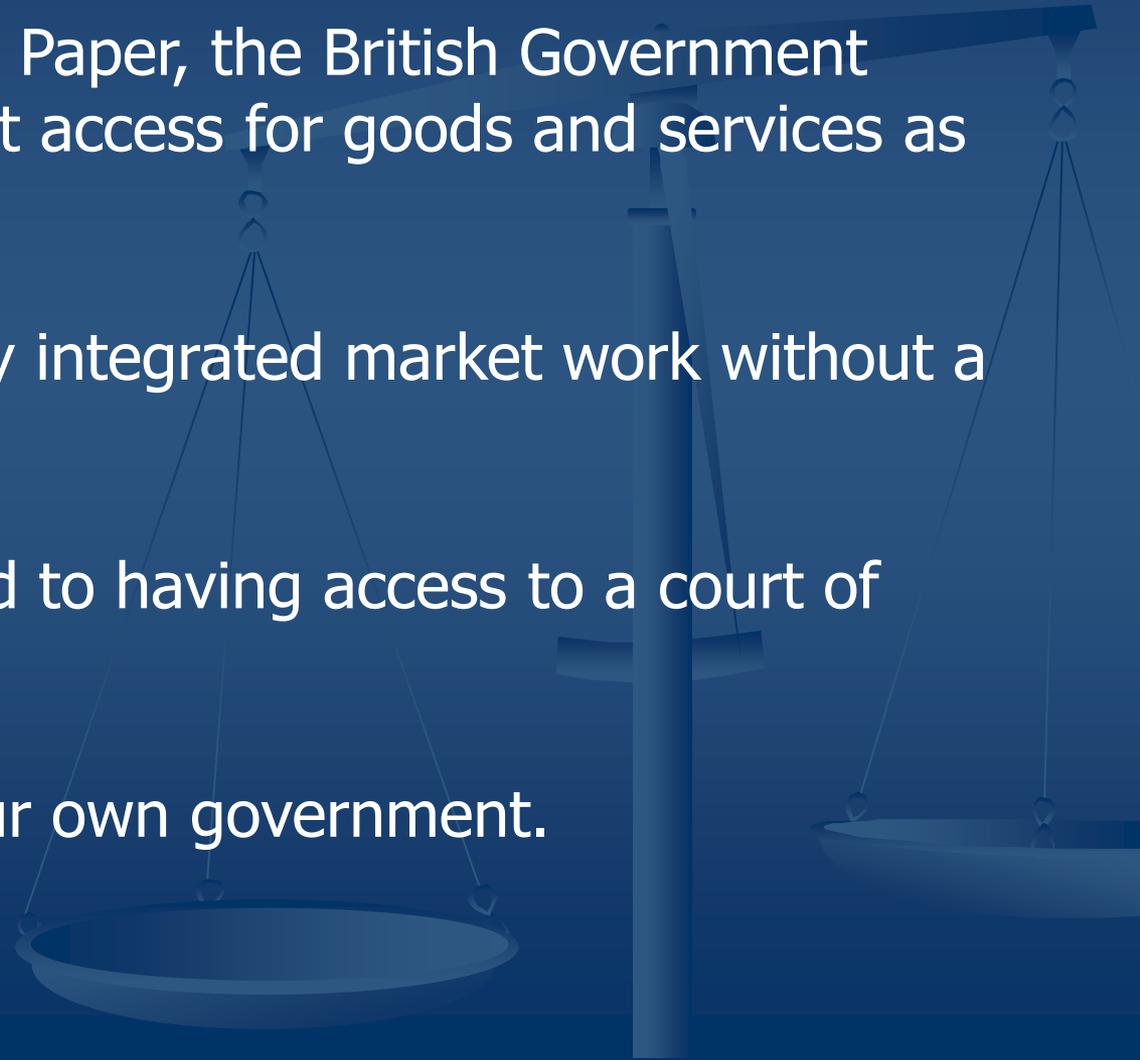
I. Rejection of the ECJ (iii)

According to its White Paper, the British Government wants as much market access for goods and services as possible.

However, can a deeply integrated market work without a common court?

British industry is used to having access to a court of law.

Protection against your own government.



C. Dispute resolution after Brexit

I. Rejection of the ECJ (iv)

British Professor *Simon Evenett* of St. Gallen University:

Hundreds of cases of discrimination against Switzerland under the sectoral bilateral agreements Switzerland – EU remain unsanctioned.

There is no court under the sectoral bilateral agreement Switzerland – EU.

A bilateral court UK – EU won't fly (ECJ Opinion 1/91).

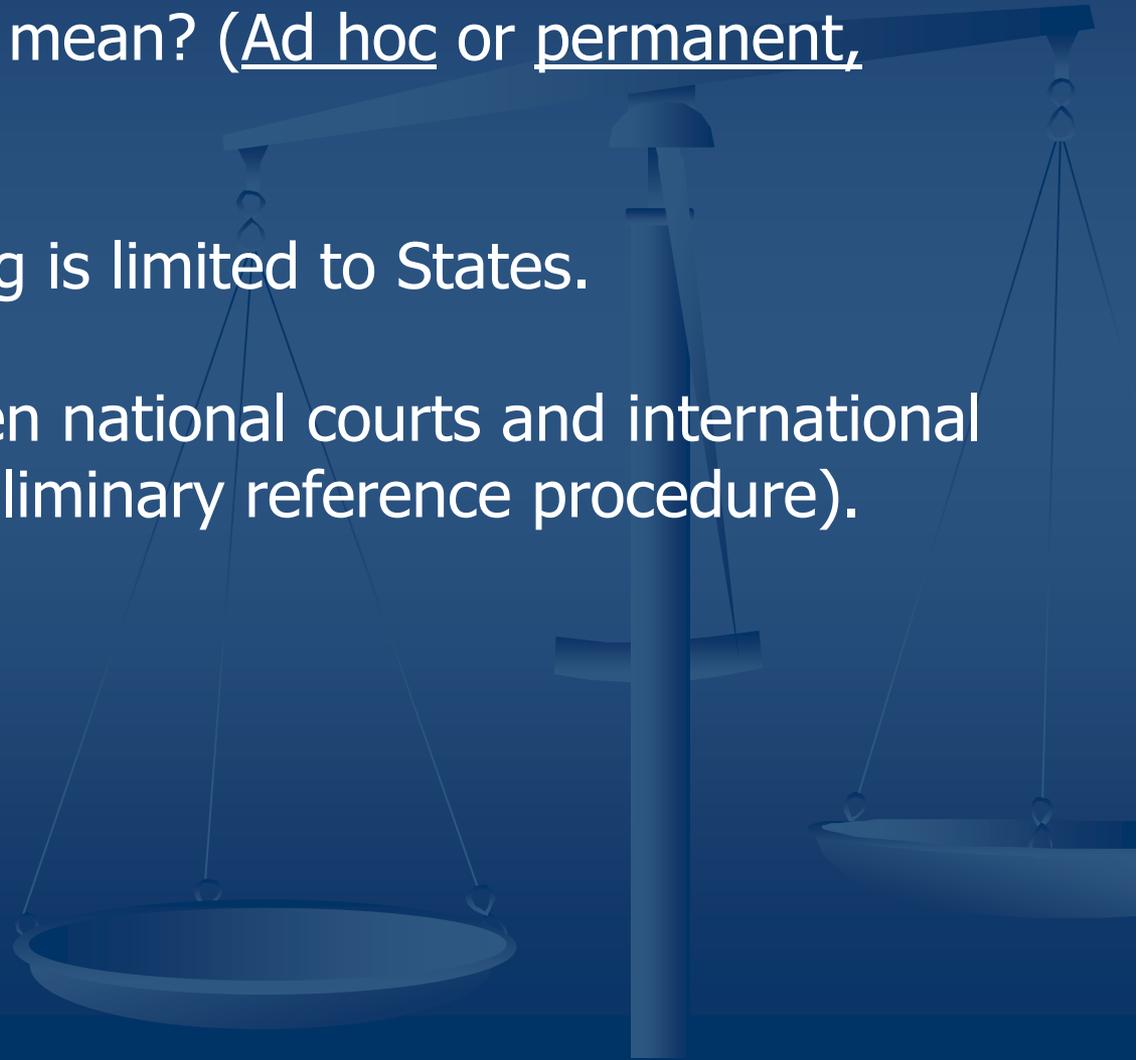
C. Dispute resolution after Brexit

II. Problems of arbitration (i)

What does arbitration mean? (Ad hoc or permanent, court-like body?)

In arbitration, standing is limited to States.

No connection between national courts and international arbitration (i.e. no preliminary reference procedure).



C. Dispute resolution after Brexit

II. Problems of arbitration (ii)

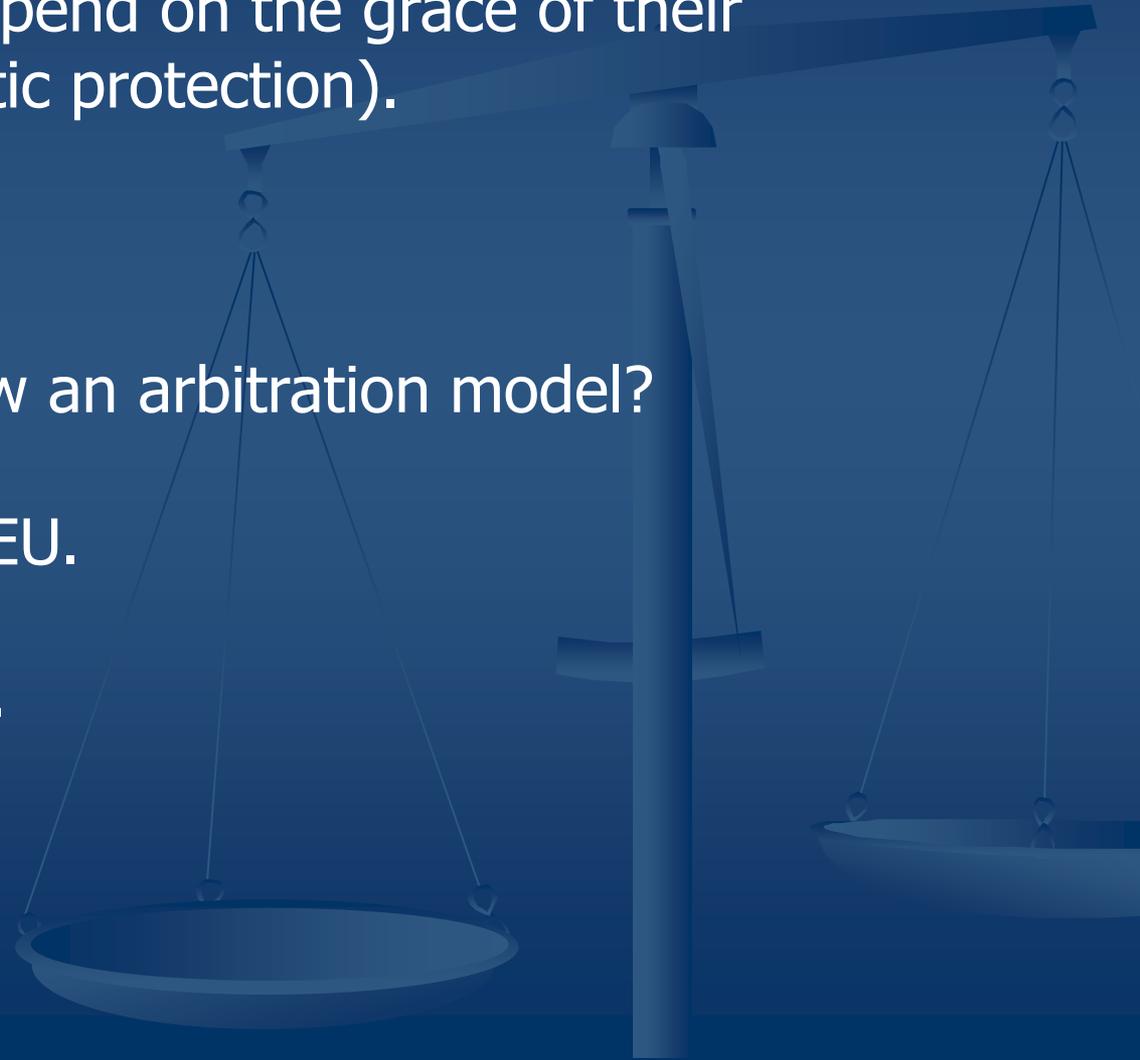
Business operators depend on the grace of their government (diplomatic protection).

“Ancien regime.”

Would the ECJ swallow an arbitration model?

Cf. Article 218(11) TFEU.

Cf. Article 111(4) EEA.



C. Dispute resolution after Brexit

III. Market access for Non-EU-States only with a surveillance and court mechanism (i)

EU Council conclusions regarding the EFTA States in 2008, 2010, 2012, 2014, 2016/2017:

Market access only with surveillance and Court.

Iceland, Liechtenstein and Norway fulfil these conditions:
ESA and EFTA Court.

Switzerland linked to EU by network of bilateral sectoral agreements without surveillance and court.

C. Dispute resolution after Brexit

III. Market access for Non-EU-States only with a surveillance and court mechanism (ii)

Since 2008, no new agreement has been concluded between Switzerland and EU.

EU even refused to have existing agreements updated.

Will the surveillance and court requirement also apply to a bespoke agreement UK - EU after Brexit? Probably.

UK wants to have as much access as possible.

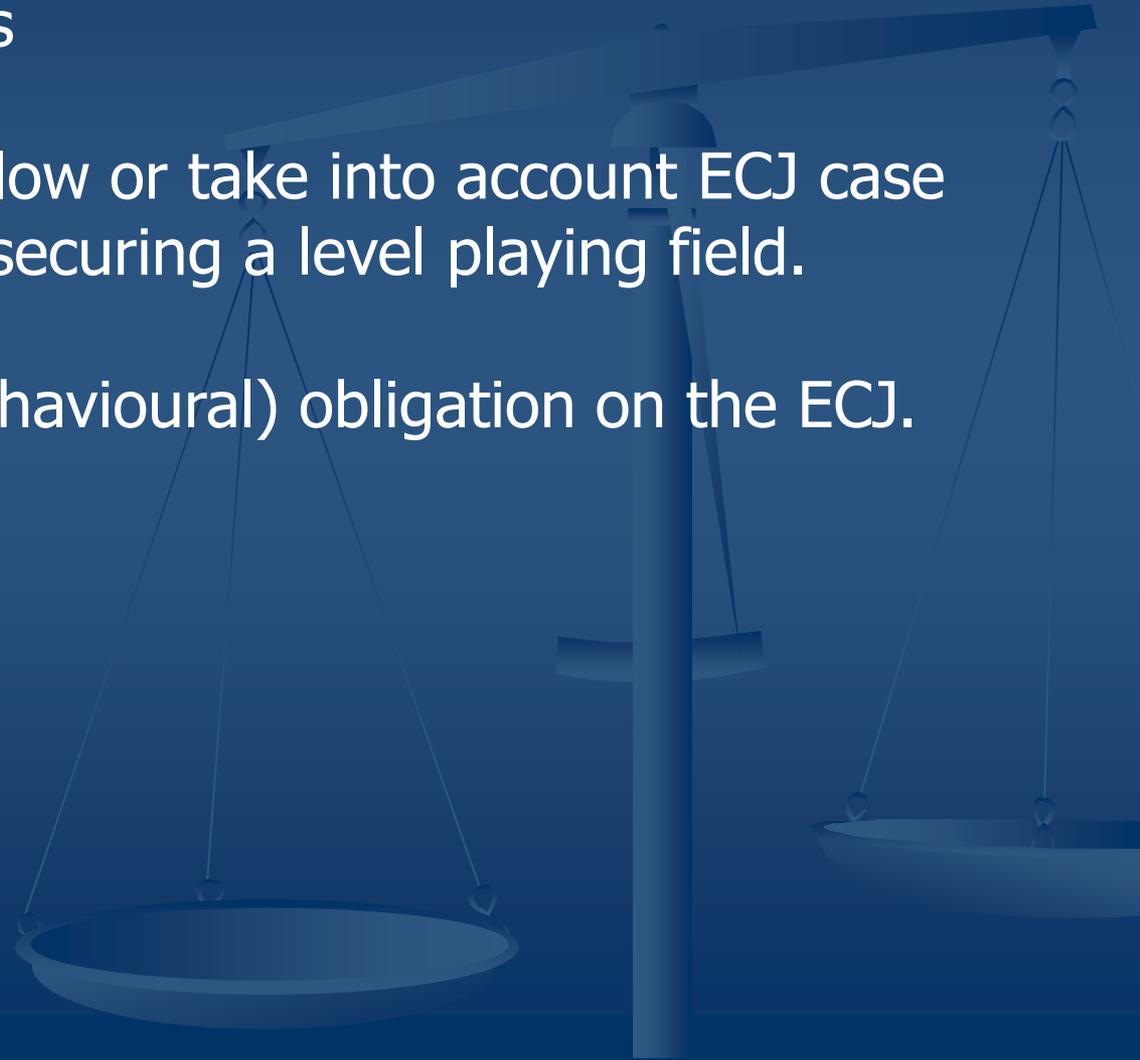
C. Dispute resolution after Brexit

IV. How much freedom does the EFTA Court have?

1. Law on the books

EFTA Court shall follow or take into account ECJ case law; homogeneity; securing a level playing field.

No such explicit (behavioural) obligation on the ECJ.



C. Dispute resolution after Brexit

IV. How much freedom does the EFTA Court have?

2. Law in action (i)

(a) General (i)

EFTA Court going first in most cases.

Vassilios Skouris in 2014: Symbiotic relationship marked by mutual respect and dialogue which has allowed the flow of information in both directions.

Former Commission DG and WTO AB Chairman *Claus Ehlermann*: Healthy (regulatory) competition.

C. Dispute resolution after Brexit

IV. How much freedom does the EFTA Court have?

2. Law in action (ii)

(a) General (ii)

285 cases, 208 contested.

233 references by AG's, GC and ECJ to EFTA Court case law in 126 cases.

Only court of general jurisdiction whose case law is regularly cited by the ECJ in the context of EU law.

AG's as an entrance gate; national high courts of the EU States.

IV. How much freedom does the EFTA Court have?

2. Law in action (iii)

(b) Recent examples of dialogue

Legal situation of a trust (AG *Kokott* C-646/15 *Panayi*).

Access to the case file (AG *Bobek* C-213/15 P *Commission v. Breyer*).

Website as a durable medium (AG *Bobek* and ECJ C-375/15 *Bawag*).

State aid (AG *Kokott* C-74/16 *Congregación de Escuelas Pías Provincia Betania*).

C. Dispute resolution after Brexit

IV. How much freedom does the EFTA Court have?

2. Law in action (iv)

(c) If there is relevant ECJ case law (i)

EFTA Court is not a court of lower instance;
independent court (E-28/15 *Jabbi*).

The EFTA Court will not wilfully deviate from ECJ
case law. But homogeneity is no snapshot in time.

Mature court has self-confidence; must be convinced.

C. Dispute resolution after Brexit

IV. How much freedom does the EFTA Court have?

2. Law in action (iv)

(c) If there is relevant ECJ case law (ii)

Triangle ECJ – EFTA Court – ECtHR. ECtHR deals with economic law questions on a regular basis.

In 11 cases the EFTA Court has 18 times referred to ECtHR case law.

In one case the ECtHR has referred to the EFTA Court's case law (*Ališić and Others v. Bosnia and Herzegovina and Others*, Application no. 60642/08, paragraphs 70-73, 94, 118).

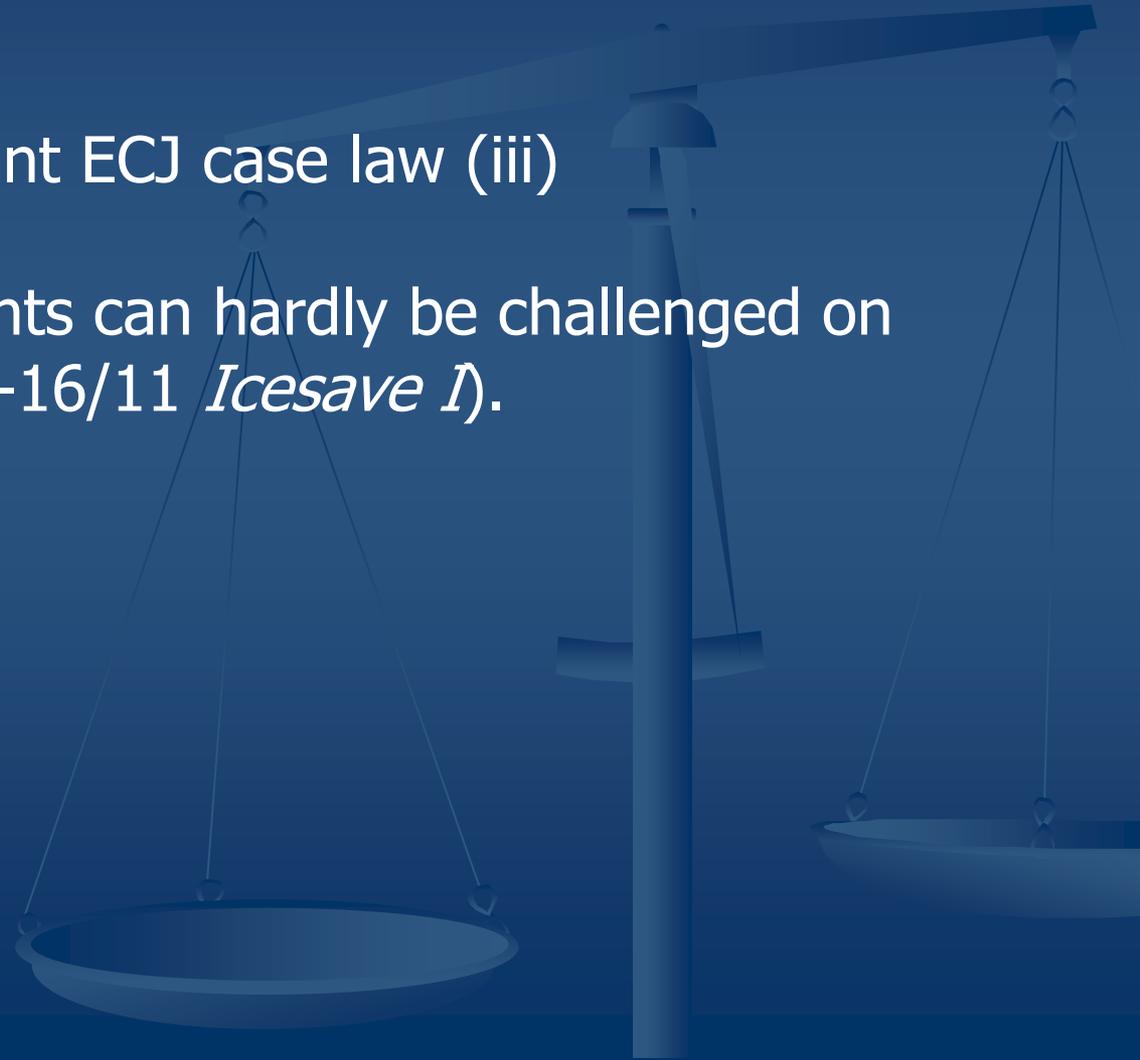
C. Dispute resolution after Brexit

IV. How much freedom does the EFTA Court have?

2. Law in action (v)

(c) If there is relevant ECJ case law (iii)

EFTA Court judgments can hardly be challenged on the political level (E-16/11 *Icesave I*).



IV. How much freedom does the EFTA Court have?

3. Own institutions are an advantage

Judging is no exact science.

Britain (as Norway, Iceland, Liechtenstein) would always have an own actor on the bench (due to the size of the EFTA institutions).

Even under the one-sided current homogeneity rules and as a court of three small countries, the EFTA Court has managed to uphold classical EFTA values.

C. Dispute resolution after Brexit

V. EFTA pillar less onerous than EU pillar (i)

Leaves EEA/EFTA States and their courts more sovereignty.

No direct effect and no primacy; only after implementation in the domestic legal order.

“Obligation of result” (difficult to enforce).

The EFTA Court has furthermore recognised State liability (E-9/97 *Sveinbjörnsdóttir*).

No penalty payments in case of non-compliance with an infringement judgment.

C. Dispute resolution after Brexit

V. EFTA pillar less onerous than EU pillar (ii)

No written obligation of courts of last resort to refer (E-18/11 *Irish Bank*: “More partner-like relationship”).

Preliminary rulings not formally binding.

But duty of loyalty and principle of reciprocity.
Right to a fair trial (Article 6 ECHR).

On balance: More flexibility.

First President of the EFTA Surveillance Authority,
Knut Almestad: EEA Agreement is tilted in favour of
the EFTA States.

VI. The EFTA Court's profile

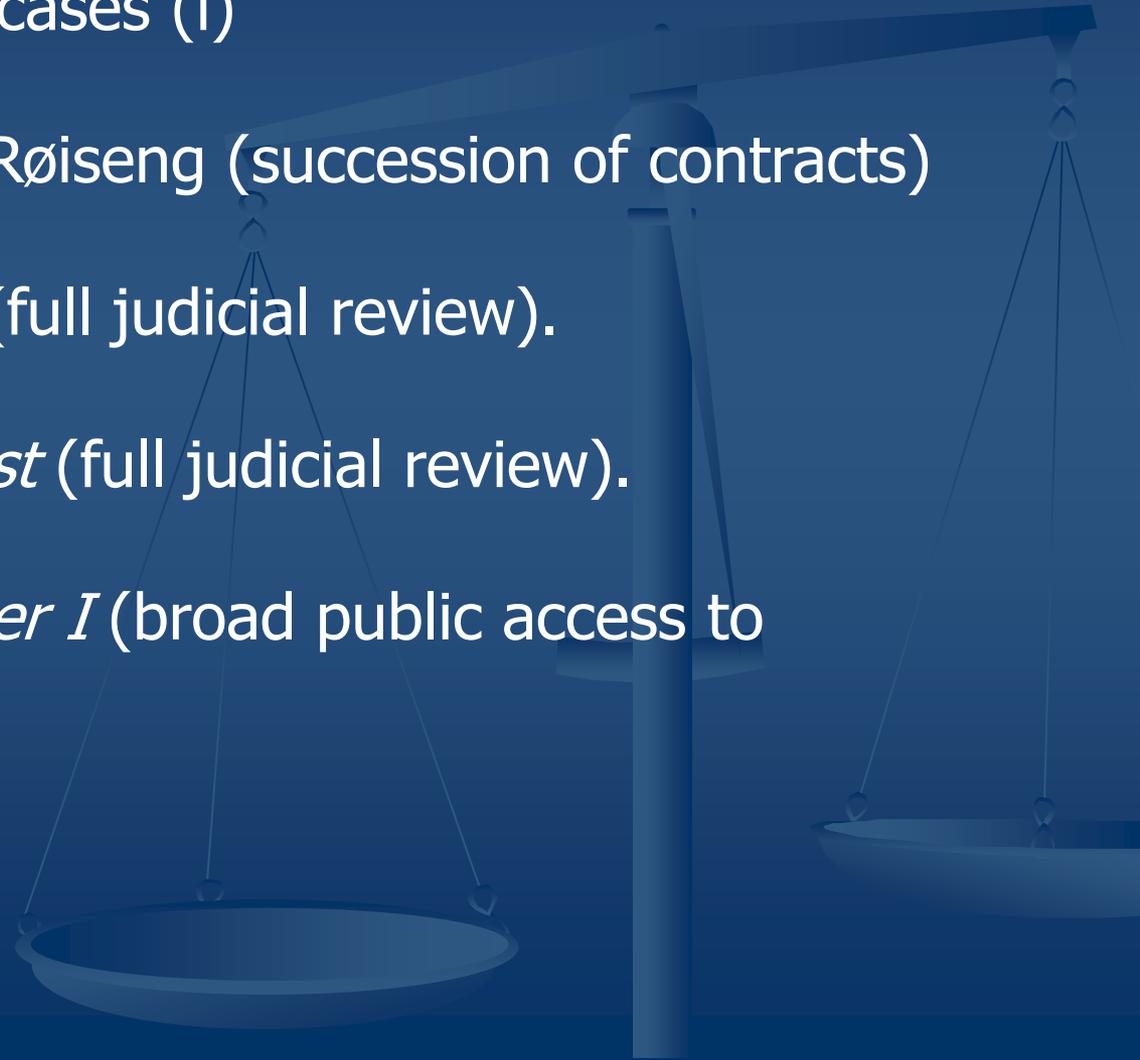
1. Some landmark cases (i)

E-2/06 *Ulstein and Røiseng* (succession of contracts)

E-4/97 *Husbanken* (full judicial review).

E-15/10 *Norway Post* (full judicial review).

E-14/11 *DB Schenker I* (broad public access to documents).



VI. The EFTA Court's profile

1. Some landmark cases (ii)

E-8/00 *LO* and E-14/15 *Holship* (collective bargaining/industrial action and fundamental freedoms/competition law; negative freedom of association; effects-based approach).

E-8/13 *Abelia* (right of audience of in-house counsel to be assessed on a case by case basis).

VI. The EFTA Court's profile

1. Some landmark cases (iii)

E-16/11 *Icesave I*: (Liability of banks, not of taxpayers; avoiding moral hazard).

E-4/09 *Inconsult* (consumers can be expected to download or print out a document from the website of a financial services provider).

E-5/15 *Matja Kumba* (fact-based, flexible interpretation of the Working Time Directive).

VI. The EFTA Court's profile

1. Some landmark cases (iv)

Order of the President in E-18/14 *Wow Air* (accelerated preliminary reference procedure; fostering competition between air carriers).

E-15/15 and 16/15 *Vienna Life* and *Swiss Life* (trade in used ["second-hand"] life assurance policies is not consumer business).

E-29/15 *Sorpa* (municipal body capable of abuse of dominance, companies in the group of the dominant company may be trading partners).

VI. The EFTA Court's profile

1. Some landmark cases (v)

E-3/16 *Ski Taxi* (only conduct whose harmful nature is easily identifiable in the light of experience and economics should be regarded as a restriction by object).

E-5/16 *Vigeland* (copyright is an incentive to contribute to the enrichment of society; registration as a trade mark after the expiry of copyright is not in itself unlawful; but it could be contrary to 'accepted principles of morality' where artworks form part of a nation's cultural heritage or act as an emblem of sovereignty).

VI. The EFTA Court's profile

2. Judicial style (i)

A small court cannot decree; must justify judgments, seek acceptance.

No AG.

No written obligation of courts of last resort to refer and no obligation of national courts to follow.



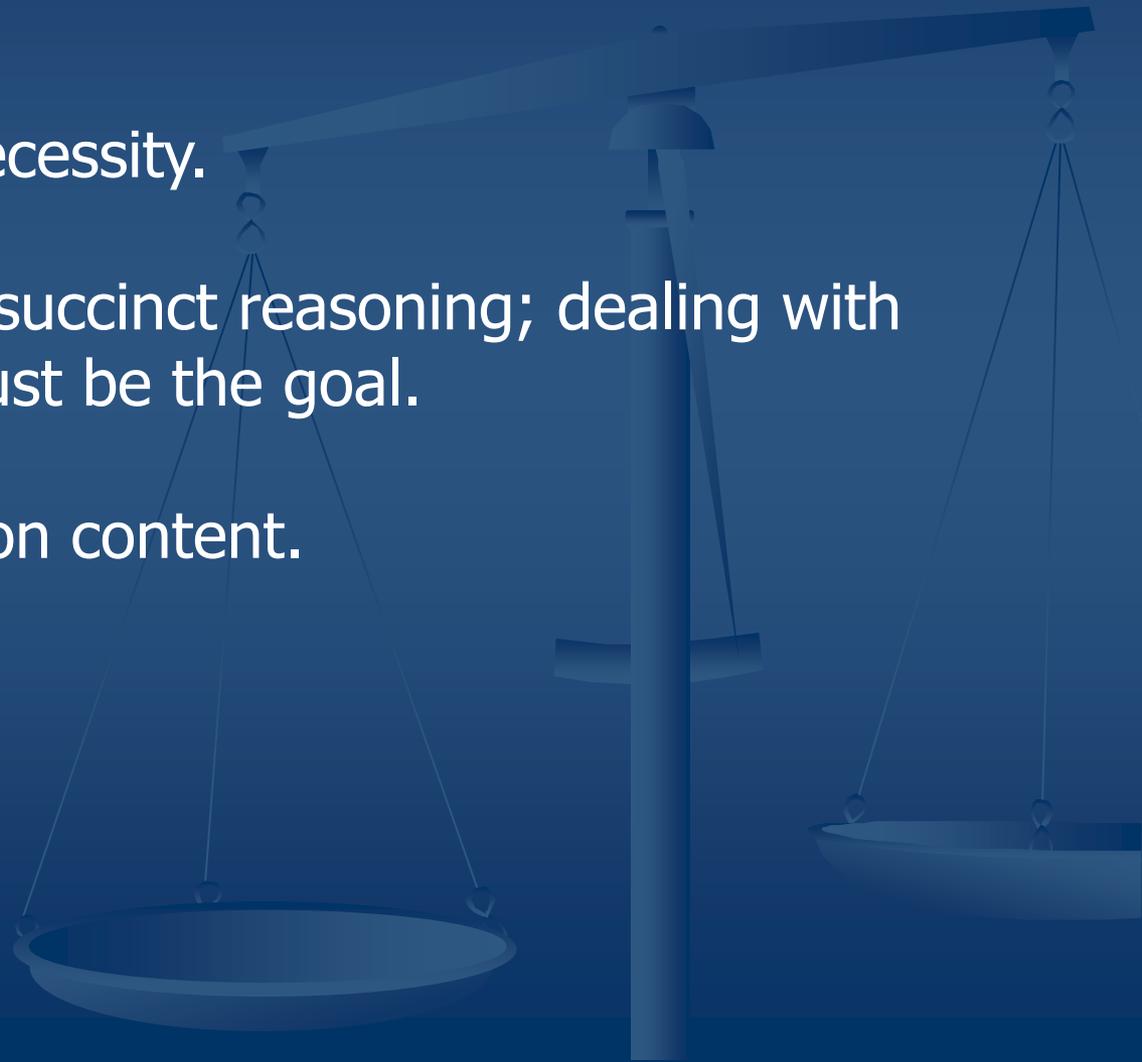
VI. The EFTA Court's profile

2. Judicial style (ii)

Making a virtue of necessity.

Comprehensive, but succinct reasoning; dealing with all the arguments must be the goal.

Style has an impact on content.



VI. The EFTA Court's profile

3. Underlying social model (image of man) (i)

Traditional EFTA values are the belief in liberalism, free trade and market orientation as well as in self-responsibility.

The EFTA Court does not carry a French rucksack.

As regards the relevance of economics, *John Temple Lang* has written: "In general one has the clear impression that the EFTA Court deals more readily with economic issues than either the General Court or the European Court of Justice."

VI. The EFTA Court's profile

3. Underlying social model (image of man) (ii)

Fact-based approach instead of presumptions and fictions (see with regard to competition law *Baudenbacher*, Shortcuts in competition law, 19th Burrell lecture, 6 March 2017).

No grand vision; pragmatism; the "man on the Clapham omnibus."

This thinking would become even more relevant in case of British membership.

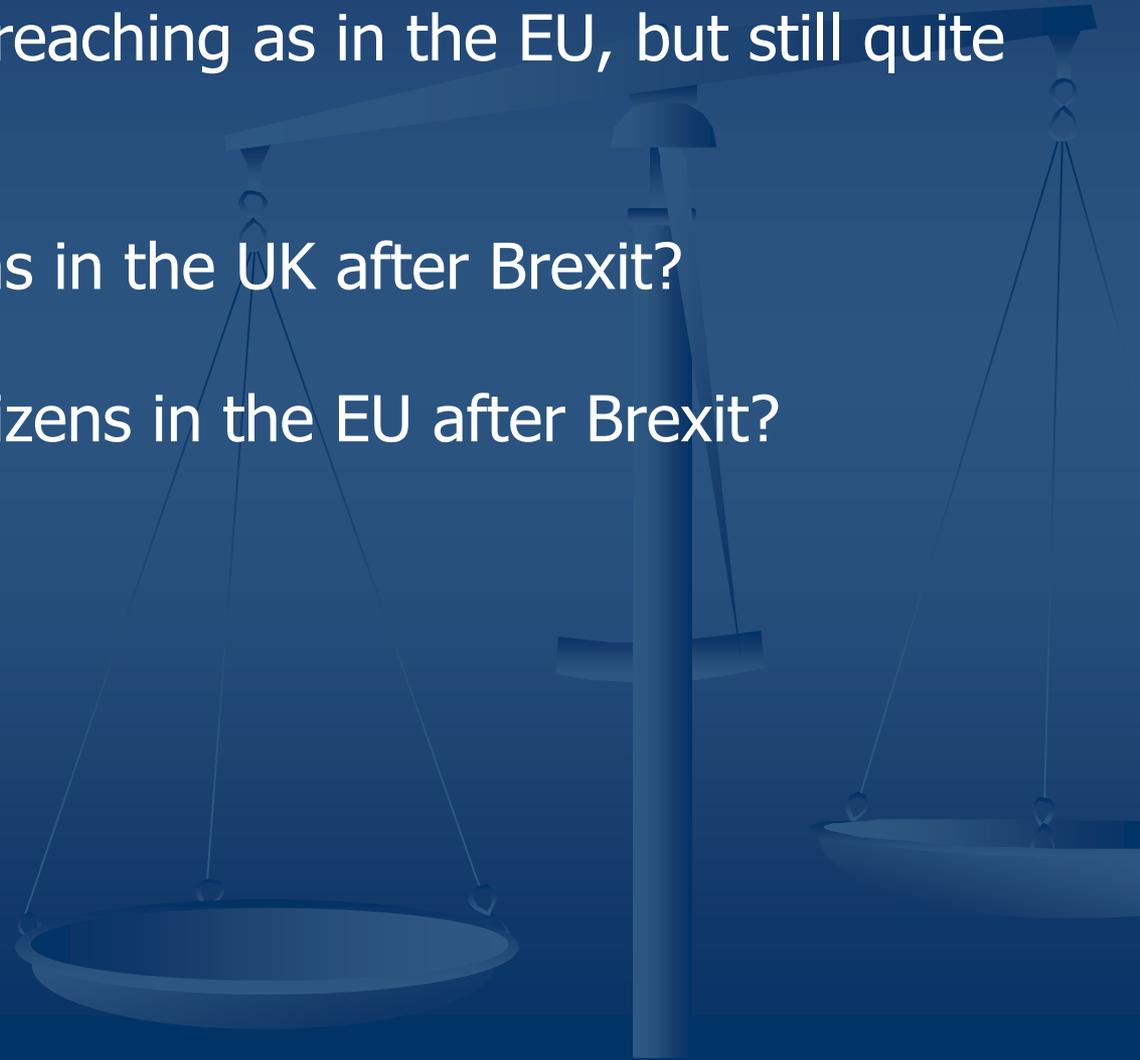
D. Other neuralgic points

I. Free movement of persons (i)

In the EEA not as far reaching as in the EU, but still quite far reaching.

What about EU citizens in the UK after Brexit?

What about British citizens in the EU after Brexit?



D. Other neuralgic points

I. Free movement of persons (ii)

Brain drain from weaker to stronger economies in the EU is a fact.

Immigration leads to wage pressures; rise of far right parties (see also the American presidential election).

Aggravation of the situation in the Eurozone.

Can the EU uphold the dogma?

“Brexit is not a still photograph, it is a moving picture.”

D. Other neuralgic points

I. Free movement of persons (iii)

Paper of the Brussels based Think Tank *Bruegel*

Discusses whether the EU should make a concession to the UK on this point.

Unlike the other freedoms, free movement of persons is in the view of the authors not economically but politically determined.

One of the 5 authors is *Norbert Röttgen*.

D. Other neuralgic points

II. Voting right (i)

1. General (i)

EEA/EFTA States have co-determination right when it comes to new legislation.

Current EEA/EFTA States do not make sufficient use of this right.

Prefer to complain about the lack of a voting right.

They underline this by using petulant language:

“Faxocracy,” “No rule making, rule taking.”

II. Voting right (ii)

1. General (ii)

But: A lot of EU/EEA legislation is based on global regulation.

Other advantages of EEA/EFTA membership; comparing apples and oranges.

Delors I (1989): A “more structured partnership with common decision-making and administrative institutions.”

Delors II (1990): Pledge taken back.

Bruegel think tank 2016: Some sort of voting right.

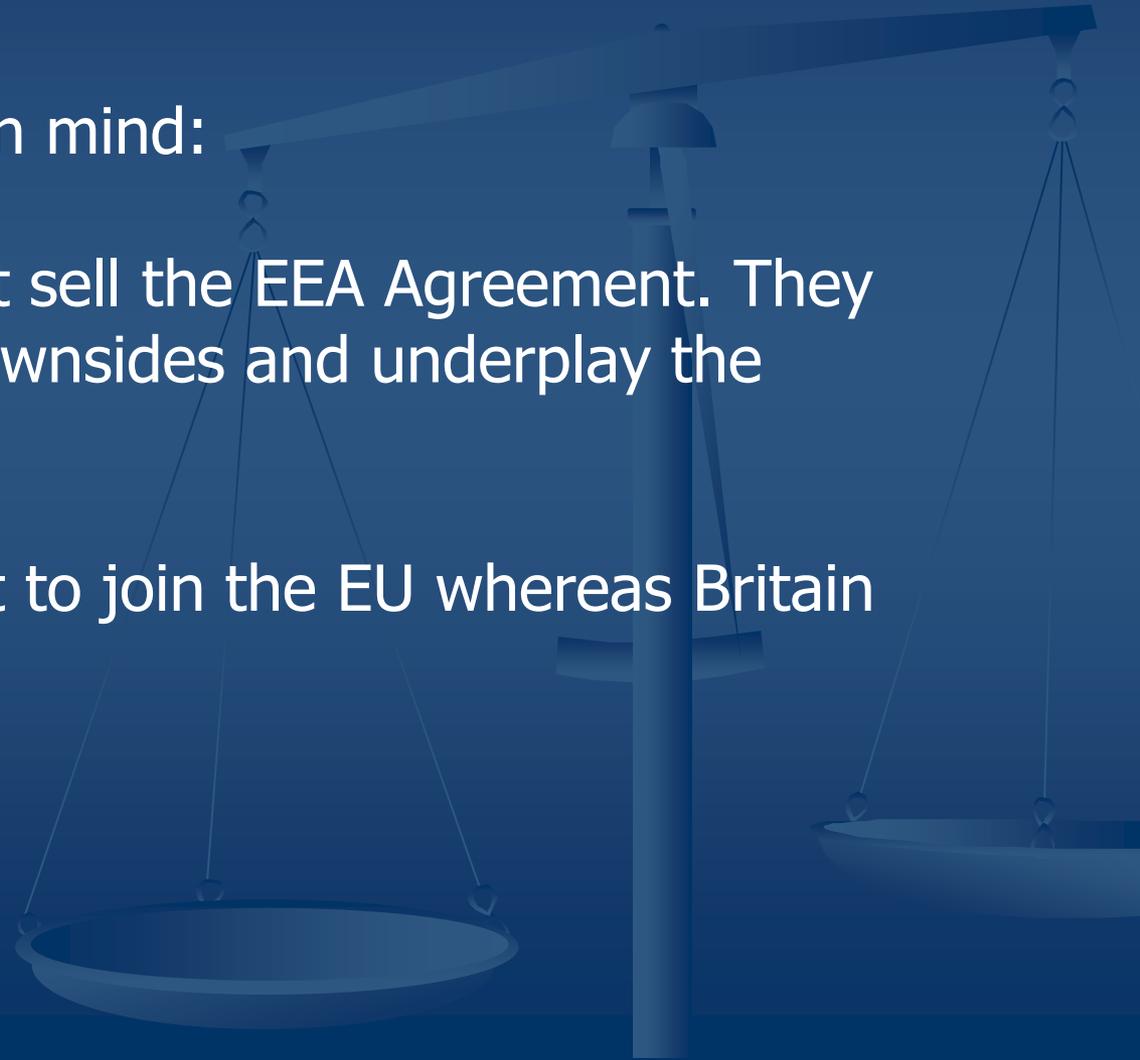
II. Voting right (ii)

1. General (iii)

What you must bear in mind:

Norwegian elites don't sell the EEA Agreement. They overemphasize the downsides and underplay the advantages.

Norwegian elites want to join the EU whereas Britain wants to leave.



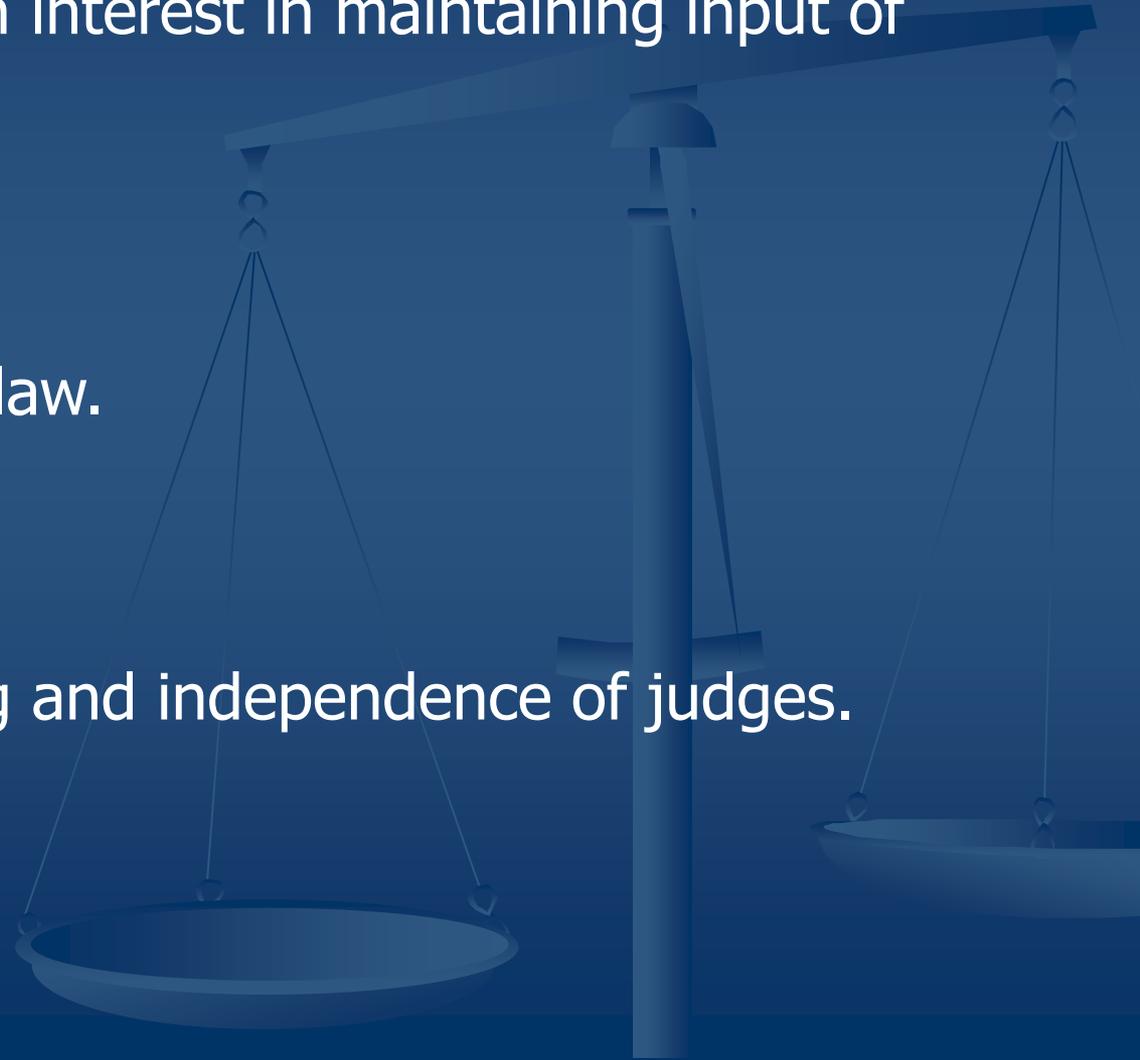
D. Other neuralgic points

II. Voting right (iii)

2. EU should have an interest in maintaining input of the common law.

Examples:

- Financial services law.
- Competition law.
- Self-understanding and independence of judges.



D. Other neuralgic points

II. Voting right (iii)

2. EU should have an interest in maintaining input of the common law.

Legal origins theory:

Institutions depend on political factors, in particular on the dominant beliefs in France and England on the roles of the King/Queen/Government, Parliament, Judges and individuals in the society.



D. Other neuralgic points

II. Voting right (iv)

English common law developed as it did because landed gentry and merchants wanted a system of law providing protection for property and contract rights and limit the Crown's ability to interfere in markets.

French civil law developed as it did because the revolutionaries and Napoléon wished to disable judges from thwarting government economic policies.

Civil law is more comfortable with a centralized and activist government than common law.

(Paul G. Mahoney, 2000.)

D. Other neuralgic points

II. Voting right (v)

Efficient financial markets have developed under the common law.

Correlation between flexible labour law, diffuse ownership in corporations and radical innovation - as opposed to incremental innovation (*M. Vatiéro*).

Schumpeter: Radical innovations create major disruptive changes, incremental innovations continuously advance the process of change.

D. Other neuralgic points

II. Voting right (vi)

Former Former Czech Foreign Minister *Karel von Schwarzenberg*:

After Brexit, we may end up by having a centrist EU acting with German thoroughness ("deutscher Gründlichkeit").



D. Other neuralgic points

III. Payments to the EU/its Member States

That a Non EU-State which participates in the Single Market pays is reasonable.

EEA/EFTA States pay too (even Switzerland pays).

But not into the EU budget.

They have their own organisation and their own projects.

Roughly 50 % of current UK payments.

“Norway Grants” are voluntary payments.

E. Conclusions

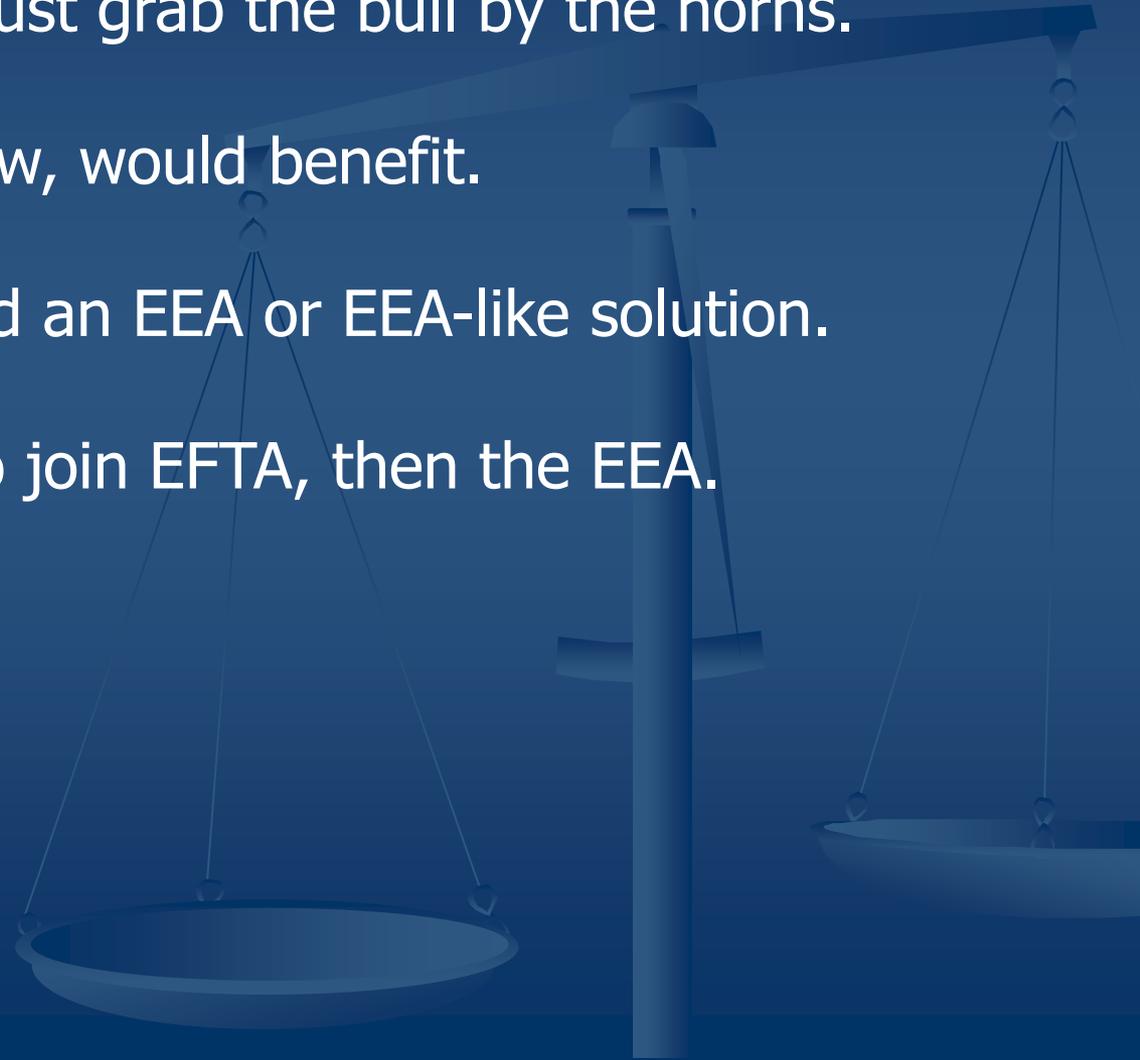
EFTA States are reluctant to take the initiative.

If UK wants that, it must grab the bull by the horns.

EFTA States may follow, would benefit.

EU has never excluded an EEA or EEA-like solution.

UK would first have to join EFTA, then the EEA.



E. Conclusions

There is room for a second structure in Europe.

New name may be necessary. EEP?

Single market would be the common denominator.

UK must find reasonable interlocutors on the EU side.

And it must alleviate the fears of the current EFTA States.

Hard Brexit would be hard for everybody.