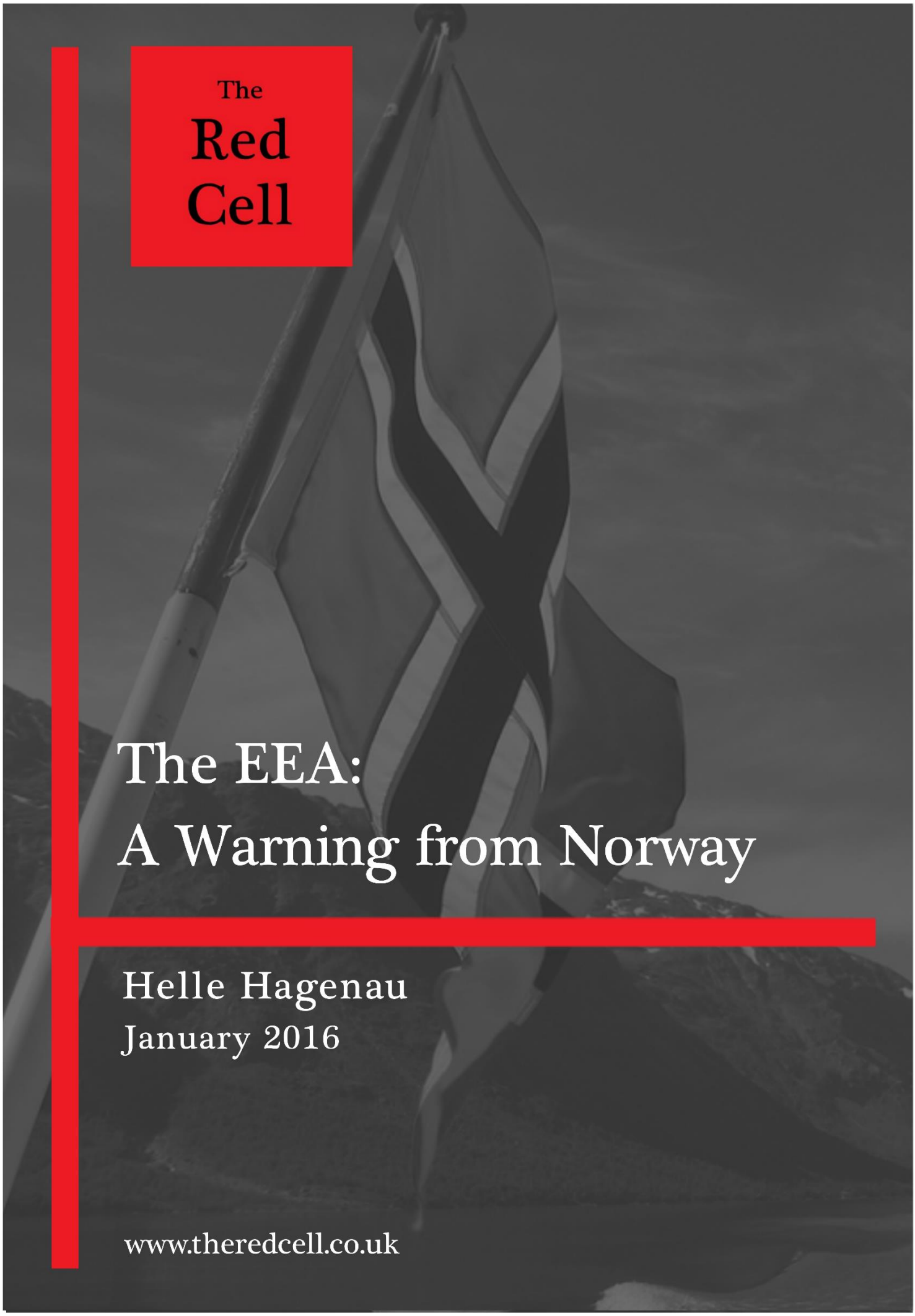

The Red Cell

The EEA: A Warning from Norway

Helle Hagenau

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www.theredcell.co.uk

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Background

In January 2017, Theresa May gave a speech spelling out how she foresaw Brexit developing. It began to look as if a new Free Trade arrangement was the route being sought: something long suspected but now confirmed.

In her words, this means

> *Not partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries. We do not seek to hold on to bits of membership as we leave.*[1]

This rules out what some political campaigners in the UK had been pushing for, and had even generateda court case to clarify the legalities behind; transitioning to the European Economic Area (EEA) as an option.

This paper sets out in more detail the problems such an arrangement means in practice, written by nationals of a country that is a longstanding EEA member and has had to face them.

It dispels some of the old myths put out by pro-EU members seeking to rubbish the EEA alternative, as well as new myths now being put forward by pro-EU members seeking a surrogate way back into the EU in the future.

Our experience is, firstly, that the British Prime Minister is quite sagacious in seeking a simpler free trade deal instead. We think Norway would be better off following that route as well, and perhaps thanks to your example we yet will.

It is still possible, secondly, that some might be tempted to view the EEA as an easy default stop, if talks drag out because of petulance in some corner of Brussels. But loitering in the EEA for any length of time carries risks, as a review of Norwegian case law helps explain. Being aware of them may help you avoid them, if - as a truly last resort - the EEA default really does become your emergency overnight lodge out of the European Union.

Norway, the EEA, and You

There are many alternatives to the current EEA agreement. It is not our objective to assess precisely whichof the many types of trade treatieswould be the most appropriate for the United Kingdom; merely to clarify some misleading statements that have been made about Norway's EEA terms over the past couple of years in the British press.

[1] Speech, 17 January 2017

Two things are central. Firstly, the EEA idea is not ideal; and secondly, there is no simple model.

Ask a Norwegian Eurosceptic if they want to be in the EU and they will say 'No thanks!' Ask us if we think the EEA is better than the EU, and we'll probably agree. But ask if being outside the EEA is better in turn than being in, many of us would agree to that too. The point is that in the round, the EEA is not the best solution.

It has its downsides. These were gratuitously overstated by David Cameron's Government, and repeated (we believe at Downing Street request) by our Norwegian Government itself during the referendum. The truth is that the real 'fax democracy' is any country that is an EU member, since each has largely lost its veto powers. EEA countries that aren't EU states still have a great influence at the source of many of the international standards bodies that the Commission just adopts and gold plates. The full story is published in another Red Cell paper called *The Life of Laws*, so we won't repeat it all here.

The key point though is that while being in the EEA is better (and cheaper, and less burdensome) than being in the EU for a developed and rich state, we can do so much better. That might mean with the UK alongside us a major reform of the EEA is possible. More likely, the EEA is as reformable as the EU is(n't). So if you really do have to plump for the EEA route, we'd advise you to make your stay as short and transitional as possible. Stay for too long and your feet will get stuck, and you'll have missed your opportunity.

The other key point is that EEA membership is not a simple thing. Norway's affiliation to the EU currently comprises over 70 different agreements, formally independent of the EEA. One might even consider these to be optional extras our pro-EU governments have opted into (making up a chunk of the 11,000 or so items of *acquis* in the process).

They have done so to make themselves more popular in Brussels, and to make it easier to enter the EU and to sell entry to a sceptical Norwegian population. Those considerations don't apply in the UK, or at least not in the same way. But it does mean you have more choice if you do see some value in EEA terms, in picking a model that best suits your needs for as long as you intend to stay in (and we'd also suggest you might consider, if you really do have to join us, setting a legal timer that gets you out and into a Free Trade deal with a solid deadline).

But the EEA is a complex topic, so in this paper we look over some of the most contentious issues associated with EEA membership – both good and bad – which are not very well known in the UK.[2]

In Part One, we set out a bit of history of Norwegian membership of the EEA, and show it's not been a bed of roses.

In Part Two, we look at the dynamics in play between the different parties involved in the arrangement, and at the ways in which non-EU members can safeguard their interests and not become a "fax democracy".

[2] Many of these points are, however, more known in Norway as they are drawn from the *Alternativrapporten* (Alternatives to the Current EEA Agreement), of which this paper is a very condensed and updated version, with additional interpretations and views by the author in the context of the UK's referendum debates.

In Part Three, we briefly reflect on the oversight and management of the agreement, which may lead the reader to ask the question of whether the UK (given its administrative track record within the EU) really might do any better.

In Part Four, we dip in passing into a small number of problems that leaving the EU for the EEA does not solve.

Whether the UK decides to plump for the EEA option is a matter for the Brits to decide – though note that every other EEA member including Norway gets a veto.[3] Our view is based on twenty five years of solid experience from living inside it.

So;

- We would counsel against wandering into the EEA without looking at the small print of what the EEA does;
- We would warn you that EEA membership is subject to the same tidal pull of European integrationism as EU membership is;
- We would underline the safeguards that do lie within the system, but remind you that they are only as robust as the foot upon the brake (and track record for both our countries shows that's rarely robust enough);
- We would alert you to the costs of the EEA terms, direct and indirect, especially when compared with looser and better forms of trade deal;
- We would point to the limits on your ability to fully benefit from the potential you now have won from deciding to leave the EU;
- We would flag up the other options for a looser trade association, which is no longer as problematic or unprecedented as it was when both our countries started looking at the EEC as an attractive option to associate around.

The EEA might work as a parking spot, but only at best for a short time, and the spot is pretty muddy and you might not get out. So it's perhaps better to work on a distinct EFTA angle instead.

[3] At the time of writing there is a court case going through to determine whether the UK can leave the EU and automatically become an EEA state. Good luck with testing that ruling out if a hard ball premier makes an issue of vetoing it to try to wring some big concession. Be mindful too that the EFTA states have strong interests in subsidising agriculture because of their geography and climate, and will want those safeguarded.

Part One - The EEA: a Growing Blob

Over time, the EEA has been increasingly extended, and now is involved in areas that it was not originally supposed to touch. Key elements in Norwegian regional policy, petroleum policy, management of natural resources, alcohol policy, and in recent years, rights and measures to prevent social dumping, have in turn been challenged by the EFTA Surveillance Authority (ESA) and the EFTA Court (the EEA entity that rules on implementation).

From the perspective of those seeking to constrain EEA competence expansion, that means it is raising concerns across pretty well all of the so-called 'Four Freedoms'. These include the following areas that have raised public heckles -

- Regional policy is hampered over district policy measures like differentiated employer contributions;
- Objections are made over the inability to limit free capital flow in crisis situations like Iceland did on its own initiative, over regulatory burdens in particular service sectors, over the rules for transport of goods, and over licensing laws;
- Norway's directives for the posting of workers is subject to the EU court's interpretation, and its collective agreements for construction projects for public agencies is under threat;
- Tendering by municipalities and limits to direct employment are governed;
- Attempts to increase stricter environmental, health and safety requirements for chemicals and stricter requirements for food products have been stymied.

Legally, these issues should be being discussed and agreed through the EEA Association Council, the liaison body, with ministers being held accountable for their positions and decisions back in national parliaments. The problem however is that they are being resolved by judges.

Seen from Brussels

The EU is generally positive to the EEA agreement and the manner of Norway's adhering to it, which was brought out in the EU Council's evaluations of December 2010.[4]This was fairly inevitable. Norway pays well for it and adapts itself effectively and loyally to ever new EU rules and interpretations of the EEA agreement. Hence we should not be surprised when we read back then how the Council "emphasises that Iceland, Norway and Liechtenstein so far have made an outstanding effort to incorporate and implement the rules."[5]

In hard currency, with all the programs and costs of the institutions, Norway pays around 7.2 billion Norwegian Kroner (NOK). The biggest expense comes from the EEA funds, for development in Eastern Europe. Norway pays 3.7 bn NOK annually (for the period 2014-2020). Participation in EU programs and agencies costs each year another 3.2 bn NOK; and 200m NOK to INTERREG for regional aid. Norway pays annually around 100m NOK to the surveillance authority ESA and the EFTA Court.

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[4] Proposition No. 44 (2008-2009), p42

[5] Circular M-2/2004: "Residence and operation obligation – the legal framework and proceedings," p8

So a point for British negotiators is this: one might argue this is a contribution twice as high as basic EEA membership fees call for, when compared with contributions by Iceland in particular which has been less interested in generating 'political buy-in'.

At the same time, the conclusions of the Council also reminded us that the EU is envisaging the possibility of major changes to the EEA in the future:

> *Furthermore, it should be reviewed whether the EU's interests are maintained well enough through the existing framework or alternatively through a more comprehensive approach, encompassing all areas of cooperation and which would ensure a horizontal coherence. This review of the EU would also take into account possible developments in the membership of the EEA.*[6]

The Council was already launching the idea of a far more comprehensive agreement, where new areas would be included in the EEA, and where the ESA and EFTA's Court's grip on Norwegian democracy may be further tightened. Even if the UK sought to make a passing stop in the EEA, and especially if people are genuinely considering the bizarre strategy of anything longer, this ambition is something strategists need to keep in their minds throughout.

Norway'sEEA Review Committee wrote that:

> *If the current affiliation with the EU is to be continued indefinitely, it is natural to ask whether one should try to make it more unified and coherent, and negotiate a common framework for the current agreements. Such a framework may be formed in various ways, but the key point is an agreement framework that encompasses it all - including the EEA, Schengen, the other legal agreements, agreements on security and defence policy, Interreg and other programmes etc. Furthermore, it must be surrounded by a common institutional framework, with procedures for the overall and general political dialogue and governance, which is lacking today. The detailed procedures could conceivably be harmonised, but could also continue to vary from subject area to subject area, as in the EU. The easiest would probably be a form of an extended EEA agreement which also covers the other areas where Norway has agreements, and strengthen the political level at the top. But other models can also be envisaged. Reform could be purely Institutional and only be implemented in a common framework around existing agreements, or one could imagine at the same time, assessing whether additional areas of EU cooperation should be included.*[7]

The Review Committee clearly exceeded the instructions they received from the Foreign Minister. It is believed it did so precisely because it mirrored ambitions held in the corridors of Brussels to integrate more deeply with the EEA. As outlined here, it would generate in practice an entirely new agreement, whereby the ESA and the EFTA court is likely to gain additional powers.

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[6]Proposition No. 44 (2008-2009), p43
[7]Ibid.

The EEA 20 Years On

With the EEA, Norway has been tied to the EU's economic liberalization through an increasingly more comprehensive internal market. The aim is for all laws and regulations that the EU adopts concerning the internal market to be implemented in Norway. The main difference with the old trade agreement with the EU, which was set up to facilitate the free flow of goods, is that the EEA is also to ensure the free flow of services, capital and labour.

In order to ensure this, things such as common competition rules, and a surveillance body and courts to enforce them were established. These are contributing to changing Norwegian society. Depending on your world view, that may be a good thing or it may be a bad thing, but the absence of a democratic mandate can only generate problems.

Let's go back towhat the Parliamentary majority originally agreed to with the EEA agreement, and with it what trades unions signed up to.

In the preamble to the EEA agreement, it states that the EEA shall be created

> *on the basis of equality and reciprocity, and an overall balance of benefits, rights and obligations of the parties*.

According to the Government-established EEA Review Committee this is "a fundamental principle of the agreement. It is meant to balance the rights and obligations between the parties, and when it was negotiated all parties gave up something and took away something."[8]

This is probably a description that the majority that backed the EEA agreement at the time could sign on to. So an important starting determinant will be to judge whether this balance is actually being maintained, or whether developments have been contrary to the intentions of Parliament.

According to the EEA Review Committee, the EEA "eventually proved to be a much more comprehensive and binding agreement than originally anticipated, and it is debatable how much longer the Parliament's approval in 1992 can provide political legitimacy."[9]

Following the presentation of the Committee's findings, there was a debate about whether the assumptions on the part of the Parliament of 1992 have been broken. Both the Government and the parliamentary majority were very clear in several areas that the Norwegian regulations needed to be maintained, and this was considered to be a very important condition. However, Norway allowed itself to be pressured to change Norwegian law in no fewer than twelve core areas by the EEA agreement's overseers. A more detailed description of each of the cases appears below.

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[8]NOU (Official Norwegian Report) 2012:2, p133
[9] NOU 2012:2, p828

(i) Reversion of Rights to Waterfalls

Background

When the EEA agreement was concluded, Norway changed the industrial licensing and watercourse regulatory act so that the Norwegian rules should not discriminate on the basis of nationality. Norwegian authorities were very clear at the conclusion of the EEA agreement that you could maintain regulations that differentiated between public and private stakeholders.

In the EEA proposition, the government stated that "the part of the licensing laws for waterfalls that apply to resource management are not affected by the EEA [...] The strong public ownership in the hydropower sector is consistent with the principles of the EEA. The same applies to the State's pre-emption in acquiring ownership of waterfalls, reversion to the State at expiration of the license and the provisions of state pre-emption and reversion of a share transfer."[10]

Further on it was maintained that"the prohibition of discrimination on grounds of nationality means that stakeholders in other EEA countries will be on par with Norwegian private interests when acquiring rights to exploit the hydroelectric potential, use rights and developed waterfalls in Norway.Access to such acquisitions will still be strongly limited by the State's pre-emptive and reversion rights, and the general requirements for the management of hydro resources."[11]

Norwegian authorities were supported by article 125, which clearly states that the agreement does not affect the parties' rules on ownership. According to the EEA proposition, the agreement shall hereby "not affect the relationship between private and public ownership in the individual country."[12] The Norwegian interpretation of the EEA agreement was communicated through Norway's notification of changes in the industrial licensing and watercourse regulatory acts. No comments on these were received - either from the EU, ESA or any EEA country. The ESA expressed in the first seven years of the EEA's existence no objections to the proposed changes.

How it turned out

After a six-year long process, the case ended with a ruling by the EFTA Court in June 2007. The EFTA Court declared that Norway had violated articles 31 and 40 of the EEA agreement by maintaining rules which granted private undertakings and undertakings from other EEA countries a time-limited license for the acquisition of hydroelectric plants. It added that there was now an obligation to return all installations to the Norwegian State without compensation at the expiry of the license, while Norwegian public enterprises enjoy the benefit of a license for an unlimited period. The Court rejected the argument that Norway's agreement that the EEA's article 1259 meant that the reversion is beyond the scope of the agreement.[13]

In August 2007 the government changed the law.Private concerns can still own up to one third of the publicly owned hydroelectric plants, but in principle these remain under public ownership.[14]The

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[10] Proposition No. 100 (1991-1992), pp200-201
[11]Proposition 6. No. 100 (1991-1992), p201
[12]Proposition 8. No. 100 (1991-1992), p103
[13] Judgment in Case E-2/06 EFTA's Surveillance Authority (ESA) against the Kingdom of Norway, Section 63
[14] Oil and Energy Ministry: the Government ensures public ownership of hydropower. Press release, 10.08.2007

example of reversion thus entailed a loss and a victory at the same time. The Norwegian authorities have, however, accepted that with the current EEA agreement we are not even free to decide the balance point between public and private ownership of hydropower resources.

(ii) Vinmonopolet

Background

Vinmonopolet runs the state monopoly on alcohol, an area of moral concern. Its future was one of the issues that aroused much debate in 1992. The Government discussed the problems of having to maintain the import monopoly in the framework of the EEA agreement, but concluded nonetheless clearly that "the current exclusive rights to the import and wholesale of wines and spirits will be maintained."[15]

The Committee majority in its recommendation during the Parliament's debate stated that the EEA agreement did not impair the ability to have an independent alcohol policy. Thus Vinmonopolet's monopoly would be retained. Christian Democratic MP SveinAlsaker for example declared:

> *Politicians do not give objective information. But it is objective information in any case that the government and the committee's majority, including the Christian Democratic Party, are making it a condition that Vinmonopolet can and will be maintained within the EEA from a health policy consideration and based on non-discriminatory procurement practices. We believe in this*.[16]

How it turned out

The promises in the alcohol policy were shown to have a short shelf life. The year after the agreement came into effect the import monopoly for wines and spirits fell. Later, Norway lost a case at the EFTA Court about alcopops. Starting in July 2009, the ban on private imports of alcohol was abolished, and it was legal to order alcohol from abroad for personal use – all due to pressure from the ESA. The assumption that was most clearly broken is that the import monopoly could and would be maintained.

(iii) Alcohol Advertising on Television

Background

The government stressed that the ban on alcohol advertising, which had been a difficult issue during the negotiations on the agreement, would continue. It was announced that the ban could be taken up for renewed consideration in 1995, but the government reassured voters that "If an agreement is not reached at this point, the current provisions will continue."[17]

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[15]Proposition No. 100 (1991-92), p118
[16]SveinAlsaker, EEA Parliamentary debate, October 15, 1992, p195
[17]Proposition No. 100 (1991-1992), p242

How it turned out

This provision is under considerable threat. The Foreign Minister announced that the Government is committed to extending application of audio visual media services in the EEA agreement, while "assuming that Norway can continue the ban on alcohol advertising in broadcasting, even if the written exemption lapses."[18] The problem with this strategy is that there are plenty of players in the market that will benefit from a different interpretation of the directive over time, who may challenge the ban and cause the case to land at the EFTA Court's board.

Alcohol advertising is already being broadcast from the UK to Sweden. And before Norway banned such advertising, many foreign channels featured alcohol from their broadcasts to Norway. TV2 has previously indicated that they would consider moving parts of their business abroad if the advertising ban is repealed for companies that broadcast to Norway from abroad.

Thus even if Norway escapes a legal challenge, it may be obliged to accept an EU directive that allows alcohol advertising on TV, based on the EU's four freedoms, by the back door.

(iv) Regional Policy

Background

Rural policy measures were heavily debated at the signing the EEA agreement, and opponents of the agreement warned against consequences including the differentiated employer fee. This system allowed for different tax rates to be set depending on which sectors the taxpayer worked in. Still the government and the parliamentary majority maintained that we could control our own local policy and that the differentiated employer fee would continue to exist.

How it turned out

Through the EFTA Court's decision in 1999, several industry saw sectors removed from the caveat arrangement. Norway was to have the arrangement grandfathered in, but in 2004 it was judged illegal by the EFTA Court.

After the EU adopted new guidelines for regional aid in December 2005, the ESA allowed for a certain differentiation of the payroll fee in parts of the country. Nevertheless, there were several municipalities that received a higher rate than before and the EFTA Court's decisions from 1999 on what industries it will apply to, still stand. In addition, the approval of the Norwegian arrangement only proved to be valid until 2013.

The EEA also affects the ability to have an active rural and regional policy in many areas - far beyond "small" regional policies (which is often used as a term for the public support system that has explicitly regional policy purposes). These include policies covering employment, housing and

[18] Minutes of parliamentary meetings 14/2/2012, Case # 2: question from DagfinnHøybråten to the Foreign Minister

geographical and social distribution. It also operates in regards to oil and gas extraction. Then then-coalition Government enshrined in its new policy platform (Soria Moria II) declaration:

> *It is a goal that the new [oil and gas] project will provide local spill over effects in that they contribute to economic development and job creation locally and regionally, through the localisation of the operational organizations. It is particularly important to focus on skilled job creation locally*.[19]

To ensure this, the Petroleum Act in Article 10-2 set forth a requirement that licensees on the Norwegian shelf must have a separate organization that is able to conduct business from Norway, and that the petroleum industry will be operated from bases in Norway. This provision has now changed - after pressure from the ESA.

(v) Petroleum Policy

Background

Resource management on the Norwegian shelf in recent decades laid the foundation for substantial revenues to the community and for many jobs along the coast. The Government plainly stated in the EEA proposition that

> *resource management includes opening new search areas based on an assessment of the desired pace of development, the interests of fisheries, environmental and regional issues and the social economic profitability. Further included is the selection of solutions for field development and transport systems. Resource management is a national responsibility that is not covered by the EEA agreement.*[20]

The government was however already aware that they did not have full national control in granting licenses. In the proposition in 1992, the Norwegian system was described along with the need for changes as follows: "Some criteria that are associated with the applicant's contribution to the strengthening of the Norwegian economy, the use of competitive Norwegian goods and services, etc. would imply the possibility of discrimination between Norwegian and foreign companies. Such criteria would have to expire or be given a form that complies with the regulations in the EEA agreement. "[21]

A line frequently used to justify accession to the EEA was that future unwanted proposals could be vetoed, since unanimity in the EEA Council was the norm. We understand much the same argument was made with the UK accession to the EEC regarding many long-term proposals even then being forewarned in a number of fields, that turned out to be all too true. In our case, it worked out in much the same way.

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[19]Soria Moria Declaration II, p60
[20] Proposition No. 100 (1991-92), p165
[21]Proposition No. 100 (1991-92), p166

How it turned out

The original Petroleum Act instituted a requirement that licensees on the Norwegian shelf must have a separate organization that is able to conduct business from Norway. It did not contain any discrimination as to nationality, either in its original form or after changes in 2003. It was quite possible for foreign companies to comply with the requirements. The "problem" for the ESA was that in practice the companies were faced with other limitations on the free flow of capital. This however ran contrary to the common understanding between Oslo and the Commission from the time of the drafting of the EEA that licensing arrangements that do not differentiate between Norwegians and foreigners, were allowed. But as a result of this ruling, the old assumption that "resources are a national responsibility that is not covered by the EEA agreement" is broken.[22]

(vi) Property Policy in Agriculture

Background

On the European Portal's focus page on agriculture it clearly states that "agriculture is not part of the EEA agreement, with the exception of veterinary matters and plant health [as well as trade in agricultural products and products]".[23] For property policies, the EEA agreement article 125 also applies, which states that "this Agreement shall in no way affect the parties' rules on property ownership."

The government of Gro Harlem Brundtland specified concerning agriculture that "furthermore, the prohibition against preferential treatment will not preclude maintaining the following provisions and principles: the residence and operation obligation is required for any acquisition of agricultural properties, including forests properties."[24]

How it turned out

Important elements in the property policy for agriculture have come under pressure from the ESA and the Norwegian authorities have accepted the EEA placing limits on the design of key measures. These have included the residence and operation obligation, loosening the period in the inheritance law, and the possibility of creating a differentiated policy between different forms in agricultural ownership.

The rules for the sale of agricultural properties, including who can buy and on what terms, effects the core of the Norwegian agricultural policy. This discovery was not anticipated at the time of accession.

The EU Court has also stated that licensing rules may not be discriminatory, or designed so that the license can be denied if the owner is not going to be operating the concern himself – a result of the

[22]Proposition No. 100 (1991-92), p165
[23] European Portal theme pages on Agriculture.
[24]Proposition No. 100 (1991-92), p197

Ospelt case from Austria in 2003, and of itself a useful example of secondary impact of case law in the EEA as well as the EU. This has had wider impact on inheritance law.

In Norwegian agricultural policy the significance of personal ownership has been emphasised over time that the agricultural property should be owned by natural persons. The second Bondevik government showed that there was broad consensus among respondents to the consultation for this principle, and stated further that: "this is a Norwegian tradition, and it has proven to be a stable and rational form of ownership. Such ownership prevents the property from being merely a place of investment where the owners are not resident and the user has no ownership ties."[25] But even here we are not masters of our own house - if we are to use ESA's reinterpretation of the EEA as a basis. In their understanding of the agreement, a rule that corporations cannot get a license, involves the discrimination of different forms of ownership which are framed by the EEA agreement.

After the change of the licensing act in 2003, the ESA has had a particular focus on companies' opportunities to acquire agricultural land in Norway. Norwegian authorities have tacitly accepted ESA's understanding and adapted Norwegian practice to follow.

(vii) Fishing Policy

Background

In the same manner as agricultural policy, fishing policy is also said to fall outside the framework of the EEA agreement. In two of the additions to the EEA agreement, exceptions to the area of fishing are specified: "Norway can continue with the restrictions that exist at the signature date when it comes to ownership by non-Norwegian interests in respect of fishing vessels [...] National authorities have the right to oblige companies that have been completely or partially acquired by non-Norwegian interests to deprive them of any investment in fishing vessels", and that "Norway can continue with restrictions on non-national ventures in fishing or companies that own or operate fishing vessels."[26]

How it turned out

The Norwegian government has agreed to remove the requirement that at least half of the crew or fishermen or leader or captain of Norwegian fishing vessels should either be Norwegian nationals or reside in Norway. The citizenship requirement has been completely abolished, while the residence requirement has been changed to a requirement of residence in the coastal municipality or municipalities which neighbour coastal municipalities for at least half of the crew.

[25] Proposition No. 79 (2002-2003), p66
[26] The EEA agreement, annex XII, letter h; and annex VIII, section 10.

(viii) Ownership Restrictions in the Financial Industry

Background

The government highlighted legislation in the EEA proposition which meant that it was "bound by law that no single owner or group can own more than 10 per cent of the shares in a Norwegian financial institution, unless permission is given to a subsidiary."[27]

How it turned out

The former prohibition has been removed after pressure from the ESA and has been replaced with a notification requirement.[28]This was because it was considered a discriminatory restriction on capital movements. There have been no formal amendments to the EEA rules on the free flow of capital since the EEA agreement came into effect: developments in this field are characterised by the specific decisions that the EC Court and the EFTA Court have made in individual cases. The accession condition, that the ownership rule would be enforced, has obviously been broken.

(ix) Property Ownership Policy

Background

When Norwegian authorities argued that property ownership policies would not affected by the EEA agreement, they referred to article 125, which clearly states that the agreement would not affect the parties to the agreement's rules on ownership. According to the EEA proposition this would mean that "the agreement would not effect for example, the relationship between private and public ownership in the individual country."[29]

How it turned out

Time has shown that with the current EEA agreement this does not hold true. In order to maintain the rules for reversion of power plants (a regulation that the government at that time explicitly said we could maintain), for example, there had to be clear limitations on the private sector's ownership of hydro power plants. In most other contexts, the pressure is in the opposite direction, to cancel or alter arrangements that private actors perceive as unfair treatment in relation to public ones.

(x) Public Services

Background

In the EEA proposition from 1992 it was stated that "most public services fall outside the agreement".[30]

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[27]No. 100 (1991-92), p 202
[28]The Financial Institutions Act, § 2-2
[29] Proposition No. 100 (1991-1992), p103
[30]Proposition No. 100 (1991-1992), p25

How it turned out

A large part of public services has been shown to be affected by the EEA agreement's competition rules. This occurs partly through EU regulations on public procurement; partly through new, broad directives (such as the services directive); partly through sector directives (such as the health care directive); and partly by the ESA and the EFTA Court's interpretation of the basic principles of the agreement.

(xi) Free Flow of Labour

Background

The government stated in the EEA proposition that

> *In the EEA, a company that performs services in another country will be allowed to bring their own employees with them. The significance of this is limited, however, by the fact that all EEA countries can pass legislation on working conditions and agreements on pay and working conditions that are applicable to all forms of paid employment in their country, regardless of the worker's nationality. The application of this principle for work assignments shorter than 3 months has not yet been fully resolved.*[31]

The proposed provisions excluded work assignments of shorter than 3 months from the residence country's rules on salary and holidays. It was assumed that people taking permanent residence in Norway would comply with the Norwegian wage and working terms.

How it turned out

Several of the judgments of the EF Court (Vaxholm/Laval, Viking Line, Ruffert and Luxembourg), and the ESA's pressure to change Norwegian laws and regulations as a result, are contributing to a new employment situation when it comes to matching Norwegian wage and working conditions when working in Norway. This applies to both the private and public sectors. In the last few years, this situation has been particularly exacerbated by the Shipyard Case, and the Holship Judgement.

The 2008 Shipyard Case (also known as the STX Norway Case) saw an unusually sharp conflict between the Norwegian courts and the Luxembourg Court. The issue related to work in Norway's nine shipyards, and over interpretations over whether certain provisions might act as unfair obstacles to posted workers from other countries. After an initial decision by the national Tariff Board, Norway's Supreme Court looked into the question whether companies had to also foot the bill for travel, board and lodging for workers coming into the country, and whether other working conditions such as pay and overtime also had to be mirrored. It asked the EFTA Court for its view as part of its considerations under the EEA terms.

[31]Proposition No. 100 (1991-1992), pp253-254

Unusually, the EFTA Court was forthright in stating the Norwegian Court had no room to manoeuvre in interpreting the EEA requirements, which is something of a deviation from its more elastic tradition of allowing more leeway for judges in EFTA-EEA rather than EU states.

Norway's Supreme Court in turn rejected both this legal interpretation and the attempt at paramountcy by Luxembourg, and for the first time reminded the EFTA Court that its rulings under EEA terms are "advisory".

Escalating matters further, the EFTA Court's President wrote an article for a legal journal effectively saying the Norwegian judges had misunderstood EEA judicial obligations, which were much closer to EU ones than previously acknowledged. He has also suggested that were the EFTA Surveillance Authority to intervene, the case could go back to the EFTA Court again (where the findings would be predictable).

Thus the Shipyard Case demonstrates that the judicial arm of the EEA Agreement now aspires to be more of a direct enforcement body than some originally thought, when it was once meant to be a mechanism for advising national courts.

The Holship Judgement relates to a dockyard labour dispute. Dockers' unions were seeking to force a freight company at the Port of Drammen to accept a collective labour agreement. The EFTA Court ruled that the pool of workers this generated effectively constituted a monopoly, and a block to foreign labour competition, as well as hindering competitiveness. Whatever one's views of particular trades unions activity may be, the EFTA Court was in effect determining that its interpretation of competition law took precedence over Norwegian collective agreements.

It also has longer term potential for generating legal conflicts with rights accruing from the UN's ILO Conventions 87 (Freedom of Association and Protection of the Right to Organise), 98 (The Right to Organize and Collective Bargaining) and 137 (Social Repercussions of New Methods of Cargo Handling in Docks).So there is another, wider, potentially serious element: the risk of contradicting and overriding other international agreements, including those designed to set out peoples' rights.

(xii) Trade in Agricultural Products

Background

According to the EEA supporting documents, the main elements of the new system were that the variable import duty would be calculated according to actual raw material content, and that it should even out the difference between the domestic price in Norway and the lowest price within the EU, rather than world market prices for agricultural raw materials. Although the negotiations on Protocol 3 had not been completed, this was played down in the EEA documents which emphasised the focus on the details of the listing of prices for agricultural raw materials, "and some other technical issues" that would be finally clarified sometime in 1992.[32]

[32]Proposition No. 100 (1991-1992), page 120

How it worked out

Through several rounds of negotiations between Norway and the EU, trade in agricultural products has moved away from the principle that formed the basis of the original draft of the protocol on trade on processed agricultural products which existed when the EEA agreement was approved.[33]The requirement that compensation should reflect the actual raw material costs was considerably toned down in the agreement text. This was not accidental, but reflected (in the EU's favour) that the EU had falling raw material prices, while Norway had stable and in some cases rising raw material prices."[34] If one had relied on the principles of the original draft of protocol 3, Norwegian customs on imports from the EU should have been revised upwards, while the EU customs on imports from Norway should be adjusted downwards. Instead, custom tariffs have been uniformly reduced for both parties.

This has provided a basis for a continuing and growing imbalance in trade in processed agricultural products. Similarly, we have seen in agricultural trade, despite the assumption in the EEA agreement, article 19 that developments in the trade are to take place on a "mutually beneficial basis." In practice, there has been an extensive increase in imports from the EU to Norway, which in 2011 was nine times greater than exports to EU.[35]

The assumptions underlying the original Protocol 3 when the EEA was adopted, that the customs tariffs would ensure equalization between the lowest level in the EEA and the Norwegian level has clearly been broken. The same is the assumption in the EEA agreement, article 19, that trade would develop on a mutually beneficial basis.

Lessons to be Drawn from Poor Practice

There is a lot to be learned by the United Kingdom in reviewing how the EU institutions have treated its EEA partner. They provide lessons in many fields and competences of particular interest to the UK economy, including the devolved administrations.

The current EEA agreement clearly violates a number of areas of important political intentions and promises made by the government and parliamentary majority when the EEA agreement was adopted in autumn 1992. The UK, if it loiters in the EEA, can expect the same.

Secondly, it is obviously relevant to look at how and why this development has occurred. In some cases this has occurred because a political majority wanted a new policy. In other cases, it is less clear whether the policy change was desired or not. But in a lot of cases it is obvious that the EEA has led to approval for changes in Norwegian policy that are in conflict with the majority's view.

Neither reversion, differentiated payroll fees nor the Vinmonopolet arrangement would had been so amended without the EEA. The EEA has been a lever for change in national policy. This observation is supported by the EEA Review Committee when they summarise that "the majority of lawsuits on the

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[33] The EEA was not negotiated in this area in 1994, and an agreement wasn't added until 2002

[34] Agricultural Investigation Office: *Customs Protection Crumbles - Norwegian Agricultural Trade in Light of the EEA and Third Countries*, Report 7/2011, p43

[35]Source: SSB/SLF

EEA agreement brought before Norwegian courts by Norwegian companies and individuals are against the Norwegian authorities."[36]

How far is the EEA likely to go? Even opponents of the agreement did not have at the time enough imagination to envision the full scope of the agreement. Few people imagined that EU/EEA would be able to deny us earmarking professorship positions at Norwegian universities for women. And who could have imagined that the surveillance of telecommunications and data traffic would be defined as an issue relevant to the EEA, as it has been through the parliamentary majority's acceptance of the data retention directive? The debate on the data retention directive shows how wrong things can turn out when letting bureaucrats and lawyers define the EEA agreement framework, based on the four freedoms. It is time that Norwegian politicians make a fundamental review of issues and discuss the content and framework of the agreement.

This is not primarily about the policies we should be for or against. No one would prevent Norway from imposing the same rules for the retention of telecommunications and data traffic that are in the data retention directive - if the political majority in Norway wanted it. But the question should be decided by the Norwegian Parliament and not through the EEA. For, as Professor of Political Science at the University of Oslo, Dag Harald Claes put it: "there is almost no limit to Norwegian policies that cannot be considered to have an anti-competitive effect. Seen in this way, it is dramatic how far the EU can possibly go."[37]

[36]NOU 2012:2, side 134.
[37]*Nationen*, 08.05.2002

Part Two - What You Need to Know About EEA Dynamics

In the previous section we showed how fundamental assumptions made at the time of the establishment of the EEA have been subsequently broken. Now we will turn to the obligations and mechanisms contained in the EEA, and how they over time have contributed to changes in Norwegian society.

Existing Regulations and Their Interpretation - Commitments and Understanding

Which obligations Norway has committed itself to through the EEA and which rights the agreement grants, exist at different levels. It is partly about the obligations and rights explicitly set forth in the agreement; partly about a mutual understanding between the parties at the conclusion of the contract; and partly about a unilateral Norwegian understanding that was assumed by the government and parliamentary majority at the conclusion of the contract.

Some of these factors weaken the hand of Oslo; others strengthen it – if and only if they are used to the full.

We might consider these, often conflicting, elements individually. We then turn to the safeguards included in the system that constitute vetoes, blocks and padding for damaging laws.

(a) The literal agreement

An example of this could be the wording in the agreement text itself about what the agreement covers - and what it does not. Although the text appears to be clear, we often find that there are differing opinions among the parties to the agreement concerning the interpretation of the wording in the agreement. There may often be contradictory wording across various articles. Examples of wording that set limits to the what the EEA agreement applies to, can have a very general design and principally have an effect in many sectors ("This Agreement shall in no way affect the parties' rules on ownership"). Or they may be specific to a particular policy area ("Norway can continue to apply restrictions which apply on the day the agreement was signed, on the establishment of foreign nationals in fishing or in companies that own or operate fishing vessels").[38]Interpreting these applied to other sectors and circumstances then becomes a matter of conjecture.

(b) Mutual understanding between the parties at the signing of the agreement

In order to seek to clarify some issues that could give rise to differing opinions between the parties, there was an exchange of letters between Norway and the EU in advance of entering into the agreement. The aim of this was that there should be a mutual understanding of how the agreement should be understood – a precaution the UK would be wise to follow and with some considerable forethought. This can often cover policy clarifications which can't be read directly from the text. An example of this is discussed in the second Bondevik government's EEA message from 2002, explaining its understanding on aspects of non-discriminatory restrictions on capital movements.[39]

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[38]The EEA agreement, article 125; and Annex XIII, section 10.

[39] Report. No. 27 (2001-2002), *About the EEA Agreement 1994-2001*, p46

(c) The understanding that assured the majority for the EEA

A third level of understanding of the agreement's obligations and rights is the unilateral understanding that the political majority in Norway assumed, both by the government through EEA proposition No. 100 (1991- 1992), and by the parliamentary majority through the committee for the parliamentary process. At the signing of the EEA agreement, a number of Norwegian laws changed. The changes were not only done as a national process: there was extensive dialogue with the EU and ESA in the meantime, and all amendments were justified and reported to the ESA. The amendments that the government thought were needed were discussed in the EEA proposition and were presented to Parliament as separate pieces of law.

The EU thus had ample opportunity to have an overview of Norway's compliance of our EEA obligations. In many cases the changes occurred just after the EU indicated an objection. The government also discussed in the EEA proposition a number of laws/rules that were not intended to be changed. The EU has - if only tacitly - accepted Norway's understanding of what changes needed to be done in Norwegian law as a result of entering into the agreement.

It is likely that as the UK begins from compliance with the EU rules, it will not need to enter into such correspondence. But Ministers seeking to repeal EU rules that were also covered by EEA terms would perhaps be wise to define terms that did not engender immediate Commission objections unnecessarily early (ie before leaving the EEA as well).

(d) Loyal compliance on the part of Norway

The EEA Review Committee describes the extensive effort that was carried out by the Norwegian administration for several years in the early 1990's to identify areas where Norwegian laws and regulations were considered to be contrary to the EEA agreement provisions, and later how the adopted amendments would implemented. Over 10,000 pages of EU rules were to be incorporated into Norwegian law and about 100 Norwegian laws and several hundred regulations were created or amended as a result of the EEA in the period 1992-1993.

The report states that "It is agreed that the Norwegian legislature and administration performed this task efficiently and in a way that was loyal to the EEA agreement's intentions."[40]

When the general perception is that both the Norwegian legislature and administration have been loyal and efficient in complying with the implementation of Norway's obligations, one could ask why Norway should be subjected to such meticulous surveillance on the part of the ESA.

This suggests that things should be able to work well with a bilateral cooperation based on equality between the parties, and mutual trust that the agreed commitments will be complied with by each side.

But the growing pressure on Norwegian policy is not only due to new regulations from the EU, but through the ESA and the EFTA Court's interpretation of existing regulations. Quite suddenly Norway’s efficient and loyal compliance with the EEA intentions from 1992 is no longer sufficient.

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[40] NOU 2012:2, p119

This should be a warning to anyone in the UK seeking to see EEA membership as a simple and benevolent partnership.

(e) A Law's legislative history

In Norwegian case law, it is common to rely on the legislative history of the law when it is to be interpreted.

In the EU, there exists in practice a ban on the use of legislative history in EU law, even if this prohibition is not codified anywhere. This is because there are a number of member countries that may have very different motives for agreeing to a treaty, regulation or directive. And more importantly, in most cases no such legislative history actually exists: they are simply working documents of the Commission and not available to either the judges or the public.

This means that EU member states in practice have no idea what they are committing themselves to by voting for the new treaty texts, regulations, and directives.

This point was not emphasised by the government in the EEA proposition in 1992, nor by the majority political parties.

The subsequent development of the EU meant that the problem of court-made law would escalate, even for the EEA. This happens partly as a result of EU regulations becoming more extensive, with increased potential for different rules pulling in different directions - and thus giving more room for court interpretation. This problem is amplified by the fact that the union has grown to 27 member countries, with sometimes very different history, cultural and political traditions and preferences.

(f) International agreements

Both Norway and the EU/EU member states participate in a number of international organizations, conventions and forums - and assume obligations under international law as a result. Norway can as a member of the EEA still speak with an independent voice in international forums, where the EU increasingly speaks with one voice. It also means that Norway has the ability to present its views and specific proposals that either the EU does not want to promote because of internal disagreements on the matter, or because they simply disagree with them.

There are a number of examples where Norway has used its control outside the EU to present views on behalf of the interests of a minority within the EU who have been prevented from promoting the proposals themselves, as well as proposals that have been in support of less developed countries of the world.

There are also examples of Norway making use of international regulations that exist within the framework of the World Trade Organization (WTO) in cases of conflict with the EU, where Norway has been successful, for example, in the Salmon Case.

There is significant flexibility for Norwegian negotiators in international forums to promote their views to a greater extent that can help to strengthen Norway's interests in cases in which Norway is under pressure from the EU and the EEA's Surveillance Authority. This is the case both within the framework of various UN organisations and conventions, such as the UN Convention on Labour Rights (ILO). Other relevant forums are the World Trade Organization (WTO), the European Court of

Human Rights (ECHR) and the Council of Europe. Although these international organisations and institutions do not have the same intrusive enforcement mechanisms, they are politically important in the tug of war battles with the EU and the EEA's Surveillance Authority.

This does in turn generate a question of how these new commitments to international forums shall be implemented in Norwegian law, and how this can contribute to "trumping" EEA commitments (implementation in the Constitution, the Human Rights Act, or other ways for them to become rules which take precedence). But it is a dynamic UK negotiators must boldly play on, to stall bad EEA law by turning to the very sources of that law, in which they will have had a direct part in crafting a more benevolent core draft. That will need diplomats instructed to be bold.

Safeguards

So what can non-EU EEA states do about breaches of their treaty rights? Quite a lot actually – if they have the gumption, and if they spot it happening.

(a) The Right of Reservation

The right of reservation is a legitimate right for the EFTA countries in the EEA to oppose new legislation that the EU adopts being made applicable to the EEA. Each EFTA country has in this context veto power.

Thus if Norway says no to the implementation of a new directive, then these regulations will not become part of the agreement.

Some say it is wrong to talk about a veto as we cannot prevent the EU from implementing the regulations for itself. This has however never been the purpose of veto power in the EEA. Of course, the EFTA countries could not veto the EU adopting new rules and developing cooperation for itself. But the participating EFTA countries, individually, through an independent national decision, may prevent the new directives from applying through the EEA agreement.

This gives EEA democracies a much greater say than their EU counterparts. Of course, in many policy areas, there is no EEA agreement while the EU does have a competence for its member states - which is largely met by QMV. But in the areas the EEA agreement covers, the right of veto does not exist within the EU and is replaced with majority decisions.

The EFTA countries in the EEA thus have the right to opt out of new EU legislation that EU countries do not have.

On April 10, 2011 the convention of the Labour Party agreed that Norway should use the right of reservation on the EU's Third Postal Directive. This was a historic decision. For the first time a majority in Parliament was to use the right of reservation in a specific case, and for the first time the Norwegian government reported to the EU that they had no intention of implementing a directive that had previously been decided as relevant to the EEA. This view was communicated to the EU at the EU Council meeting in May 2011.

Along with the debate on the data retention directive, the treatment of the EU's Third Postal Directive marked a crossroads in the debate on the implementation of EU directives in Norway. Every time the right of reservation has been brought up before, a clear parliamentary majority consisting of the Labour, Conservative and Progress Party has argued against it being used.

So why has the right of reservation never been used before? Over the years, this inactivity has been justified in many different ways. The warnings against the use of this right as the agreement provides have been strong, even somewhat hysterical. The EU's former ambassador to Norway, Percy Westerlund, threw himself into the debate in 2006 with what could be perceived as threats from the EU related to the EEA agreement's continued existence: "If Norway against all imagination chooses not to implement the services directive, the question of EEA's future will be held at stake."[41] The current EU Ambassador Janos Herman followed the same track, when he announced that one could not exclude the prospect of broader counter-reactions from the EU if Norway turned down the Data Retention Directive.[42]

These should be viewed as undue threats from the EU's representatives in Norway, which cannot be mandated by the provisions of the EEA agreement.

The possible effect of the use of the right of reservation is often exaggerated in political debate. It is a legitimate right enshrined in the agreement. It does not allow for counter-reactions on the part of the EU.

Nor does the world collapse if the legal right is used. The agreement's provisions on protection measures may only be used when "serious economic, societal or environmental difficulties are about to occur"; it is only the directly affected part of an annex to the agreement which may be suspended; and it is incumbent upon the parties to find solutions that do not create unnecessary problems for the cooperation.[43] Market participants will be assured of good protection in the event of suspension of the rules, through the "rights and obligations which individuals and market participants have already acquired pursuant to this Agreement continuing to exist."[44] In addition, prior agreements between the parties do not stop, so no 'gap' in the market emerges.

It has been argued that the right of reservation cannot be constantly used. But there are no people who have been calling for it. Norway has, since the existence of the EEA agreement, has accepted thousands of directives, and only in the debate of a few of these has the question of a possible reservation on the part of Norway been brought to a head.[45]

The suspicion is then that pro-EU leaders in Oslo have been thinking all along that in matters related to the Internal Market, it is the majority who decides - and the minority must acquiesce. All this was known however when the EEA agreement was negotiated. Then the question arises – does one not trust that the EU stands by an international agreement that it has signed? Would the EU lose interest in Norway if we used the right of reservation? The answer to this question is obviously no (because if

[41] *Aftenposten*, 22.11.2006
[42] *Aftenposten*, 25.11.2010
[43] EEA agreement, article 112. The problem may be exacerbated by annexes being worked on separately from main texts, complicating the use of the opt-out.
[44] EEA agreement, article 102, section 6
[45] Cf. NOU 2012:2, p246

it is Yes, then the EU is not a partner we want to be too closely associated with anyway). But in any case, this isolation is the same frightening image that the yes side has tried to conjure up in two referendum campaigns for membership in the EU.

The EU has an interest in maintaining good trade relations with Norway. The EU even has a surplus trade balance with Norway for traditional products; and it is completely dependent on imports of Norwegian gas, for example, to ensure its security of supply.

It is not only Norway that has said no to the EU. The Swiss voted no to the EEA in a referendum, but still have subsequently negotiated a series of agreements with the EU. Understandably enough - the EU is interested in maintaining good relations with its neighbours and major trading partners. Also understandably, the Commission wants to keep its arrangements as simple, and therefore as uniform, as possible (though it is not for the Commission to impose such self-interested formats on others, particularly when coming from an institution also interested in accruing power to itself).

Did Gro Harlem Brundtland mislead the Norwegian Parliament in 1992? One may question whether the right of reservation was really meant to be used when necessary. If so, then Prime Minister Brundtland led the Parliament to conclude an agreement on false premises. This is probably an argument for the agreement to be reviewed and that one should look at alternatives to the current EEA agreement. From a UK perspective though, if you are entering the EEA, it is worth entering it with a clear idea from the outset of *when*, *how* and indeed *if* you are prepared to use the EEA veto. If you are prepared to, then it may save later pains by making it clear early on.

As a net importer, you are in the UK in a strong position. If you don't use it because your diplomats and ministers are weak, you can expect the Commission to push boundaries.

(b) Pinchpoint engagement

The right of reservation both should be and should have been used several times. However, the use of the right of reservation is not the first choice. Defining a question as not being relevant to the EEA is a track that should have been pursued with much more force in many contexts, and is a tool that is becoming ever more relevant.

The assessment of relevance depends partly on the basis that was used in the EU treaties for enacting legislation, and on which pieces of legislation in the relevant area that were previously included in the EEA.[46] With the Lisbon Treaty the pillar structure of the EU has been removed and at the same time the EU is enacting more and more wide framework directives. This makes it less obvious than before which directives are relevant to the EEA and it also raises questions about which parts of directives should be implemented. The EEA Review Committee states that "it may seem to be a tendency that in cases of doubt, one has chosen to adopt legislation."[47]

As we have seen, one of the most glaring examples of the deterioration of the agreement through the assessment of relevance is the Data Retention Directive. Who would have imagined that the

[46] Cf. NOU 2012:2, p94
[47] Ibid, p95

surveillance of telecommunications and data traffic would be defined as a question relevant to the EEA? The EEA Review Committee evaluates it to the point where "if Norway at an early stage rather than [believing that it was relevant to the EEA] had quietly argued that the directive was not relevant to the EEA, there might have been support for this, and the great battle over the reservation would have never occurred".[48]

Over the years, Norway has accepted directives concerning sovereignty over natural resources (such as the Licensing Directive and Gas Market Directive). Experience shows that being compliant in a case does not contribute to the general goodwill, but rather that the screw gets tightened further at the next opportunity. In some situations, the EEA's relevance has been considered politically in individual cases, and it has come to open conflict between Norway and the EU. Such was the case with the EU's Emissions Trading Directive, in which Norway, unlike the EU, initially conceived of a system that covered most sectors and emissions. Neither the EU's comprehensive system of free allowances was in line with the vision that was originally prevalent in Norway, while in view of the measures in developing countries (which were not committed to emission reductions via the Kyoto Protocol) it was the EU that was the most restrictive.

Based on this different policy, the Norwegian authorities wanted to be associated with the EU's emissions trading plan without implementing the directive. The Norwegian authorities argued that the directive was not relevant to the EEA, but the Commission disagreed and after several years of negotiations, Norway relented. The result was a narrow quota system, where most of the permits were given out for free and the use of measures in developing countries was limited.[49]

Another issue being discussed these days is the EU's proposed safety rules for the offshore oil and gas industry – an area that the UK fought unsuccessfully to block within the EU. If you join the EEA, you will not escape this treaty creep here either.

The system for assessing the relevance, which the EFTA countries themselves have influence over, appears to be generally closed and without sufficient political leadership and control. An example which the EEA Review Committee refers to are the standard forms that the EFTA Secretariat sends out to EFTA/EEA countries, with questions about whether a new act is deemed relevant and the need for (political) adaptation texts or exceptions, technical adjustments and the need for parliamentary consent. The EFTA Secretariat gives no insight into the standard forms that are sent out and which ones are returned.[50]This is a gap the UK would need to investigate.

(c) Special National Arrangements and Exemptions

Although new regulations can be contentiously defined as relevant to EEA, there are other options besides the right of reservation.

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[48] Ibid, side 94.

[49] For further discussion of this matter, see Elin Lerum Boasson: *Norwegian Environmental Policy and the EU and EEA as a Source of Inspiration and Power Assets*. External report to the EEA Review Committee; 08/07/2011; pp19-20.

[50] NOU 2012:2, p94

The EEA Review Committee divides the exceptions into three groups;

- The exception that was achieved by the signing of the agreement,
- Exceptions (permanent or temporary) for new regulations
- Exceptions due to special circumstances.

Of Norway's last-count total of 55 exceptions (NB a full list of recent exceptions does not exist), the EEA Review Committee estimates that the majority are from the original negotiations on the EEA or from the first few years thereafter.

At the request of *Aftenposten* (Norway's paper of note) in spring 2011, the government indicated that in the period starting in 2005 it had been given exemptions from four directives (the Revised Gas Market Directive, the Tunnel Directive, the Hygiene Package and the Equality Directive), after which the EEA Review Committee estimated that only the Tunnel Directive represented a new, substantial exception.[51]

Norway has in two other cases received special provisions in EU legislation, one of which concerns a directive on the health of fish and the other concerns railway wagons, plus amendments to the Bank Deposit Guarantee.[52]

There is a general pressure on the part of the EU to lift such exceptions. Among the exceptions that are still causing contention is the prohibition of alcohol advertising on television and genetically modified organisms (GMO). However, there is no reason why Norway should allow itself to be pressured into unilaterally revoking such bans - without the possibly of getting something in return. The exceptions are part of the overall balance of the agreement.

There are good reasons why Norway should strive for national exceptions and special arrangements in several cases, in addition to our rejecting the revoking of existing exemptions. The number of exceptions for Norway (55) is significantly lower than those of our EFTA partners Iceland (349) and Liechtenstein (1056). The EEA Review Committee says the difference is almost entirely attributable to Iceland and Liechtenstein being so small that many laws do not make any sense for them, in addition to a number of the exceptions for Liechtenstein having been provided to safeguard their special relationship with Switzerland.[53]

Given the EU's scale, however, Norway cannot be regarded as a big country and there are more than enough examples of legislation from the EU that are not specifically adapted to a sparsely populated, elongated country with special challenges related to the topography and climatic conditions.

We have no doubt that many laws would not make sense if applied to the UK; your ministers should not swallow the lot hook, line and sinker. If anyone tells you that you must, it's definitely clear the EEA will be a poor place for you.

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[51] *Aftenposten*, 01.03.2011
[52] Answer from the Ministry of Foreign Affairs, 03.01.2012, e-mail correspondence with Sigbjørn Gjelsvik
[53] NOU 2012:2, p98

(d) National Adjustments

The EEA EFTA countries also have the right to make adjustments to the incorporation of new EU regulations in the EEA agreement. This is done either through negotiation of the document, or through Norway making a unilateral declaration concerning how the regulations should be interpreted and applied.

While the flexibility in implementation is relatively small (one is obliged to implement these literally), there is considerably greater latitude in the implementation of the increasing number of wide framework directives. It is up to national authorities to adapt the text and formulate national measures to meet the directive's intention.

In the Boasson Report, the EEA Review Committee described how the interpretations of the EU rules can contribute to curtail Norway's flexibility, in this case the state aid rules and Norwegian policy for renewable energy and energy efficiency. The Oil and Energy Ministry decided to promote a strict cost-effective interpretation, which is not based on the guidelines for environmental aid as such. This was overturned by the ESA. But a different outcome followed over carbon capture and storage where it was primarily politicians and civil servants who had dialogue with the ESA.[54]At the heart of this lies a tension between the national civil service, which like to further gold plate Commission documents and to ensure complete adherence, and some politicians who may be more keen to avoid costly rules (especially ones not in the Commission's original plan, but introduced domestically…). It can also be argued that most politicians, through their low involvement in the implementation of EU environmental policies, have given the civil service increased importance in this process.[55]That suggests EEA membership is unlikely to allow UK democrats the chance to fully 'take back control'.

[54] Elin LerumBoasson: *Norwegian Environmental Policy and the EU EEA Agreement: Source of Inspiration and of Power*. External report, 08/07/2011, p23.
[55]Ibid, page 28

Part Three: What You Need to Know About the Oversight

When the EU gets new members the EEA is also changed. With the latest rounds of expansion of the EU, legal proceedings have been brought because those countries Norway has bilateral trade agreements with have been subject to the EU's tariff arrangements. Thus, these countries no longer have any guarantee that they can still take advantage of the fish that Norway can still sell duty free to the EU market. For Norway's part, it cannot be documented that increased tariffs to these countries has led to lower exports, either in volume or value.

Some people use these examples as an argument that Norway to an even greater extent should be subject to a system of external legal oversight. But as we have already seen, the legal and rule-based system through which we are connected to the EEA is by no means any guarantee that Norwegian interests are safeguarded. A core feature of the problem has been over how the EFTA Surveillance Authority or ESA (which monitors compliance with EEA rules), and how its judicial associate the EFTA Court, have worked.

Box I: Official Definitions

The EFTA Surveillance Authority (ESA) monitors compliance with the Agreement on the European Economic Area (EEA Agreement) in Iceland, Liechtenstein and Norway, enabling those States to participate in the Internal Market of the European Union.

The EFTA Court has jurisdiction with regard to EFTA States which are parties to the EEA Agreement (at present Iceland, Liechtenstein and Norway). The Court is mainly competent to deal with infringement actions brought by the EFTA Surveillance Authority against an EFTA State with regard to the implementation, application or interpretation of EEA law rules, for giving advisory opinions to courts in EFTA States on the interpretation of EEA rules and for appeals concerning decisions taken by the EFTA Surveillance Authority. Thus the jurisdiction of the EFTA Court largely corresponds to the jurisdiction of the Court of Justice of the European Union over EU States. The EFTA Court consists of three Judges, one nominated by each of the EFTA States party to the EEA Agreement. The Judges are appointed by common accord of the Governments for a period of six years. The Judges elect their President for a term of three years.

Dynamic Interpretation

A core problem lies in the scope of the ESA's remit. As you have found within the EU, the definition of 'competition' opens the door to an expansive court if its judges on a given day are ambitious.

The EEA, however, sets both limits for participation in the existing EC cooperation at the time of signing and the acceptance of future legislative development. The ESA and the EFTA Court have been given the authority to interpret, but this right is not absolute. It then becomes a political issue to make sure to monitor the monitors.

If one disagrees, one can for example take up the matter at the EEA Council for clarification between the parties.

Some seem to think that once you have accepted the EEA as a dynamic agreement, then you have to accept everything the EU defines as part of this dynamic. There is no reason to. The agreement contains provisions that set clear limits on the ESA and the EFTA Court's ability of dynamic interpretation. A major role here is Article 6, which states that

> *the implementation and application of the provisions of this agreement, and subject to the future development of case law, the provisions [...] shall be interpreted in accordance with the relevant rulings that the EC Court made prior to the signing of this agreement.*[56]

While the ESA in cases where the legal situation in the EU has changed, relatively consistently relate to legal development after the agreement was signed, the agreement holds that we should interpret in accordance with the relevant rulings from before the agreement was signed. This is a logical consequence of Article 93 of the Norwegian Constitution, which allows for ceding sovereignty in only a limited area to an organization Norway has joined.

It was stated further with the EEA's founding that

> *interpretations made by the EC court after this date will therefore not be legally binding on member states. The objective of uniformity nevertheless implies, among other things that the Court and the EC court as mutually as possible comply with other's decisions even after the time of signature*.[57]

Here it is assumed, in other words that the two courts as mutually as possible apply the other's decisions - not that decisions from one court shall be unilaterally assumed by the other. This is certainly how the second Bondevik government interpreted the wording.So while Norway accepted the *acquis* as it stood in 1992, for future regulation a right of reservation applies, a right that the EU member states notably do have not.

So the issue over the relevance of ECJ case law is more complex, a detail the UK needs to be aware of.

In formal terms, there is no commitment to complying with later judgments. In practice, it has been long established (including by the Norwegian Supreme Court) that the later judgments of course carry great weight. The reality is that ongoing case law is of great importance for the interpretation of the EEA agreement, and thus the extent of Norway's obligations."[58]Those decrying this detail yet still advocating joining the EEA might reflect on the non-existent amount of national input into ECJ case law by EU member states as well.[59]

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[56]EEA agreement, article 6
[57]Proposition No. 100 (1991-1992), p319
[58] NOU 2:2012, p235
[59] It is worth caveating this with an important observation: EEA states are increasingly being excluded from becoming involved in ECJ cases as interested parties unless there is unambiguous relevance to the EEA Agreement.

More Catholic than the Pope?

From time to time there has been the debate in Norway about whether the ESA is more Catholic than the Pope; in other words, if the ESA is rigorous in its monitoring of Norway through the EEA than the Commission is with EU member states.

The EEA Review Committee discussed the key issues on the basis of a quantitative analysis of the number of ESA cases against Norway to the number of Commission cases against Sweden. It is however not a very precise analysis. As the EEA Review Committee itself points out, Norway is very conscientious in its compliance with its EEA obligations. Thus, the Norwegian authorities themselves might better fit the label of "more Catholic than the Pope".

That being the case, with all that gold plating of EU texts there is basically less need for the ESA to take up cases against Norway.

When the ESA periodically has been taken to task, it has a lot to do with how they have acted in specific cases. One must therefore look to the content of the issues that the ESA has taken up on its own initiative. To what extent is it about, for example, Norway's compliance with obligations under the agreement, or whether it has to do with the development of regulations based on court-created case law in the EU? Moreover, one must look at whether the content in the cases that ESA takes upmeans that Norway will be denied the ability to maintain rules that have an equivalent in (individual) EU member states.

The assessment of the ESA and ESA's role is also about how they proceed in specific cases. The ESA has sometimes been criticised in some cases for actually negotiating with Norwegian authorities about which solutions should be selected. This is outside their mandate.

The ESA's mission is to identify the Norwegian legislation that is contrary to its EEA obligations. It is not up to the ESA to have any opinion about which laws and regulations Norway should implement in order to meet these obligations.

Whitehall might want to bear that detail in mind.

The "Ask Permission" Society

After debate in Norway over several years, the majority in Parliament approved in the spring of 2009 the implementation of the EU Services Directive in Norway. In connection with the implementation of the services directive, the Norwegian authorities were obliged to report to the ESA on all national authorization systems and requirements for service providers.

As a result, wherever Norway is to introduce new national requirements for the provision of services, it must now be reported to the ESA with an explanation of why it is considered necessary for the public interest.

Although the obligation to "ask permission" as a EEA member is less extensive than that of the countries in the euro zone, which must submit their state budget proposals to Brussels for review

before such are presented in the home country, it is however, a clear example of how the grip on national sovereignty has been tightened in the EEA.

In parallel with this development has been the reduction of the independence of the Norwegian courts. As with the EU system, national courts are hotwired into the EU's legal system and are expected to be subservient to a higher judicial order.

But this also has included references to EU law as a source of law in case areas in which Norway is not bound to do so. As the EEA Review Committee puts it, "there are also examples in which Norwegian courts have on their own initiative taken EU's legal solutions into consideration, including on tax matters."[60]

This is reason to take a critical look at this practice, especially if it is spreading. One such example is the Supreme Court ruling in February 2012, involving helicopter pilots' claim that the employer cannot demand that they resign at the age of 60. The Supreme Court deferred the issue in 2010 pending the decision in the so-called "Prigge Ruling" of the EU Court. In that case, the Lufthansa's pilots' claim that they could continue to fly until age 65 was upheld. The Court had found that an age limit was in conflict with EU provisions on age discrimination, and that the age limit could not be justified by safety or health concerns as long as the certification rules allowed flying until the pilot turns 65. The judgment subsequently provides a basis for a review of a number of age limits in Norway.

When the Supreme Court used the Court's decision as a basis for its own decision, and set aside a collective agreement in aviation, this was not based on a commitment by Norway under the EEA agreement. EU age discrimination rules are basically beyond the scope of the EEA, and Norway had not been obliged to implement them.

Middle Age Spread

How far can the current interpretation of the EEA go before it becomes unconstitutional, in that a *de facto* surrender of sovereignty beyond a reasonable restricted area has occurred?

The EEA agreement's limitations were not inserted for fun. The text was designed to meet the Norwegian constitution's requirements and to set out a political reality. If it is considered to mean that other articles of the EEA override any limiting clauses, a "legality check" of the EEA agreement should be done against the Norwegian Constitution's Articles 1, 26 and 93.

Quite where this leaves the UK with its unwritten Constitution, we leave to your interpretation. As least we have some measure of conceptual safeguard. A difference exists however in that Norway is part of the Schengen zone and there is a conflict of interpretation over how those elements are covered by EU case law. That at least is an element you will not have to factor in.

All told, we might though summarise the problems arising from jurisdictional issues as falling into the following categories;

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[60] NOU 2012:2, p209

• The EEA agreement article 6 states that the EU Court's decisions prior to signing the EEA agreement (May 1992) shall be the basis for the interpretation of the agreement. In practice, it has long been established (also by the Norwegian Supreme Court) that later judgement of course carry great weight;

• When a national court in the EU obtains an interpretation ruling from the EU Court, this is binding. When a Norwegian court obtains a similar interpretation ruling by the Court, it is formally only "advisory." The difference means little or nothing in practice, because there is no political will or judicial interest in applying sovereign interests;

• In the EU, the common EU law has precedence over national law, in the event of any conflict. For formal reasons the EFTA states did not wish to introduce a similar principle in the EEA agreement. But we agreed on a formally somewhat more cautious form of primacy, which was embodied in a protocol to the agreement and then implemented in the EEA act in Article 2. The difference means little or nothing in practice. In the event of conflict between implemented EEA and "normal" Norwegian law, Norwegian courts as a clear rule let the EEA law prevail, and let Norwegian law yield;

• In the EU, Regulations have a direct effect on national law even if they are not implemented by the national legislature. Under the EEA agreement, all laws must formally implemented by Norwegian legislation before being considered as applicable law. There is no so-called "direct effect". But through case law, principles have developed that largely fill the same function. First, Norwegian law as far as possible is to be interpreted in accordance with non-implemented legislation. Second, the state can be financially liable if someone suffers losses due to lack of implementation;

• In cases involving competition the EU Commission may adopt damning decisions against Norwegian companies, and impose large fines on them. Formally, the decision will not be enforced in Norway. The obligation to pay applies nonetheless and will also be enforced against properties companies have in EU countries;

• According to the agreement on Norwegian participation in EU response forces (the Nordic Battle Group), the Norwegian authorities must formally give consent on the day the marching orders come;

Many of these issues fall down to a lack of political, diplomatic, judicial or civil service will to use rights that legally reside still in Oslo. They have been withering through lack of use.

So perhaps before thinking about joining the EEA, people should ask themselves whether their British counterparts will be more robust in sticking up for their interests, or if they are more likely to be cut from the same cloth.

Part Four: Welcome Back to Your Old Problems

Why do the Norwegian Authorities Allow the EU to Set the Agenda?

The EU corporately likes to do things "the easy way."[61] This is not necessarily by any means the most democratic way; or the most respectful way in terms of national sovereignty. It is the way that gives it the most direct role, the widest powers, and the fewest speed bumps.

How the EU interprets the EEA probably has a lot to do with that they live in an "EU world", where details of the EEA agreement's provisions are not always the most prominent. As the EEA Review Committee highlights, it is mostly handled by the EFTA Secretariat, the EFTA countries and the ESA and the EFTA Court, and only a few people in the EU's Foreign Service (EEAS) handle the daily EEA business and the EU's relationship with EFTA countries.[62]

It is therefore the responsibility of the non-EU national authorities to ensure that the agreement is managed in line with the assumptions, and in line with that country's constitution. That there is unused flexibility in the EEA is without a doubt. Then the question becomes: why not utilise this flexibility to a greater extent? Is it the result of a deliberate policy, or could there (also) be other explanations?

It probably has to do with several factors. First there is the 50-year-long EU battle in Norway as a backdrop. The forces that are most committed to get Norway into the Union perceive differences between Norwegian practices and EU practices to be a problem because that in turn could be used as an argument against membership.

Secondly, it is too often part of our Foreign Ministry culture to quietly give in when the EEA management leads - at the expense of sectoral interests and Norway's main political interests. A historic lack of challenge has generated an interpretation of reality that exists in the ESA, the EFTA Court and the EU in terms of what Norway's obligations are under the EEA.

Lack of resources -whether political, economic or legal - to take up the fight, and if necessary take the case to the top of the EFTA Court and to be prepared to pay the costs of a loss, can lead to "good causes" being shelved.

Another factor that comes into play is those who see a political advantage from the developments that occur when a reinterpretation of the EEA is pushed forward. They see that this can win support for political solutions that they could otherwise hardly dream of – and furthermore the decisions are made irreversible as long as Norway is in the EEA. This was for example a key motivational factor for the Progress Party for entering the EEA agreement in that time.

The EEA thus becomes a kind of superglue for solvent abusers in the lobby world. It is much more visible in the EU system with its vast lobby industry, but applies to the EEA as well.

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[61] Excluding the Council, at best.
[62] NOU 2012:2, p300

Policy Magnet

It is a paradox of the EEA structure that we in Norway send some of our best officials and lawyers to the EEA system (the ESA and the EFTA Court), for meticulous monitoring of elements in Norwegian legislation "with EU glasses on" which can be thought of as having an anti-competitive effect.

There is a reason for this: Brussels is the new cock-fighting pit for arguments that determine major national policy.

Most complaints to the ESA against Norway come from Norwegian citizens and businesses. This leads in many cases, to a pure Norwegian tug of war with the Norwegians on all sides of the table - where players from the EU, in the best case, are represented on the tribunal. In cases where there is a question of whether Norway will comply with the commitments agreed upon in the EEA agreement, this is not necessarily problematic. But the involvement of private Norwegian players and agencies also tends towards changing Norwegian laws and regulations, and in areas where a broad political majority in Norway wishes to maintain Norwegian legislation.

Thus, the EEA is also a lever for change in national policy, for what there otherwise would not have been political support (at least not in the foreseeable future).

The NHO (Confederation of Norwegian Enterprise) has long committed itself to get the regulations on wages and working conditions in public contracts repealed, and has expressed willingness to take it up in the EEA system if the government does not give into the ESA. Similarly, we have seen that players within the NHO system (such as the Private Child Care Association) has gone to the EFTA Court to argue its case when they haven't got political support in Norway for their demands. The general application of collective agreements is another example of the same, where the NHO instead of showing loyalty to the three party cooperation in employment was trying to use the EEA as a lever for political changes for which there otherwise would not be majority support in Norway.

Such a development is not just a problem for the labour movement, but for the entire Norwegian democracy.

The KOFA

According to the EEA Review Committee the administrative body that gets the most EU/EEA legal cases is the Complaints Board for Public Procurement (KOFA).[63] The reason for the establishment of the Complaints Board was to streamline the public procurement regulations and facilitate the contractor's right to appeal.

According to KOFAs own overview, in its first decade following its establishment in 2003,it handled more than 2,000 complaints concerning the processes of public procurement. Just under 800 of these saw rules violations confirmed.[64]

[63] NOU 2:2012, p204
[64] KOFA statistics online.

The EU's legislation on public procurement is extensive and is becoming even more so. We note that the UK is by far amongst the best practitioners in putting public contracts out to tender online, so they can be bid for by businesses based in other member states. We note that some Eurosceptics in the UK have criticised this one-sidedness.

The lesson from public procurement in Norway may suggest that you are unlikely to find your civil servants encouraged to be more robust if you shift to EEA terms. Civil servants who are rule followers (like ours) will continue to apply the rules; those in other countries that are more selective (naming no names) will not.

The Gas Market Directive and the Gas Negotiating Committee

As a fellow North Sea energy state, you may also reflect on Norway's case history in that field as well. Take the Gas Market Directive, and the abolition of the Gas Negotiating Committee. As far back as 1988 the Commission believed that a number of conditions in the West European gas market were contrary to the principles of the internal market.[65] This was followed by the development of three directives with the goal of liberalising the gas trade.

The goal was to get rid of the monopolies in the gas trade, in order to increase competition and lower prices. The consequence of this is that it has become less attractive to invest in large, long-term, but costly projects, and this in the long run will threaten a secure supply.[66]

The Gas Negotiating Committee was set up to contribute to gas fields being utilised more efficiently and to keeping prices stable. Under pressure from the EU, this committee had to be shut down, because it was a barrier to free competition in the gas market. The Gas Market Directive and the closure of the Gas Negotiating Committee has led to estimated losses of up to 9 billion NOK a year.[67]

Clearly, the Norwegian energy supply model and the UK one are different. Norway has a state supplier and has resolved to make a more strategic use of the revenue that has been brought in. But the principle remains that the Commission's eye on the North Sea remains a risk even outside of the EU.

Consider then how the EU and Norway can easily have conflicting market interests. The EU is the buyer, and wants lower gas prices, while Norway is the seller and wants higher gas prices. In addition, Norway has focused on a more long-term use of resources, in which all the fields, in principle, are be used to the fullest, while the EU has shorter-term goals of cheaper gas, and therefore has not taken into account the efficient use of infrastructure and gas deposits. This is without even reflecting on the dynamics arising through policies on renewables, security of energy supply, or shale…

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[65] Austvik, Ole Gunnar and Dag Harald Claes: *EEA and Norwegian Energy Policy*. External report, 2011 p23

[66] op. cit., p27

[67] *Today's Business*, 01/31/01

Ultimately this has resulted in the Norwegian regulations having to be changed. Particularly serious is the fact that not even in the energy sector, the largest industrial concern, has it been possible to stop unsolicited policy change under pressure from the EU.

In a significant body of cases, Norway has been forced to accept the originally unwanted directives; in some cases we have managed to circumvent the consequences of changing the rules so that the consequences for Norway would be reduced. Many have referred to these examples to show what possibilities Norway has for maintaining desirable regulations in spite of the provisions in the EU and the EEA. Even more clearly though, these examples show how in many cases we have to fight to maintain our own rules and regulations.

Club Fees

Originally, it was agreed that Norway would pay an annual 200 million NOK a year over five years. During negotiations on the expansion of the agreement, Norway accepted that the annual cost to the EEA would increase in stages to its current level of nearly 3 billion NOK annually.

We still pay, in other words, in 2016 – a decade and a half after the payment was to cease - an annual EEA membership fee which is currently around 15 times greater than in the agreement's first year.

This cost is excessive.

It appears in many cases also hardly appropriate to channel funds through the EU and its budget, instead of establishing direct country-to-country and people-to-people cooperation.

It is difficult to imagine that there won't be any significant change (and certainly not a decrease) in "membership dues" as long as Norway is in the EEA.

When it was signed, both parties stated that the agreement would ensure "the greatest possible mutual benefit" and that cooperation was of a "balanced character." For that to be true and for it to be mutually advantageous, it should not be paid for by the one party.

Our recommendation to anyone looking at joining the EEA is to strip off those contributions that our past governments unwisely signed up to in order to curry favour with the European Commission. A major part of the 'donatives' are not part of the EEA framework terms at all.

The EEA Grants are often referred to as Norway's "membership fee". This is misleading since Norway does not pay to access the Single market. The aim of the EEA Grants is to reduce social and economic disparities in the EEA and to strengthen the bilateral cooperation with the beneficiary states.

There is no obligation in the EEA agreement for Norway to provide such funding. The grants are negotiated separately with the EU, limited to five or seven year programmes. In addition to the EEA Grants, Norway has funded a parallel scheme since 2004: the Norway Grants.

But the UK can negotiate something quite different, if it wants to. That will save you a few billion Pounds you would be better spending and accounting for yourselves.

Conclusion: Lessons from Norway

The above-mentioned cases show how the EU uses all means possible to negotiate results within the EEA system that are most favourable for it. Norway does not do the same. Instead of the EEA agreement serving as an agreement between equal parties, we have an agreement where one party sets all the premises and may even go so far as to prohibit the other party's negotiating basis, as the EU did in gas negotiations.

No matter what kind of association Norway chooses to have with the EU - or for that matter, the United Kingdom should it still choose to explore the EEA route as a last-minute default - it is important to be aware of the costs and the real alternatives to the current agreement.

The undesired adaptations Norway has made at the request of the EU has not led to milder negotiations by the EU subsequently; on the contrary, we have ended up in a relationship of unbalanced power in which the EU requires Norway to make even more extensive adaptations, including in areas that do not really fall under the purview of the EEA.

It falls to other studies to set out the remarkable opportunities that exist for the UK outside of the EU, in a much simpler and looser trading agreement with the EU that more basically tackles avoiding Non Tariff Barriers (NTBs), and keeping unnecessary tariffs to a minimum.

Those talks may take some time. Or they may not.

Some will see the EEA as a possible bridge to transition for a UK, especially for a UK that starts fully compliant with EEA rules.

But EEA membership carries costs and risks, especially for a country steeped in administrative buy-in by an honest civil service, trained to rigidly comply with the EU system and rules. For any country that has the impetus and momentum the UK now has, the EEA risks being a mire rather than a springboard.

Our view here is that we would welcome you to the EEA as a travelling guest. But we would welcome you to the freedom and opportunities offered by the option of ‘just EFTA’ much more.

About the Lead Author

Helle Hagenau is Head of International, Board member, and former Secretary General of *No to EU* in Norway.

She has been the Secretary General of TEAM – The European Alliance of EU-Critical Movements – and of the British organisation Trade Unions Against the Single Currency.

In the late 1990s, she worked for six years in the European Parliament.

Hagenau works as Secretary General of the Norwegian Association of Dental Technicians, and has a degree in History.

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