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**The EEA Agreement; a sustainable legal model?**

**- The challenge of homogeneity**

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# 1 Introduction

## 1.1 The scope of study and current interest

This study will aim to assess the degree to which the Agreement on the European Economic Area<sup>1</sup> is a sustainable legal model for the future. The parties to the Agreement are the European Union<sup>2</sup> and the members of the European Free Trade Association.<sup>3</sup> The agreement which gives the EFTA states Iceland, Liechtenstein and Norway access to the EU internal market, has developed in a manner which could not be foreseen when it was signed in 1992. This is especially visible regarding how the EEA Agreement is interpreted in compliance with EU law, and the results will be examined in this study.

The scope and functioning of the legal criteria in the EEA agreement is of relevance today for multiple reasons. First of all, Norway has as the first EFTA State<sup>4</sup> evaluated the EEA Agreement to discover how the EEA Agreement is serving national interests. Liechtenstein has started a similar process as well.<sup>5</sup> As a reply, the EU will do the same.<sup>6</sup>

Secondly, for the first time since 1995, changes within the EFTA block may happen. In 1995, Finland, Austria and Sweden left the EFTA, and since then the member states have been Norway, Iceland and Liechtenstein. Currently, Iceland is negotiating for EU membership and may leave the EEA agreement. Meanwhile, other European states have examined the EEA agreement when assessing their own relationship with the EU. The degree of state sovereignty may be decisive for their view regarding the legal structure of the EEA Agreement and thus if they want to participate or not. The question arises as to whether the EEA agreement is a judicial model strong enough to survive these present tendencies. This demands an examination of the main legal characteristics of the agreement.

Thirdly, the overreaching principle of legal homogeneity within the EEA Agreement will be put to the test if the '*right of reservation*' in article 102 is used for the first time in terms of the Third Postal Directive.<sup>7</sup> Whilst the process may highlight the sometimes contradictory nature of the principle of legal homogeneity and state sovereignty, the outcome may be vital to the future of the EEA Agreement. These are some of the aspects that the study will cover, and the topic to be approached is:

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<sup>1</sup> Agreement on the European Economic Area, *Official Journal* No L 1, 3.1.1994, p. 3, hereinafter the 'EEA Agreement'

<sup>2</sup> Hereinafter the 'EU'

<sup>3</sup> Hereinafter 'EFTA'

<sup>4</sup> Norway: NOU 2012:2 '*Inside and outside*' (Official report on the assignment from the Norwegian Ministry of Foreign Affairs)

<sup>5</sup> Council Conclusions on EU relations with EFTA countries, 3060<sup>th</sup> General Affairs Council meeting, Brussels 14<sup>th</sup> December, para 34

<sup>6</sup> Council Conclusions on EU relations with EFTA countries, 3060<sup>th</sup> General Affairs Council meeting, Brussels 14<sup>th</sup> December, para 34-36

<sup>7</sup> Joint Press statement '*Informal EU-Norway consultations on the 3rd Postal Directive*'

*Does the principle of homogeneity and lack of legal influence impair the legal structure of the EEA Agreement?*

In order to answer this question, the outline of this study will contain assessments of some legal aspects of the EEA agreement where homogeneity may impair its legal function. Although it was clear from the beginning that the EEA Agreement included a transfer of a set of limited powers to the EFTA institutions<sup>8</sup>, no powers were to be transferred to the EU organs. Firstly, the study will thus assess the extent to which EU constitutional principles are present in the EEA Agreement. The EFTA States shall be exempted from this sort of EU integration, having chosen not to become members of the EU. In this evaluation the interpretation of the EFTA Court will be of vital importance.

Secondly, the study will assess article 102 of the EEA agreement. This article regulates the amendment procedure of the EEA Agreement. This article will also serve as an example for the different comprehensions regarding the balance of the principles of sovereignty and homogeneity. Two practical examples will be given in order to provide different angles of the comprehension of this procedure.

In the third section, to what extent the EFTA States may influence the EU legislative process will be examined. The lack of influence is a criticised feature of the EEA Agreement in the EFTA states, and it is suggested that the influence is not sufficient to retain the sovereignty of the EFTA States. The influence given through the EEA Agreement will be assessed in addition to other channels of influence, in order to give a complete presentation as necessary within the frames of this research. Where examples from an EFTA State are beneficial, it will be from a Norwegian view. This is because Norway is the first EFTA State that has completed its review of the EEA Agreement, as well as decided to use the '*right of reservation.*'

The fourth section will examine how other European States view the EEA Agreement. For third parties, the legal function of the agreement is of vital importance in an agreement which aims to integrate the contracting parties into the legal structure of the EU. Thus, the balance of homogeneity and sovereignty will be decisive, as the main difference between an EU member state and an EFTA/EEA state is the transfer of legislative powers. Furthermore, the participation of new contracting parties to the EEA Agreement may be important for its sustainability.

Last, there will be suggestions on how to overcome those aspects that weakens the legal function of the agreement, in order to have a sustainable EEA agreement.

This study will not cover the influence and consequences of the four freedoms in the EFTA/EEA states, nor the degree to which the EEA agreement has been beneficial for the contracting parties, even

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<sup>8</sup> As an example, the EEA Agreement had to be incorporated into Norwegian legislation through the Constitution article 93, which allows such a transfer to an organization where Norway is a *member*.

though this is also decisive regarding future participation in the Agreement. Alternatives to the EEA agreement will not be a substantial part of this paper, despite this being closely related. The focus of this study is rather improvements within the present structure due to the fact that neither Liechtenstein nor Norway has sent signals of withdrawal.

## 1.2 Key concepts and definitions

Switzerland is also a part of EFTA, but not to the EEA Agreement. As the topic is the EEA Agreement and its contracting parties, the term '*EFTA State*' will be used for Liechtenstein, Norway and Iceland.

In the preamble to the EEA agreement, the objective is defined as a '*homogeneous European Economic Area*'. Homogeneity means identical. Thus, rules within the EEA shall have identical application, meaning in this regard that there shall be no legal distinction between EU member states and EFTA/EEA states. The aim of homogeneity is also visible in the EEA agreement article 6. According to the latter article, the interpretation and application of the Agreement by the EFTA Court must be done '*in conformity with the relevant rulings of the Court of Justice of the European Communities*'. Thus, the EFTA Court must respect relevant rulings of the ECJ in order to ensure homogenous application of the EEA agreement.

Another governing principle in the EEA Agreement is the sovereignty of the EFTA/EEA states. Sovereignty includes having self-governance, being independent and being its own permanent authority. Sovereignty is a power possessed by a state in its ability of being a state. The EFTA/EEA states remain sovereign as they have not formally transferred legislative powers to the EU organs, as is the case for the EU member states.

## 1.3 Historic background

The European Free Trade Association (EFTA) was founded in 1960, under the Stockholm convention, between Norway, Denmark, Portugal, Great Britain, Switzerland, Sweden and Austria.<sup>9</sup> The background for the establishment was to create a trade partner to the European Community (EC) for those European states who did not want to become EC members. In 1977, EFTA consisted of 7 states; Iceland, Switzerland, Finland, Austria, Sweden, Liechtenstein and Norway, and in comparison with EC's 9 member states<sup>10</sup> there was an equal balance between the two blocks. In 1989 Jacques Delors,

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<sup>9</sup> NOU 2012:2 '*Inside and outside*' p 46

<sup>10</sup> Ibid p 47

president of the EC Commission, formally announced the idea of a structured partnership with EFTA, based on '*common decision-making and administrative institutions... to create a dynamic and homogenous European economic space*'.<sup>11</sup> The prime ministers of the EFTA States then gathered in Oslo, Norway to discuss an answer.

As the European Community was planning the internal market, the EFTA States realized that they could not afford to be left out. The Norwegian Prime Minister had argued to the Norwegian *Storting* about the necessity to strengthen the cooperation with the EC and the problems that would otherwise occur.<sup>12</sup> EFTA was already trade-dependent on the EC; between 1972 and 1986, intra-EFTA imports decreased from 15.5 % to 13.3 %, while EFTA imports from the EC had increased from 59.4 to 61.1 %.<sup>13</sup> The development continued, and in 1992, for example the Norwegian export of oil and gas to the EC represented 2/3 of the oil and gas export in total.<sup>14</sup> The dependence on the EC market and the risk related to being left out of the development, increased simultaneously.

The EFTA States demanded exemptions and influence, but few of them were accepted.<sup>15</sup> According to the NOU 2012:2, these demands should be seen as purely tactical moves,<sup>16</sup> though such demands are reasonable for a state who seeks participation in an intergovernmental agreement. As a compromise, the parties stated in a joint declaration that '*this framework should inter alia respect in full the decision-making autonomy of the parties*'.<sup>17</sup> During the process, the EC was clear on the fact that they would not give up their single and independent right to legislate, and that the EFTA States were supposed to take over all *Aquis Communautaire* (aquis).<sup>18,19</sup> Due to the nature of EC law, sharing the legislator competence is not a legal possibility. As a result, no transfer of legislative powers was given from the EFTA States to '*any institution of the European Economic Area*', according to the preamble of Protocol 35 to the EEA agreement.

The negotiations between the EU and the EFTA States started in June 1990. The discussions regarding influence and exemptions contributed to a change of the EFTA view on the status of the agreement.

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<sup>11</sup> EFTA commemorative publication '*15 years EEA agreement European Economic Area 1994-2009*' Extract from Delors speech to the European Parliament 17th of January 1989 p 11

<sup>12</sup> St.meld.nr. 61 '*Norge, EF og europeisk samarbeid*' (1986-1987) referred in NOU 2012:2 '*Inside and Outside*' p 49

<sup>13</sup> Cedric Dupont '*The Failure of the Nest-Best Solution: EC-EFTA Institutional Relationships and the European Economic Area*' Chapter 4 p 9  
<http://www.princeton.edu/~smeunier/Cedric%20Dupont,%20Chapter%204,%20Aggarwal%20Institutional%20Design%20book.pdf> accessed 23.03.2012

<sup>14</sup> NOU 2012:2 '*Inside and outside*', p 60

<sup>16</sup> Ibid p 62

<sup>17</sup> Joint Declaration following the EFTA-EC ministerial meeting (Brussels December 19<sup>th</sup> 1989) p 25 Joint Declaration following the EFTA-EC ministerial meeting (Brussels December 19<sup>th</sup> 1989)

<sup>18</sup> The term within the EU means 'the EU as it is – in other words, the rights and obligations that EU countries share' [http://europa.eu/abc/eurojargon/index\\_en.htm](http://europa.eu/abc/eurojargon/index_en.htm) accessed 23.03.2012

<sup>19</sup> NOU 2012:2 '*Inside and outside*', p 52

During the negotiations, the view from many of the EFTA States changed from seeing the EEA Agreement as a permanent agreement to a temporary agreement on the way to full membership.<sup>20</sup> Jacques Delors later stated that his speech in 1989 supported a temporary solution on the way to membership.<sup>21</sup>

The negotiations lasted until October 1991. When the Agreement was accepted in the Norwegian *Storting* on May 15<sup>th</sup> 1992, the Minister of Trade, in contrast to the previous statement of Jacques Delors, acknowledged that the EEA agreement still could be an independent alternative, in addition to a foundation for further integration towards full membership.<sup>22</sup> Against this background, the EEA agreement was signed in May 1992 in Porto, Portugal.

The idea was to extend the internal market to comprise the EFTA States, meaning that EU law should also apply for the EFTA/EEA States. Meanwhile, already in the 1960's, the EC court had established the doctrine of direct effect<sup>23</sup> and supremacy<sup>24</sup> of EC law, principles enforcing the supranational character of the EC. As the EEA agreement was an intergovernmental agreement, these principles were not applicable for the EFTA States. The EEA Agreement was EU law without certain characteristics of EU law. The EFTA States treated international law according to the principle of dualism, which requires that international law must be incorporated into the national legal system in order for it to have effect. This was also the method to be used for the EEA agreement. The latter is *the opposite* of direct effect, which requires a monistic approach.

Until this point the character of the agreement was an international one, originally to be interpreted according to the Vienna Convention. This procedure was left out from the beginning. The agreement was both to be interpreted according to the principle of homogeneity and at the same time respecting the status of the EFTA/EEA states as sovereign. Consequently, the EEA agreement did not fall into any existing category of an international agreement. Some years later, in the EFTA Court case of '*Sveinbjörnsdóttir*'<sup>25</sup> the EEA agreement was characterized as a an '*international treaty sui generis which contains a distinct legal order of its own...less far reaching than under the EC Treaty ... the scope and the objective of the EEA Agreement goes beyond what is common for an agreement under public international law*'.<sup>26</sup>

#### 1.4 Legal nature and effects of the EEA agreement

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<sup>20</sup> Ibid p 55

<sup>21</sup> Ibid p 51

<sup>22</sup> Ibid p 60

<sup>23</sup> Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1

<sup>24</sup> Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585

<sup>25</sup> Case E-9/97 – '*Erla María Sveinbjörnsdóttir v Iceland*' [1997] EFTA Court Report 1998 p 95

<sup>26</sup> Ibid para 59

As the EFTA/EEA states are sovereign, the EEA agreement is as a starting point an international agreement. As all the contracting parties to the agreement are dualist states, international legislation must separately be made a part of the national legislation in order for it to apply. This is in contradistinction to the EU member states, where monism applies.

According to the EEA agreement article 7, there are two possibilities when integrating EU law into the national law of the EFTA/EEA states. According to article 7a, an '*EEC regulation*' shall be made part of the internal legal order. A regulation is binding in its entirety. In Norway the implementation is secured through reference, according to the '*EEA act*'<sup>27</sup> § 1. There will be one sentence stating that the EU regulation applies as national law, in its original version. In addition to regulations, the EEA agreement is incorporated by reference. The advantage of this method is the elimination of differences in the national translation. Furthermore, it is easy to identify EU law, making the EU impact more visible. The latter argument also works as a disadvantage; as EU law stands out from the national legislation, EU law receives the status as foreign law. This may contribute to reluctance for people in general to accept EU acts as a part of national legislation. If the reference method was used for all amendments to the EEA agreement, the quantity of EU law in the national legislation would have become visible, which could have contributed to a more correct perception of the influence the EU has in the EFTA/EEA states today.

The EEA agreement article 7b states that members may choose the incorporation method regarding an '*EEC directive*'. In Norway this is done by translation of the EU act. This is a beneficial method for directives, because directives are binding only as to the aim. As long as the translation is loyal to the directive and clear in its choice of words,<sup>28</sup> the tools and methods are free to be decided. As a result, some directives are transposed as law and others as administrative regulations. The negative aspects of this method, is that the visibility of what is originally EU law is not clear, despite some laws having footnotes to the original EU directive.<sup>29</sup> When one cannot easily see the contribution of EU law into the national legal system, the debate regarding the EU is dependent on what the media and politicians publicly will discuss. On the other hand, the nature of EU law is not to distinguish itself from the national legal system as international law, but to form part of the national legal system. In the period between 1994 and 2010, 6462 new regulations and directives have been incorporated into Norwegian legislation.<sup>30</sup>

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<sup>27</sup> LOV 1992-11-27 nr 109: '*Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde*'.

<sup>28</sup> NOU 2012:2 '*Inside and outside*' p 121

<sup>29</sup> NOU 2012:2 '*Inside and outside*', p 121 for more details

<sup>30</sup> NOU 2012:2 '*Inside and outside*', p 793

## 1.5 Problematic features of the EEA Agreement

A consequence of the principle of dualism is that the EEA Agreement is formally treated as other international agreements by the EEA/EFTA states. However, one problematic issue is that some decisions by the EFTA Court imply that the principles of direct effect and supremacy, both aspects of the EU's supranationality, have been used in order to respect the aim of homogenous interpretation. This is not compatible with the status of the EFTA States as sovereign. The use of direct effect and supremacy may influence the agreement's sustainability as well as the possibility for other states to join the agreement.

Another issue criticised by the EFTA/EEA citizens is the lack of influence in the EU legislative process. Despite the EU being sole legislator, the EFTA/EEA should as sovereign states, have influence in the legislative process. However, in the EEA Agreement there are certain provisions ensuring the EFTA States influence on the legislative process. These articles are targeted towards the most important organ when the Agreement was signed in 1992; the Commission. When the balance of power between the EU organs changed after the entry into force of the Lisbon Treaty in 2009, the EEA agreement has not been amended accordingly. The intended influence may have been weakened, presumably contributing to the fact that the EFTA/EEA states are losing their sovereignty a little by little.

In the following, these problematic features will be examined. The existence of direct effect and supremacy among others will be addressed through the case law of the EFTA Court. Then these principles and their interaction will be examined through the amendment procedure, and in the light of the degree of influence in the legislative procedure. Last, these features will be viewed from other European States.

## **2 EU constitutional principles in the EEA Agreement**

### **2.1 The jurisdiction of the EFTA Court**

The establishment of an EFTA Court is required in the EEA Agreement article 108 (2). As a consequence of direct effect not being applicable for the EFTA States, the EFTA Court shall ensure the correct application of the EEA Agreement in the EFTA States. Despite EU law being identically applied in the whole European Economic Area, the EFTA States enjoy a different position compared to the EU member states in terms of legislative powers and sovereignty. Consequently, the legislation in the EEA Agreement must be applied different in the EFTA States to a certain degree, leaving the EFTA Court a degree of independence.

The question is whether the principle of homogeneity and the influence of ECJ case law prevail over the EFTA States and their sovereignty to such an extent that the independent role of the EFTA Court may be doubted.

The jurisdiction of the EFTA Court pursuant to article 32 of the Surveillance and Court Agreement<sup>31</sup> is to rule ‘*in actions concerning the settlement of disputes between two or more EFTA States regarding the interpretation or application of the EEA Agreement*’. The mandate of the EFTA Court pursuant to the preamble of SCA is to ensure ‘*uniform interpretation and application of the EEA Agreement*’. This will pursue ‘*equal treatment*’ for the EFTA/EEA citizens with the EU citizens, in terms of the four freedoms and competition. These criteria favour a homogenous interpretation with ECJ rulings.

Additionally, the Court must ensure that the EFTA States refrain from measures ‘*which could jeopardize the attainment of the objectives of this Agreement*’, article 2 (2). This article raises the threshold for non-homogenous behaviour, as all measures which *risk* the homogenous application can represent a breach of the Agreement. Instead of acknowledging that the interpretation in some cases will be different due to the special framework of the EEA Agreement, this obligation stresses the aim of homogeneity. This criterion raises the threshold for the EFTA Court to divert from ECJ interpretation, and weakens the independence of the EFTA Court.

The judges in the EFTA Court shall be chosen among persons ‘*whose independence is beyond doubt*’, (SCA article 30). The judges’ independence safeguards that they will not act biased to their home EFTA state. Meanwhile, there are no references in the SCA to the independence of the EFTA Court. In comparison, the independence of EFTA Surveillance Authority<sup>32</sup> whose task is to ensure the EFTA States does not breach the EEA Agreement, is mentioned both in the preamble and in article 4 (1). Consequently, the overarching objective of the EFTA organs is ensuring compatibility with EU law, highlighted by the fact that the sovereignty of the EFTA States and independence of the EFTA Court is not mentioned. When independence is not expressed combined with the guidelines ensuring homogeneity, the EFTA Court cannot be said to enjoy a full independent status.

The framework and structure of the EFTA Court is modelled upon the one of the European Court of Justice.<sup>33</sup> Although, while decisions from the ECJ are binding upon the member states pursuant to TFEU<sup>34</sup> article 274, the rulings of the EFTA Court are only ‘*advisory*’, (SCA article 34 first paragraph). This is a consequence of the fact that the EFTA/EEA states have not transferred legislative

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<sup>31</sup> Hereinafter ‘SCA’.

<sup>32</sup> Hereinafter ‘ESA’

<sup>33</sup> Hereinafter ‘ECJ’.

<sup>34</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal C-83* 30 March [2010]

powers to the EFTA Court, as opposed to the EU member states and the ECJ. Formally, sovereignty of the EFTA States is secured. Meanwhile, there are implications that their decisions are closer to being binding in reality. As an example, the Norwegian Supreme Court gives their interpretation ‘*preeminent weight*.’<sup>35</sup> If the national court does not interpret the EEA Agreement in the same manner as the EFTA Court, which leads to a different application of the rule in question than envisaged by the EFTA Court, ESA will most likely bring the EFTA State in front of the EFTA Court due to lack of proper implementation of the EEA Agreement, (SCA article 31 (2)).

Pursuant to the EEA Agreement article 6, the EFTA Court must interpret the EEA Agreement ‘*in conformity*’ with the rulings of ECJ. An interpretation of the criteria gives the same content as homogeneity. Furthermore, the obligation to interpret in conformity with relevant ECJ decisions, only apply to rulings ‘*prior to the date of signature of this Agreement.*’ The EFTA Court is, according to this article, not bound by the ECJ decisions after 1992. Decisions before 1992 are binding, which includes the rulings of ‘*Van Gend en Loos*’ and ‘*Costa/ENEL*’, which introduced direct effect and supremacy into the European Community. Even though these principles do not form part of the EEA Agreement, this article does leave the door open to use these principles in interpretation of the EEA Agreement.

If the article was to be read isolated, the limited scope of time could apply. However, interpretation ‘*in conformity*’ must be viewed as an expression for homogeneity. The latter is an overall principle which is not restricted in time. Therefore, it can be argued that decisions after the signing of the Agreement are equally binding. This is supported by the view of the Norwegian Supreme Court which give all rulings of the EFTA Court ‘*preeminent weight*’.<sup>36</sup>

Under Article 3 II of SCA, the EFTA Court must pay ‘*due account to the principles*’ in any relevant ECJ decision. Thus, the EFTA Court shall also consider pure EU principles when interpreting the EEA agreement. The results of paying due account these principles, remains uncertain. If it means that these principles shall be used, EU principles such as direct effect could have an indirect legal base in the EEA agreement. In the case of Norway, it has never been a situation where the lack of EU principles in the EEA agreement has been decisive for the result.<sup>37</sup> This fact may imply that that the EFTA Court *does* make use of purely EU principles in the interpretation of the EEA agreement, where this is necessary in order to safeguard a homogenous application of EEA law.

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<sup>35</sup> Tor-Inge Harbo ‘The European Economic Area Agreement: A case of Legal Pluralism’ *Nordic Journal of International Law* 78 (2009) pp 201-223, at 205-206

<sup>36</sup> Halvard Haukeland Fredriksen ‘One market, Two Courts: Legal Pluralism vs Homogeneity in the European Economic Area’ *Nordic Journal of International Law* 79 (2010)pp 481-499 at 488

<sup>37</sup> Halvard Haukeland Fredriksen ‘One market, Two Courts: Legal Pluralism vs Homogeneity in the European Economic Area’ *Nordic Journal of International Law* 79 (2010)pp 481-499 at 490-491

The EFTA Court is only bound as to the result of an ECJ decision.<sup>38</sup> This means that the EFTA Court can reason on other grounds than the ECJ, making the Court independent in this manner. However, the EFTA Court judge Carl Baudenbacher, states that in practise it is not possible to interpret the articles in the EEA agreement different from the interpretation of the ECJ.<sup>39</sup> He further states that this means that ‘*the basic structure and governing principles*’ of the EU internal market, developed by the ECJ, have been transposed into the EEA agreement.<sup>40</sup> Examples are fundamental freedoms of competition and State aid provisions.<sup>41</sup> This means that the EFTA Court ensures the dynamic function of the EEA agreement, as stated in the preamble.

As the EFTA Court is only bound by ‘*relevant*’ rulings, they are free to interpret EEA law in issues where there is no precedence. The question becomes if the Court in these situations will try to follow the ECJ on alternative grounds, or if they will rule solely on grounds of the EEA agreement.

A study performed by ECJ judge Christian Timmermans, showed that the EFTA Court has possibly gone beyond the aim of following the ECJ only where there is concise precedence, but extensively applying legal grounds from the ECJ which are not required to obtain homogeneity.<sup>42</sup> This characteristic is called ‘*creative homogeneity*’. If the EFTA Court is likely to follow the ECJ precedence to a greater extent than the EEA agreement demands, the agreement becomes more homogenous than needed, possibly negatively affecting the EFTA States position as sovereign states.

On the other hand, in the case of ‘*LO*’<sup>43</sup> the EFTA Court held that collective agreements in some regard are sheltered from the cartel prohibition, despite the ECJ having previously ruled that such agreements fall outside the scope of formerly Article 85.1 TFEU. Also in recent cases regarding the free movement of services, the EFTA Court has assessed the criteria in a different way than the ECJ.<sup>44</sup> This implies that the principle of sovereignty can prevail over homogeneity on a case by case basis, which will preserve the sovereignty of the EFTA States.

### 2.1.1. Concluding remarks

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<sup>38</sup> Carl Baudenbacher ‘The goal of homogenous interpretation of the law in the European Economic Area’ *The European Legal Forum* (e) 1-2008, 22-23, 2008 IPR Verlag GmbH München p 23

<sup>39</sup> Carl Baudenbacher ‘The goal of homogenous interpretation of the law in the European Economic Area’ *The European Legal Forum* (e) 1-2008, 22-23, 2008 IPR Verlag GmbH München p 23

<sup>40</sup> *Ibid* p 23

<sup>41</sup> *Ibid* p 23

<sup>42</sup> Christian Timmermans ‘*Creative Homogeneity, Festschrift for Sven Norberg*’, 2006, 471 in Carl Baudenbacher ‘The goal of homogenous interpretation of the law in the European Economic Area’ *The European Legal Forum* (e) 1-2008, 22-23, 2008 IPR Verlag GmbH München p 23

<sup>43</sup> Case E-8/00 ‘*LO (Norwegian Federation of Trade Unions) with NK (Norwegian Union of Municipal Employees) v KS (Norwegian Association of Local and Regional Authorities)*’ EFTA Court report [2002] 114 para 35

<sup>44</sup> Case E-1/06 – ‘*EFTA Surveillance Authority v The Kingdom of Norway*’ [2007] EFTA Court Report p 8

The EFTA Court interprets and applies the EEA Agreement guided by its principles and accordingly to the Surveillance and Court Agreement. When the SCA only provides a legal base which safeguards homogenous interpretation, the EFTA Court is bound to let homogeneity prevail in order to fulfil their mandate. It is peculiar that homogeneity is mentioned in several articles, while the independence of the EFTA Court is not codified, so as not to interfere with the goal of homogeneity.

This fact can be seen as a result of the unequal balance of power during the negotiations for the EEA agreement with the EU as the stronger block. Consequently, the EFTA states are not fully sovereign, despite the fact that they have not formally transferred legislative powers to the EU organs. When the Norwegian Supreme Court gives the EFTA Courts interpretation '*preeminent weight*', there has been an indirect transferral of powers.

The faithful interpretation to ECJ decisions may have increased the legitimacy of the EFTA Court from an EU point of view, implied by the increasing reference to the EFTA Court by the ECJ.<sup>45</sup> Thus it has probably contributed to the sustainability of the EEA Agreement. On the other hand, a recent study of the EFTA Court case law concluded<sup>46</sup> that in cases of doubt, the EFTA Court favours even more integration of the states than the ECJ. It cannot be said to be proportionate if the EU states who even have a voice in the decision making process, have more freedom than the EFTA states.

Legislative power is therefore in some extent given from the EFTA states, through the EFTA Court and to the EU organs. Not explicitly, but through the conditions and principles for the EFTA Court in the EEA Agreement and in the Surveillance and Court Agreement. Homogeneity is the principle that prevails in these agreements, and which decides whether there has been a breach. Consequently the principle of homogeneity prevails over sovereignty in most cases, leaving the EFTA Court without much independence.

## 2.2. Supremacy

Supremacy, or primacy, within the EU is a principle developed through teleological interpretation<sup>47</sup> of the EU Treaty by the ECJ.<sup>48</sup> Supremacy ensures the prevalence for EU law over the law of the member states. As the ECJ stated in the case of '*Costa-E.N.E.L*', EU law '*could not, because of its special and*

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<sup>45</sup> NOU 2012:2 '*Inside and outside*' p 226

<sup>46</sup> Halvard Haukeland Fredriken 'Er EFTA-domstolen mer katolsk enn paven? Noen betraktninger om EFTA-domstolens dynamiske utvikling av EØS-retten og streben etter dialog med EF-domstolen, *Tidsskrift for Rettsvitenskap*, [2009] pp 507-576, referred in NOU 2012:2 '*Inside and Outside*' p 863

<sup>47</sup> To interpret a condition into the structure of the agreement in order to obtain the aim of the agreement

<sup>48</sup> Case 6/64 '*Flaminio Costa v ENEL*' [1964] ECR 585

*original nature, be overridden by domestic legal provisions*'.<sup>49</sup> Supremacy of EU law is a consequence of the transferral of legislative powers from the member states to the EU. If the member states had retained their sole power to legislate, there would be no reason for EU law to automatically prevail.

In cases of conflict between the EEA agreement and the law of the EFTA/EEA states, '*the EFTA States undertake to introduce... a statutory provision to the effect that EEA rules prevail in these cases*' (Protocol 35 of the EEA agreement). The wording expresses that the EFTA States, as with the other EEA states, must ensure that EEA law prevails over national law in cases of conflict. Despite the fact that the EFTA/EEA states have not conferred legislative powers to the EU, EU law must still prevail. Presumably, this is based on similar reasoning as for the EU member states; the nature of EU law.

Meanwhile, the original comprehension in Opinion 1/91 given by the ECJ is clear on the fact that supremacy does not exist in the EEA agreement.<sup>50</sup> This is consistent with the EFTA States not having formally transferred legislative powers to any EU or EFTA institution. Still, supremacy has been accepted by the EFTA States as they have incorporated such an obligation in their national system, such as the '*EEA Act*' in Norway.<sup>51</sup>

The existence of supremacy in the EEA Agreement was confirmed in the EFTA Court case of '*Einarsson*'.<sup>52</sup> This case regarded the interpretation of the EEA agreement related to differentiated value-added tax. The EFTA Court concluded that EEA rules, which gave individuals rights that could be invoked in front of national courts, would prevail over national legislation in cases of conflict.<sup>53</sup>

The applicability of supremacy in the EFTA pillar has been called '*quasi-primacy*'.<sup>54</sup> Meanwhile, as it is clear that the EEA Agreement must prevail in cases of conflict and the fact that this principle will only apply in cases of conflict, the principle of supremacy will have identical effect for the EEA Agreement as for the EU Treaty. This is an important aspect when assessing the character of the EEA agreement itself; even though the agreement may seem as an agreement with its own character because of the lack of transfer of powers, the agreement includes an aspect which is decisive for the supranational character of the EU.

### 2.2.1 Remarks

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<sup>49</sup> Ibid para 17

<sup>50</sup> Opinion 1/91 para 21

<sup>51</sup> Section 2 of the Statute of 27 November No.109, which implements Protocol 35 into Norwegian Law.

<sup>52</sup> Case E-1/01 – '*Hörður Einarsson v The Icelandic Stat*' [2002]

<sup>53</sup> Ibid para 53 , 55.

<sup>54</sup> Carl Baudenbacher '*The contribution of the EFTA Court to the establishment of a homogenous and dynamic European Economic Area*' EFTA Seminar Brussels Spring 2008 p C III.

Supremacy seems to have been a precondition to ensure effective applicability of the EEA Agreement in the EFTA States, contrary to what is the situation with the Free Trade Agreements, for example between EU and Switzerland. The formal difference to supremacy in the EU is that a legal base for the principle of supremacy had to be implemented into the national legislation. This is contrary to the EU, where the ECJ stated that supremacy applied and then the principle had direct effect into the national legislation. Meanwhile, the effect of supremacy in the EFTA/EEA states and within the EU is identical.

## 2.2 State liability

As the State can be liable on the grounds of national law, so can the State be liable on the grounds of implemented EEA law. Despite the principle of dualism in the EFTA/EEA states, there is an established principle of state liability for non-implemented directives in the EFTA/EEA states. In the EFTA Court case of ‘*Sveinbjörnsdóttir*’<sup>55</sup> the court assessed whether the principle of state liability for breach of EU law had an equivalent in the EFTA/EEA states. The factual circumstances were that Ms Sveinbjörnsdóttir had been given notice in a machine factory. In the notice period she claimed for unpaid wages but was refused on the grounds that she was the sister of the 40% shareholder in the factory, and therefore not a priority.<sup>56</sup> She claimed this was a breach of Community law due to a non-implemented directive and demanded compensation from the State. The question was whether such a state-obligation is to be derived from ‘*the stated purposes and the legal structure of the EEA Agreement*’<sup>57</sup>.

The principle of dualism should prevent state liability when the directive is *not* transposed into the national legal system. Despite this, the EFTA Court takes a teleological approach and assesses if the legal base can be found in the *objectives* of the EEA agreement. The grounds for this teleological approach, is that the EU principles cannot be exported into the EFTA/EEA national states.<sup>58</sup> The Court highlights that state liability is not contrary to the system of the EEA Agreement.<sup>59</sup> Furthermore does the Court not object to the plaintiff’s argument regarding that state liability in this case is supported by the EFTA States’ responsibility for individual damages caused by incorrect implementation.<sup>60</sup>

First of all, it must be noted that the EFTA Court chose not to ground this state liability for non-

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<sup>55</sup>Case E-9/97 – ‘*Erla María Sveinbjörnsdóttir v Iceland*’ [1997]

<sup>56</sup> Ibid para 3-5.

<sup>57</sup> Ibid para 47

<sup>58</sup> Ibid para 44

<sup>59</sup> Ibid para 45

<sup>60</sup> Ibid para 45

implemented directives on conformity with the interpretation of ECJ case law based on EEA article 6.<sup>61</sup> If article 6 was used, it would be clear that the EFTA Court imports principles from the EU. By using the objectives in the EEA agreement itself, the formal independence of the EFTA Court and sovereignty of the EFTA States are ensured, as the Court has not expressly imported anything from the EU.

Secondly, teleological interpretation is a characteristic aspect of EU law, not stated in the EEA agreement nor used by the EFTA Court earlier. When this method is used by the EFTA Court to interpret the EEA Agreement, this method forms part of the interpretation of the EEA Agreement. As a result, an EU principle is transferred from the EU into the EEA Agreement.

### 2.3.1 Remarks

The result of the introduction of state liability into the EFTA/EEA national legal systems is that despite the wording in the articles, the EEA agreement is open for developments that are difficult to foresee. When a teleological assessment is used, the EEA Agreement may be open to all EU principles that are necessary to ensure homogeneity in the specific case. Further, the principle of dualism, which is important in relation to the formal sovereign status of a state, becomes a secondary priority when the aim of homogeneity prevails.

## **2.4 Direct effect**

Direct effect is a principle created by the ECJ<sup>62</sup> and which forms part of the supranational character of the EU legal system. Direct effect means that an EU citizen may derive rights from an EU regulation and directive from the time it is published in the Official Journal, (TFEU article 297 second paragraph). This means that the effectiveness of regulations and directives is not dependent on the implementation into the national legal system of each member state. Directives only have direct effect between private citizens, so-called vertical direct effect.<sup>63</sup>

Direct effect of EU legislation applies for the EU member states. If this principle was comprised in the EEA agreement, full homogeneity would be ensured in terms of application of the internal market rules. Meanwhile, the exemption for direct effect in the EEA agreement is a consequence of the EFTA States' lack of transfer of legislative powers to EU institutions.

In an EFTA/EEA state, the EEA agreement has direct effect for private citizens, because the main part is implemented in national law, pursuant to the principle of dualism. To the extent that directives and

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<sup>61</sup> Hans Petter Graver 'Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement' *European Foreign Affairs Review* 7:73-90 [2002] p 81

<sup>62</sup> Case 'NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration.' [1963]

<sup>63</sup> Case 41-74. 'Yvonne van Duyn v Home Office' [1974] ECR 1337

other legislation are also implemented in the national legal system, they will also bind the citizens. The difference to EU law is that regulations and directives that are not approved in the EEA Committee are not binding to *any* extent and directives approved in the Committee but not implemented by the EFTA state, are only binding for the State. (EEA Agreement article 104).

In the EFTA Court case of '*Restamark*'<sup>64</sup> the subject matter was whether the import monopoly in Finland<sup>65</sup> contradicted non-implemented EEA law. The Court had to decide whether article 16 of the Agreement was sufficiently unconditional and precise, so it would produce direct legal effect<sup>66</sup>. These criteria are the threshold for direct effect within the EU for secondary legislation. Article 16 EEA was in substance identical to article 37 EC, of which it was already established met the criteria of unconditional and was sufficiently precise to give rise to direct effect. Consequently, due to article 6 EEA, the principle of equal treatment and the aim of homogeneity, article 16 EEA had direct effect.<sup>67</sup>

The judgement shows that implemented EEA acts can have direct effect in the EFTA/EEA states. The notion has been called '*quasi-direct effect*',<sup>68</sup> because of the lack of an explicit legal basis. Meanwhile, the effects are no different from within the EU.

In the Norwegian Supreme Court case '*Finanger I*'<sup>69</sup> the question was whether a wrongfully implemented directive could have horizontal direct effect in Norwegian legislation, meaning direct effect between private parties. The background was that Norwegian law reduced the liability from the insurance company when the passenger knew or should have known that the driver was intoxicated with alcohol. The EC Motor Vehicle Directive did not have this exemption, implying that if the directive had been implemented correctly or given direct effect, the injured party, here Ms Finanger, would have received full compensation. The majority of the Supreme Court voted negatively to the directive having horizontal direct effect. As directives do not have horizontal direct effect within the EU, the homogeneity principle was not an argument. The question remains what would have been the result if the case concerned vertical direct effect for the implemented directive.

The EFTA Court case of '*Sveinbjørnsdottir*' implemented the doctrine of state liability of non-implemented EU law in the EEA agreement. This principle was confirmed in the EFTA Court case '*Karlsson*'.<sup>70</sup> In the latter case, the Government of Norway presented the argument that the principle of

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<sup>64</sup> Case E-1/94 – '*Ravintoloitsijain Liiton Kustannus Oy Restamark*' [1994] EFTA Court Report 1 January 1994 - 30 June 1995, p.15

<sup>65</sup> Finland left EFTA and joined the EU in January 1995

<sup>66</sup> Case E-1/94 – '*Ravintoloitsijain Liiton Kustannus Oy Restamark*' [1994] EFTA Court Report 1 January 1994 - 30 June 1995, p.15 para 79

<sup>67</sup> Ibid para 80

<sup>68</sup> Carl Baudenbacher '*The contribution of the EFTA Court to the establishment of a homogenous and dynamic European Economic Area*' EFTA Seminar Brussels Spring 2008 p C III.

<sup>69</sup> Rt-2000-1811

<sup>70</sup> Case E-4/01 '*Karl K. Karlsson hf. V The Icelandic State*' [2002]

state liability under EU law was inseparable from the principle of direct effect, and therefore could not apply in the EEA agreement.<sup>71</sup> This argument was not heard, because the reasoning for state liability was based on the objectives of the EEA agreement itself.

Arguably, there are reasons to comply with the Government's argument. That the Norwegian State shall bear the responsibility based on a directive that is not a part of Norwegian Law, ultimately refers to the doctrine of direct effect, which shall not apply. As Haukeland points out, this is an example of the EFTA Court trying to minimise the practical consequences due to the lack of direct effect, in order to ensure the effectiveness of EEA law in EFTA states.<sup>72</sup>

On the other hand, one can arguably consent with the EFTA Court. As homogenous application is the overall objective, it is likely that direct effect will be necessary in some situations in order to reach this objective. Thus, direct effect may implicitly be found in the objectives of the EEA Agreement.

Despite the non-existing clause or directly spoken direct effect, it seems clear that the doctrine is invoked for the EFTA states through the demand of homogeneity.

#### 2.4.1 Concluding remarks

Although direct effect is not formally a part of the EEA agreement, and other conditions such as dualism support this fact, it is arguable that an indirect legal base for direct effect is found in SCA article 3 (2). Regardless of this, direct effect had its entry into the EEA agreement in the case of '*Restamark*' and later '*Sveinbjørnsdottir*'. The introduction of direct effect in the agreement is also a consequence of the homogeneity objective and its prevalence in SCA. Due to the lack of an explicit legal base, direct effect was interpreted into the preconditions in the EEA agreement. The EFTA Court was not wrong in this assessment. EU law and therefore EEA law are formed on the basis that they will have direct effect in the member states. In order to obtain homogeneity with '*relevant*' rulings of the ECJ, it cannot be excluded that direct effect may be necessary. This especially applies when there is no other principle with equal weight to balance out the principle of homogeneity.

On the other hand this method of interpretation is arguably contrary to the purpose of the Agreement, when direct effect was not made a part of the EEA Agreement. If principles in the EU may be exported into the EEA Agreement, the principle of legitimate expectations<sup>73</sup> should have protected the EFTA states from the use of direct effect.

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<sup>71</sup> Ibid para 26

<sup>72</sup> Halvard Haukeland Fredriksen 'One market, Two Courts: Legal Pluralism vs Homogeneity in the European Economic Area' *Nordic Journal of International Law* 79 (2010)pp 481-499 at 490

<sup>73</sup> Case 148/78 '*Criminal proceedings against Tullio Ratti*' [1979] para 46

## 2.5 Homogeneity or legal pluralism?

Case law of the ECJ influences the decisions of the EFTA Court, pursuant to SCA article 32 and EEA Agreement article 6. The EFTA Court decisions influence the national systems, as an example the Norwegian Supreme Court gives the preliminary rulings of the EFTA Court '*preeminent weight*'. Consequently, there is a monologue from the ECJ through the EFTA Court which ends in the national legal systems of the EFTA/EEA states.

When the ECJ assesses general principles within the Union, the national legal systems can be a valuable source. There is no explicit legal base in the EEA agreement which expresses a room for a dialogue, meaning that the national legal systems in the EFTA/EEA may influence the EFTA Court.

Despite of the previous, some authors claim that there is in fact an implicit *dialogue* between the EFTA Court and the EFTA States' national legal systems.<sup>74</sup> In the following, some EFTA Court cases will be examined to locate if there are legal grounds to this perception.

In '*Piazza*'<sup>75</sup>, regarding compatibility of the Civil Code in Liechtenstein with the EEA Agreement, the EFTA Court made a reference to the '*good functioning of the legal systems ...common principle in the constitutional structure of the EEA Contracting Parties*'.<sup>76</sup> Here the Court explicitly refers to the national system of an EFTA state, making its principle of '*good functioning*' a part of their judgement.

However, as pointed out by Fredriksen<sup>77</sup> it would be premature to conclude that EFTA legal systems are now a legal source for the EFTA Court. Additionally pointed out, is that the '*good functioning*' principle can safely be assumed to form part of all EEA national systems. As long as the EFTA national system does not bring a new legal source into the interpretation of EEA law, it cannot be argued that the EFTA Court considers EFTA legal traditions in their interpretation.<sup>78</sup>

The '*Wilhelmsen*'<sup>79</sup> case concerned the prohibition to sell beer with high alcohol content from retailers other than the Wine Monopoly. The EFTA Court used *reasonableness* as a ground not to doubt the Norwegian Government's intention behind the Wine Monopoly.<sup>80</sup> Because of the explicit reasoning, author Harbo<sup>81</sup> is of the opinion this is due to a willingness of the EFTA Court using a Norwegian

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<sup>74</sup> As stated by Tor-Inge Harbo 'The European Economic Area Agreement: A case of Legal Pluralism' *Nordic Journal of International Law* [2009] 201-223 p 216

<sup>75</sup> Case E-10/04 [2005]

<sup>76</sup> Ibid para 43

<sup>77</sup> Halvard Haukeland Fredriksen 'One market, Two Courts: Legal Pluralism vs Homogeneity in the European Economic Area' *Nordic Journal of International Law* 79 (2010) 481-499 p 492

<sup>78</sup> Ibid p 492

<sup>79</sup> Case E-6/96 [1997]

<sup>80</sup> Ibid para 86

<sup>81</sup> Tor-Inge Harbo 'The European Economic Area Agreement: A case of Legal Pluralism' *Nordic Journal of International Law* 78 (2009) 201-223 p 216

court-made doctrine when assessing Norwegian cases. A contesting view is given by Fredriksen,<sup>82</sup> who states that the EFTA Court is only following the doctrine of the ECJ.

When the same principles are used and the result is identical, the aim of homogeneity is not harming the sovereignty of the EFTA States. Nonetheless, a dialogue between the EFTA Court and the national courts regarding implementing new parameters cannot with certainty be stated to exist. If the EFTA Court was to introduce new legal parameters into the interpretation of EEA law, the homogeneity would be at risk.

If the application of already existing EFTA principles are in fact an implicit dialogue, this would be a positive signal for the third states interest in EEA membership, as it would imply to a limited extent, a possibility for individual application. If legal pluralism was established through the introduction of pure EFTA/EEA principles, the legal structure and predictability would be secured, which are aims that should be pursued.

## **2.6 Concluding remarks on constitutional principles in the EEA Agreement**

The legal principles in the EEA Agreement favour homogeneity with the interpretation of the ECJ. The opposite, legal pluralism, does not have a legal basis in the agreement. It may be questioned whether the EFTA Court is actually importing principles from the EFTA/EEA states. Meanwhile, the case law until today cannot confirm this tendency. This fact is supported by the statement of Judge Carl Baudenbacher, regarding the duty to interpret the EEA articles in the same manner as the ECJ.

It would not be correct for Carl Baudenbacher to suggest otherwise, as the legal basis only approves of homogeneity. Consequently, a shift in direction of the interpretation of the EFTA Court must be based in the EEA Agreement. A change of the agreement demands approval from all contracting parties. These negotiations will be influenced by the political situation between the parties, which cannot be predicted.

## **3 The amendment procedure in article 102**

### **3.1 Introduction**

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<sup>82</sup> Halvard Haukeland Fredriksen 'One market, Two Courts: Legal Pluralism vs Homogeneity in the European Economic Area' *Nordic Journal of International Law* 79 [2010] 481-499 p 493

Article 102 of the EEA agreement regulates the procedure when amending the agreement, as a result of a change in the community *aquis*. The two first paragraphs regulate the amendment procedure, and disagreements that arise during this process are solved according to the steps in paragraph 3-5. The latter procedure has by the EFTA/EEA states been referred to as the '*right to veto*' or the '*right of reservation*'.

In the following the legal nature of this article will be examined, as well as the normative discussion of how the agreement ought to be.

### 3.2 Relevance as amendment criteria

In the EEA agreement article 102 first paragraph, '*the EEA Joint Committee*' has the responsibility for amendments in the EEA agreement. The committee consists of representatives from the contracting parties<sup>83</sup>, thus from EFTA/EEA countries, as well as from the European Commission and the EU member states.

The committee shall '*take a decision concerning an amendment of an Annex to this Agreement*' (article 102 first paragraph). A decision concerning an amendment of the agreement is dependent on the existence of a relevant annex to amend. Thus there must be a legal basis in the EEA agreement before it can be amended. In other words, the EU legislative act must be relevant<sup>84</sup> to the EEA agreement.

Amendments of the EEA Agreement are done to ensure '*simultaneous application*' with EU law, (article 102 (1)). This aim corresponds with the objective in the preamble of the EEA agreement, which is a '*dynamic and homogeneous European Economic Area*'.

There are no further guidelines in article 102 to what makes an EU act EEA relevant. When legislation is officialised in the '*Official Journal*', some are marked as '*EEA relevant*'. However, this is not legally binding and not always corresponding with the decisions of the Joint Committee.<sup>85</sup> As a result the Joint Committee decides, without additional criteria, what will be subject to inclusion in the EEA agreement. After a publication of new EU law in the Official Journal, the EFTA secretariat releases standard forms to the EFTA/EEA states where the states estimate whether the act is relevant, and if they need legal or political adjustments.<sup>86</sup> After this procedure, it is decided whether the legislation is EEA relevant or not. If it is relevant, it is implemented in the corresponding annex of the EEA Agreement.

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<sup>83</sup> EEA Joint Committee '*Decision of the EEA Joint Committee No 1/94 of 8 February 1994 Adopting the Rules of Procedure of the EEA Joint Committee*' (4)

<sup>84</sup> The word 'relevant' also used in NOU 2012:2 '*Inside and outside*' p 93

<sup>85</sup> NOU 2012:2 '*Inside and outside*' p 93

<sup>86</sup> *Ibid* p 94

Since the pillar structure was abolished by the Lisbon Treaty in 2009, the relevance assessment has become more uncertain. According to NOU 2012:2 from the Norwegian Ministry of Foreign Affairs, there has been a tendency, regarding those acts that are not clearly relevant, to incorporate only those that are estimated to be beneficial for the states.<sup>87</sup> This unintended margin of appreciation, contributes to retain the sovereignty of the EFTA states. Meanwhile, it also witnesses lack of legal criteria, resulting in unpredictability which was to some extent secured by the pillar structure.

To make sure that the EEA agreement is amended according to relevant EEA legislation, the EU take tests<sup>88</sup> to ensure the states' cooperation. This far the EU has been content with the work of the Joint Committee which implies that the Committee is doing a satisfying job in terms of the interpretation of relevance.<sup>89</sup>

Neither the EFTA Court nor the European Court of Justice have jurisdiction in cases of conflict in these matters. If it was discovered that this discretionary power was used to avoid implementing *aquis* that opposed the EFTA/EEA states national interests, it would represent a breach of both the principle of homogeneity and the principle of loyalty in the EEA agreement article 3 (1).

Additionally, from a political point of view, the EU is the powerful party to the agreement, which implies that their view would prevail in conflict. When politics have the possibility to prevail due to the lack of legal criteria, the results are often unpredictable. This must be considered a weakness in a legally binding agreement.

The process of determining what is an EEA relevant act is thus not only a legal issue, but also an administrative and political one. This has several consequences. Firstly, the EEA agreement may come to contain more acts than legally predicted. Secondly, what the EEA agreement will contain in the future may depend on which states are party to the EEA agreement. Thirdly, it may depend on the political situation within each state and between the states within the Committee. This weakens the EEA agreement as a sustainable agreement open for accession to other states, as the agreement is not predictable.

### 3.2.1 Remarks on the amendment procedure

It is possible that a criterion for EEA relevance were not included in the agreement because it was clear that relevant acts in any case would find its legal basis in the EEA agreement. Meanwhile, as a result of the vast increase of EU policies and the abolition of the pillar structure, the separation is not evident today.

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<sup>87</sup> Ibid p 94

<sup>88</sup> Ibid p 95

<sup>89</sup> Ibid p 95

If the parties disagree on what is relevant, there is no established procedure for solving the problem. This is an interesting aspect, because when law is absent, politics will often fill in the gap, even if the act shall be interpreted pursuant to general principles in the agreement. The party who loses on such an arrangement, is often the weaker party, here the EFTA/EEA states.

On the other hand, this construction creates a possibility for the EFTA/EEA states not to include certain EU acts. It is accordingly created a discretionary power that may secure the EFTA/EEA states more sovereignty than the EU member states. There is no equivalent mechanism in the EU system for the member states, because of the principle of direct effect.

Meanwhile, the discretionary power gains its value only if it is used. This applies both for the current EFTA/EEA states and for potential future members. If the discretionary power is politically closed, the possibility in practise does not exist. Thus, it will not serve the sovereignty of the current members nor be an incentive for new states to participate in the EEA agreement.

### **3.3 'Right of reservation'**

#### **3.3.1 Legal basis**

Article 93 of the EEA agreement states that the EEA Joint Committee '*shall take decisions by agreement*'. Because agreement must be reached, there will be a deadlock situation if one party dissents. Article 93 applies for all decisions made by the EEA Joint Committee, included the amendment procedure in article 102. In the EFTA States and in Norway for example, the general comprehension is that this means that the EFTA States has a right to oppose the implementation of an EU act, which does not suit their interest. From this legal basis, the '*right of reservation*' derives.

Even though the legal criteria in these two articles do not contradict such an understanding, the right has never been used, as the threshold has seemed high. This procedure has even been compared to an atomic bomb, which '*might be effective*' but '*not very beneficial for anyone*'.<sup>90</sup> However, on the 23<sup>rd</sup> of May 2011 Norway gave formal notice to the EU communicating their willingness to make use of the right of reservation regarding the Third Postal Directive.<sup>91</sup> If the EFTA/EEA states have a right to make a reservation against an EU act in practise, the EEA agreement could be more attractive for new states to join. The EEA agreement would then be a more distinct alternative to EU membership.

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<sup>90</sup> Eirikur Bergman 'Iceland and the EEA agreement 1994-2010' (2010) '*Report for the Norwegian Review of the EEA, NOU 2012:2 Inside and Outside*' p 20

<sup>91</sup> Joint Press statement '*Informal EU-Norway consultations on the 3rd Postal Directive*' regarding directive 2008/6/EC, following the decision of the Norwegian Labour Party's decision April 10<sup>th</sup> 2011 not to implement the directive.

According to article 102 paragraph 3 of the EEA agreement, the first step in the procedure if agreement is not reached, is that the Contracting Parties shall ‘*make all efforts to arrive at an agreement on matters relevant to this Agreement*’. In this situation, the EEA Joint Committee shall ‘*in particular, make every effort to find a mutually acceptable solution*’ (paragraph 2). From these criteria it is understood that the negotiations are an important aspect. Already at this point, the name ‘*veto right*’ or a ‘*right of reservation*’<sup>92</sup> is not appropriate; it is not a definitive right to avoid an EU act, it is a right to negotiate for a mutually acceptable solution.<sup>93</sup>

The 2012 report from the Foreign Ministry supports this interpretation of a negotiations procedure.<sup>94</sup> The opposite opinion is put forward by the organisation ‘*Nei til EU*’ (No to the EU).<sup>95</sup> In their opinion, article 102 does not facilitate a negotiation procedure, but expresses a sole right of reservation that the EU must accept. As the wording however is clear on the point that the parties shall negotiate, this must be regarded as a political statement rather than a legal one.

Due to the high threshold in the article not to reach an agreement, the presumption is that most disagreements will end at this stage. This would be the most beneficial for both parties in most situations, in order to safeguard the proper functioning of the agreement.

If a solution is not found, ‘*the EEA Joint Committee shall examine all further possibilities to maintain the good functioning of this Agreement and take any decision necessary to this effect...*’ according to paragraph 4. The wording emphasizes the high threshold for not agreeing on amendments. This process may last a maximum of six months (article 102). Before starting this limited period of time, the parties may have been negotiating for a long time. It is not until this deadline is made effective, that the negotiation procedure officially starts. All criteria thus facilitate the aim of finding a solution.

### 3.3.2 Absence of legal criteria

Whether it is correct to interpret a right of reservation into these articles, or if it is merely an opportunity to negotiate the content or extent of an EU act, there is a lack of criteria for reaching the threshold of this procedure. Compared to national laws in general, this is an unusual construction where filling the criteria is essential to give effect to a legal remedy. In international law as well, criteria are naturally used to protect the sovereignty of a state. As an example, EU member states may limit the scope of EU legislation if they threaten public safety, public health or security, for example in the area of freedom of persons, workers and capital, pursuant to TFEU chapter one article 45, 3.

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<sup>92</sup> Term used recently in NOU 2012:2 ‘*Inside and Outside*’ p 100, and is also used in the media, for example in Bjørn-Tore Godal ‘*Utenfor og innenfor i 20 år*’ *Aftenposten* 03.05.2012

<sup>93</sup> The term ‘right of reservation’ will still be used, as the term highlights the core of the discussion.

<sup>94</sup> NOU 2012:2 ‘*Inside and Outside*’ p 106

<sup>95</sup> ‘*Nei til EU*’ – Official Comments to the NOU 2012:12 ‘*Inside and Outside*’

Another example is the European Convention of Human Rights (ECHR), which operates with similar thresholds as public health and security, freedom and morals (see for example ECHR article 9, 2).

From an EU point of view, it would serve the aim of homogeneity if it was only in certain areas the EFTA States could start a negotiation procedure. As the situation is now, the EFTA states may negotiate all EU acts. When there are no legal criteria that follow the negotiations procedure, other parameters for when it is appropriate to negotiate will fill the gap, most likely the political environment. The consequence is that this procedure has never been used in the lifetime of the EEA Agreement, which serves EU interest but not the interests of the EFTA states. If the meaning was to have a right of reservation as comprehended by the EFTA states, the right is diminished due to the lack of criteria.

There is no obvious reason for why a reservation against law that threatens national vital interest or public morals should not be an applicable possibility for the EFTA/EEA states. On the contrary, because the EFTA/EEA states are not EU members, they should be granted more independence than the member states.

On the other hand, because the participation is limited to the internal market, the agreement would be of lesser value for the EU if the EFTA States could block legislation without being a member. The agreement is well functioning now partly because the EFTA/EEA states do not represent a problem<sup>96</sup> or vastly increased workload for the EU; the most recent figures show that all the three EFTA/EEA states are below the transposition deficit of 1 %. The EU states are not below 1.2%.<sup>97</sup> In the 2010 Council Conclusion<sup>98</sup> the Council encouraged Norway to '*maintain the same good record in the coming period*'<sup>99</sup> as well as describing the relationship with the EFTA countries as '*very good and close*'.<sup>100</sup>

Meanwhile, the result is that the EFTA/EEA states have less independence than the EU member states in this regard, lacking criteria that can be assessed as basic elements for a sovereign state.

Furthermore, the '*right of reservation*' becomes illusionary without criteria. This view is supported by the fact that the '*right of reservation*' has never been used. Furthermore, the use of the procedure is likely to depend on the political situation between the EU and the EFTA block, or the domestic political situation, like the pressure of using this right in Norway today.

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<sup>96</sup> 'Council Conclusions on EU relations with EFTA countries'. '3060<sup>th</sup> General Affairs Council meeting, Brussels 14<sup>th</sup> December 2010' para 1

<sup>97</sup> EFTA Surveillance Authority '*Internal Market Scoreboard*' February [2012]

<sup>98</sup> 'Council Conclusion on EU relations with EFTA countries', 3060<sup>th</sup> General Affairs Council meeting [2010] 14<sup>th</sup> December, Brussels

<sup>99</sup> *Ibid* para 25

<sup>100</sup> *Ibid* para 1

### 3.3.3 Legal consequences

The procedure expresses a right for a party to the EEA agreement to have a dissenting opinion regarding the implementation of EU legislation, which may lead to differences in content in the same legal areas within the EU and the EFTA/EEA. If it is a right for the EFTA states to prevent the implementation of an EU act, and its nature being contrary to the objective of homogeneity, it cannot legally be considered as a breach of the agreement. The right can be read from the conditions in the article 93 and 102.

The consequences of a disagreement are according to article 102, paragraph 2 and 4 that the '*affected part*' of the EEA agreement will be non-functioning. What the affected part is in each case will be decided by the EEA Joint Committee. If a solution is not reached at this stage, the affected part of the annex will be '*provisionally suspended*'. As it is only a temporarily suspension, the procedure does not in any case contain a permanent right of reservation.

On assignment from The Norwegian Postal Service, a Norwegian law firm<sup>101</sup> assessed the legal nature of the right of reservation. Regarding the legal consequences, they interpreted the question to be '*which legal room the EU has to sanction .... And how serious and extensive sanctions can be used*'.<sup>102</sup> Their assessment was that the legal sanctions, in any case, could not be more extensive than the suspended provision entails, because of the principle of proportionality in EEA law.<sup>103</sup>

Article 102 does not mention legal sanctions. The wording in the article is in fact quite the contrary; it explains the procedure for a specific *right*. If legal consequences that are not in the agreement, shall be given for following a right and procedure stated in the agreement, it seems a paradox that the article is there at all.

A use of the right of reservation will result in a lack of homogeneity between EU and EFTA/EEA law, which in itself is problematic. Still, as the article gives the right to negotiate, it seems that article 102 is supposed to envisage that the states are sovereign.

The EU ambassador to the '*European Delegation to Norway*'<sup>104</sup> János Herman, expressed that EU reactions might be more far reaching than mentioned in the Norwegian debate and that it would lead

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<sup>101</sup> Arntzen de Besche Advokatfirma AS v/Thomas Nordby og Espen Bakken, Notice, July 7th 2009, authors translation

<sup>102</sup> Ibid para 6 – '*political measures from the EU is outside our mandate*', authors translation

<sup>103</sup> Ibid para 6

<sup>104</sup> Name at that time: '*European Delegation to Norway and Iceland*'. Change of name as of 01.01.2010.

us into unknown legal and political territory.<sup>105</sup> This statement implies that both legal and political sanctions may be the result, despite them not being mentioned in the article.

The official Norwegian comprehension is that the EU cannot legally sanction an EFTA/EEA state for use of the right of reservation<sup>106</sup>, since no such sanctions are mentioned in article 102. Political measures are more difficult to anticipate. These different comprehensions may be assessed in the light of the negotiations for the EEA agreement, consequently resulting in the unclear choice of words in article 102. Due to lack of time, the wording became a compromise between the demands from the parties.

In article 3 first paragraph of the EEA agreement, the parties '*shall take all appropriate measures... to ensure fulfilment of the obligations arising out of this Agreement.*' This implies that all parties have a duty to be loyal to the agreement.<sup>107</sup> This principle of loyalty implies that the suspended part shall be interpreted in a restrictive way, as pointed out by the organisation '*No to the EU*' in their comments to the report from the Ministry of Foreign Affairs. This argument can be used to protect the aim of homogeneity between EU and EEA law.

Furthermore, pursuant to paragraph 2, the parties '*shall abstain from any measure which could jeopardize the attainment of the objectives*'. The wording '*measure*' includes both legal and political actions. The paragraph expresses a duty not to take steps that can hurt the cooperation within the agreement.

According to paragraph 3, the parties are obliged to '*facilitate cooperation within the framework of this Agreement.*' This wording also expresses a demand for loyalty. In terms of the reservation process, the '*No to the EU*'<sup>108</sup> group stated that this expresses a principle of cooperation that will hinder the EU to take measures.

These three paragraphs favour cooperation leading to an agreement which fulfil the principle of homogeneity. There is no alternative direction for the disagreement than to agree, because there are no guidelines for how a total reservation may be successful. The consequence is not that the EFTA/EEA state can choose not to implement the legislation, only that the parties may negotiate for adjustments. After the necessary and agreed adjustments are made, the legislation will enter into force. This is not a

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<sup>105</sup> 'Press om datalagring' Aftenposten 26.11. [2010] <http://www.aftenposten.no/meninger/leder/Press-om-datalagring-6273938.html#.T7yck8XuWHQ> accessed 29.03.2012

<sup>106</sup> 'Biannual address to the Storting on important EU and EEA matters' Oslo, 19 May 2011 [http://www.regjeringen.no/en/dep/ud/Whats-new/Speeches-and-articles/speeches\\_foreign/2011/address\\_storting\\_eu\\_eea\\_matters.html?id=643648](http://www.regjeringen.no/en/dep/ud/Whats-new/Speeches-and-articles/speeches_foreign/2011/address_storting_eu_eea_matters.html?id=643648) accessed 23.05.2012

<sup>107</sup> Arntzen de Besche Law Firm AS by Thomas Nordby and Espen Bakken, Notice, July 7th 2009 para 6; 'No to the EU' – comments on the NOU 2012:2 '*Inside and outside*' to the chapter about the '*Right of Reservation*' on page 105

<sup>108</sup> 'No to the EU' – comments on the NOU 2012:2 '*Inside and outside*' to the chapter about the '*Right of Reservation*'

*'right of reservation'*; it is a right to negotiate for adjustments, which will lead to the implementation of the legislation.

### 3.3.4 Normative assessment of legal criteria

Political aspects will dominate the procedure pursuant to article 102 as there is a lack of legal criteria. The political aspects that may interfere during this process are not certain. It will probably depend on the character of the directive in question and the relevant interests.

In order to give the EEA agreement a firm character, there are good arguments that criteria for the right of reservation should be established. One possibility would be to have criteria that provided the possibility for the EFTA states to reserve themselves against legislation regarding flanking areas to the agreement. As these areas were not originally a part of the agreement, the EFTA/EEA states should have more room to decide in these matters. On the other hand, the dynamic functioning of the agreement was an aim from the start.

Another possibility would be to have criteria providing a right to reserve the states against legislation concerning only the internal market. Since the states' objective is to benefit the most from the internal market and to be treated as EU member states in these areas, the logic consequence would be that the need to use the right of reservation would only be invoked where the EU legislation collided with vital national interests. This way all EEA states would be treated in the same manner.

The article as it is today weakens the chances for other states to participate in the EEA agreement. If the EEA agreement became an independent alternative, this could serve the interest of the EU as the EEA agreement could be presented as the only other alternative to EU membership. This would be more economic and time effective than negotiating individual agreements, as the EU and Switzerland has done.

### 3.3.5 The Norwegian point of view

The debate in Norway regarding article 102 and the *'right of reservation'*, has been an important factor in the debate since the negotiations and signing of the EEA agreement in 1992,<sup>109</sup> because it represents the state sovereignty. From a constitutional perspective, it is of decisive importance that Norway has the possibility to reject unwanted regulations.<sup>110</sup> In the debate in society, the right of reservation has

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<sup>109</sup> NOU 2012:2 *'Inside and outside'* p 100

<sup>110</sup> *Ibid* p 100

been viewed for many as an excuse when the argument is that too much power has been given to the EU.

Despite this, the right has never been used by any of the contracting parties, though it has been discussed several times. Meanwhile, the Norwegian Foreign Minister notified the EU on the 23<sup>rd</sup> of May 2011 that Norway is considering using article 102 in relation to the Third Postal Directive<sup>111</sup>. In Norway, the right of reservation has been more or less debated in relation to 17 directives since the agreement entered into force in 1994 and until 2011.<sup>112</sup> Considering that the number of incorporated acts is above 6000<sup>113</sup>, it is clearly evident that the right of reservation plays a relatively minor role.

The debate has intensified since 2005.<sup>114</sup> The reasons for this can be several. In the Norwegian report from the Ministry of Foreign Affairs<sup>115</sup> it is suggested that one reason may be that people are tired and frustrated with the general dynamics of the EEA agreement. Another could be that mobilisation of persons who are engaged in the directives' consequences<sup>116</sup> has been successful and that the character of the directives in question has been able to create a general interest. Examples are the Data Retention Directive<sup>117</sup> and the Third Postal Directive<sup>118</sup>.

It is arguably a combination of reasons. As a consequence of an expanding EU, the power is more visible in European and international relations. This leads to a growing understanding of what Norway is not fully a part of. Added to this is the number of EU acts that have been incorporated into Norwegian law since 1994 and the fact that Norway has no influence in the decision-making process. The result may naturally be a question of why the right of reservation has not been used, when it is supposed to be that *available* as often presented by some political parties.<sup>119</sup>

### 3.3.6 The Data Retention Directive

The Data Retention Directive was published in the Official Journal on the 13<sup>th</sup> of April 2006. The directive gave public authorities the possibility to obtain and store '*traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or*

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<sup>111</sup> Joint press statement [http://www.eu-norge.org/Global/SiteFolders/webeu/110629\\_3rd\\_postal\\_directive\\_statement.pdf](http://www.eu-norge.org/Global/SiteFolders/webeu/110629_3rd_postal_directive_statement.pdf) accessed 06.04.2012

<sup>112</sup> NOU 2012:2 '*Inside and outside*' p 103

<sup>113</sup> *Ibid* p 104

<sup>114</sup> *Ibid* p 104

<sup>115</sup> *Ibid* p 105

<sup>116</sup> *Ibid* p 105

<sup>117</sup> Directive 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 284

<sup>118</sup> Directive 2008/6/EC of the European Parliament and of the Council amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services [2008] OJ C 307 E

<sup>119</sup> As an example, the majority in the Labour Party.

*registered user*' (article 1 paragraph 2). The directive concerned telephony and internet (article. 5). The aim is to make it easier for the public authorities to fight crime and terrorism.<sup>120</sup> The directive was approved in Norwegian Parliament with 89 to 80 votes,<sup>121</sup> and will be implemented into the EEA agreement, effective in Norwegian legislation from the 1<sup>st</sup> July 2012.<sup>122</sup>

The Data retention directive created debates in Norwegian society and media. The concern was in large the protection of privacy. This was also a concern for several member states, as well as an issue recognized by the Commission.<sup>123</sup> The European Commission is now working on adjustments to the directive.

The reasons why it was not decided to use the right of reservation concerning the data retention directive may be numerous. Firstly, the directive only seeks partial harmonisation. Secondly, the concerns were general and not able to mobilise a specific group of 'victims'. Furthermore, it was likely that the directive would be modified after all, because of all the reactions from the member states in the EU.

### 3.3.7 The Third Postal Directive

The third amending directive to the EU Postal Services was published in 2008 and decided to be EEA relevant by the EEA Joint Committee. The intention with the directive is to profit from the internal market while liberalising the whole postal sector.<sup>124</sup> The Third Postal directive will liberalise and open the competition for other actors also for letters weighing less than 50 grams. In Norway delivery of these letters is often not profitable because of the often difficult geographical location of the recipient. Currently this is partly financed through The Norwegian Postal Service and partly by the annual state budget because of societal reasons.<sup>125</sup>

The concerns with the new directive are that the postal services in question will either cease to exist or become more expensive. This will affect the whole population, but in particular those who live in rural areas. In Norway this is of particular importance due to the Norwegian topography, with mountains and fjords making large areas difficult to access. In general it is a governmental aim to secure the living conditions in these areas to preserve a diverse population and Norway's national history.

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<sup>120</sup> Directive 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 284 art. 9

<sup>121</sup> <http://europolov.no/rettsakt/datalagringsdirektivet-lagring-av-data-fra-elektronisk-kommunikasjon/id-309> accessed 02.04.2012

<sup>122</sup> *Ibid*

<sup>123</sup> European Commission Press Release '*Commission evaluates the Directive on retention of telecommunications data*' [2011] IP/11/484

<sup>124</sup> Norwegian Government '*Posisjonsnotat*' regarding Directive 2008/6/EF [2008] OJ C 307 E

<sup>125</sup> Minister of Foreign Affairs, Mr Jonas G. Støre '*Biannual address to the Storting on important EU and EEA matters*' [2011] May 19<sup>th</sup>

Politics that protect these values have a strong position in Norway. Because of the directive's potential consequence for rural areas, this debate has engaged those who support a strong rural politic in general. They fear it will become more difficult to live in such areas than it already is.

As a result of this debate, a report of the possible consequences of the implementation was drafted on behalf of the Ministry of Transport and Communications. In the report the conclusion was that if the state aid for delivering in non-profitable areas continues for the Norwegian Postal Service, the Third Postal Directive will not affect the distribution service.<sup>126</sup>

The voting in the Government was equal, leaving the Labour Party with the final decision. At the annual meeting within the party<sup>127</sup>, it was a majority *for* using the right of reservation in this particular case. In the biannual report to the Norwegian *Storting*<sup>128</sup>, the Foreign Minister<sup>129</sup> concluded that there still are concerns, and emphasized that the directive might have a negative effect on working conditions and wages in the post sector, based on experience from other states. On the 23<sup>rd</sup> of May 2011, the Norwegian Foreign Minister delivered a notice to the EU, concluding that Norway is considering using the procedure in article 102 EEA.

It does not seem that this move has provoked particular interest beyond Norwegian borders. However, it is likely that if the procedure continues, attention will be given from those states which are considering joining the EEA agreement.

### 3.3.8 The European Union point of view

The official report from the meeting on 23rd of May 2011 does not mention the Norwegian initiative.<sup>130</sup> Representatives from the EU and from Norway had the first informal meeting some days later<sup>131</sup> and another one in September.<sup>132</sup> In the Council Conclusion from November 2011, the Council states that ‘...*The EEA Council noted the Progress Report of the EEA Joint Committee and, in particular (...) noted the importance of maintaining close cooperation between the EU and the EEA EFTA States on postal reforms while addressing the concerns on the implementation of the Third Postal Directive (2008/6/EC)*’.

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<sup>126</sup> Andersen; Mjør Lund: SNF Rapport 3/09 ‘Effekter ved en liberalisering av det norske postmarkedet’ (‘Postens evne til å opprettholde tjenestetilbudet på dagens nivå i hele landet’)

<sup>127</sup> April 2011, NOU 2012:2 ‘*Inside and Outside*’ p 103

<sup>128</sup> The Norwegian Parliament

<sup>129</sup> Minister of Foreign Affairs, Mr Jonas G. Støre ‘*Biannual address to the Storting on important EU and EEA matters*’ [2011] May 19th

<sup>130</sup> Conclusions of the 35th meeting of the EEA Council Brussels, 23 May 2011

<sup>131</sup> Joint Press Statement [http://www.eu-norge.org/Global/SiteFolders/webeu/110629\\_3rd\\_postal\\_directive\\_statement.pdf](http://www.eu-norge.org/Global/SiteFolders/webeu/110629_3rd_postal_directive_statement.pdf) accessed 29.03.2012

<sup>132</sup> Comment from the ‘EU delegation to Norway’, Oslo 29.03.2012

Article 102 of the EEA agreement was not mentioned in the statement, but the ‘*close cooperation*’ is emphasized. This implies that negotiations are accepted, as is the procedure in article 102. The potential specific measures are not mentioned. This can imply that no other specific measures will be taken except from those found in agreement in the EEA Joint Committee. On the other hand this statement could mean that EU has not yet decided how to react.

### 3.3.9 Consequences

In the report from the Foreign Ministry, the expert group highlights the probability of countermeasures from the EU.<sup>133</sup> This is a political assessment. The statement has been criticised, saying that the fact that the EU has waited almost one year to answer the Norwegian notice implies the opposite.<sup>134</sup>

Some positive aspects that may arise from the right of reservation are firstly, that it underlines the principal difference from being an EU member state. This is the only provision that justifies the fact that the EFTA/EEA states cannot take part in the decisions making.

Secondly, it will contribute to a substantial EU/EEA debate in the member states. If the right is used, the debate about the EEA agreement can be founded on facts, not on how the agreement is supposed to function theoretically.

Third, this provision may safeguard important national interests. If the use is accepted by all parties, including the EU, this will contribute to the sustainability of the EEA agreement.

On the other hand it could first off all harm the agreement itself, if the EU does not have a similar comprehension of the article as the EFTA/EEA states. It can be argued that the article does not envisage a right to veto, only a negotiation procedure where veto is not an option.

Secondly, it might harm the political cooperative environment. Concretely, this may result in difficulties for the EFTA/EEA states to get the exemptions that they would otherwise get.

Third, if the use of the right of reservation concerns a particular national interest, the argument about the ‘cherry picking’<sup>135</sup> of the EFTA/EEA states will gain substance.

## **4 Influence in the legislative process**

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<sup>133</sup> NOU 2012:2 ‘*Inside and outside*’ p 105

<sup>134</sup> ‘No to the EU’ – comments on the NOU 2012:2 ‘*Inside and Outside*’ to the chapter about the Right of Reservation on page 105

<sup>135</sup> Global Britain Briefing Note ‘*Cherry-Picking*’ No 36 26th November, 2004

## 4.1 Introduction

One of the most important differences between being an EU member state or not, is the issue of influence in the legislative decision-making process. The legal base for EFTA/EEA influence is the EEA agreement article 81, 99, 100 and 101.

Article 81, 99 and 100 give the EFTA/EEA states the right to participate in preparatory groups related to the work of the Commission. Article 101 is a legal basis for participation in other committees. The granted right of participation mainly concerns the Commission. When the EEA agreement was signed, the Commission was the most important EU organ. After the entry into force of the Lisbon Treaty 1<sup>st</sup> December 2009, the balance of power between the EU actors has changed. Today, the Commission still has vital tasks such as setting the political agenda for the EU as well as the exclusive competence of initiating law under the ordinary legislative procedure. However, as an example, the decisive legislative power is now given to the Council and the Parliament, (TFEU article 149). The change makes influence more difficult for the EFTA/EEA states, as new procedures and networks had to be established when the EEA Agreement has not been changed accordingly.

Despite the lack of updating the EEA Agreement in this regard, there are alternative means of influence. For example can the EFTA/EEA States forward their view to the representatives of states with whom they have a close cooperative relationship and common interest. For Norway this will for example be the other Nordic countries, with which there are also other arenas outside the EU that may be used for lobbying.

Meanwhile, the lack of adaption in the EEA agreement makes the EFTA/EEA influence more difficult than what was the objective when the agreement was signed. In the following the aforementioned articles and the influence obtained, will be examined.

## 4.2 Article 81

The EFTA/EEA states derive the right to participate in Programme Committees from article 81 of the EEA agreement.<sup>136</sup> The Program Committees are under supervision of the Commission. As the name implies, the Program Committees shall develop the different programs of the EU. In the period 2007-2013, the EFTA/EEA states will participate in 16 program committees through the EEA agreement.<sup>137</sup> One example is the equal right for students in EFTA/EEA states to benefit from the Erasmus exchange program for higher education.

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<sup>136</sup> EFTA Bulletin 'Decision shaping in the European Economic Area' 1-2009 March p 20

<sup>137</sup> Ibid p 20

According to article 81b, when developing policies in an area where EFTA States contribute financially, the EU ‘*shall take full account*’ of the EFTA contribution. This means that the EFTA States have a right to be heard when developing relevant policies. Furthermore in article 81e, the ‘*EFTA States...shall have the same rights and obligations with regard to dissemination, evaluation and exploitation of results as those applicable to EC Member States...*’ The article secures the right to be heard in the same manner as an EU state, when the EFTA/EEA state is participating.

### 4.3 Article 99

According to article 99 of the EEA agreement, the EU Commission ‘*shall*’ consult ‘*experts*’ from EFTA/EEA countries in the drafting of new EU legislation ‘*in the same way*’ as they seek advice from the experts from the EU member states. The wording implies that only if the Commission seeks advice from the EU member states, are they obliged to consult the EFTA/EEA experts. This interpretation is consistent with the one in the report from the expert group, NOU 2012:2.<sup>138</sup> In this regard, EFTA/EEA states are treated in the same manner as EU member states.

The national experts are independent experts and do not formally represent their national government.<sup>139</sup> Meanwhile, the experts often come from the national ministries or departments under the ministries.<sup>140</sup> Their experience and advice are not formally the states’ position, though through their task of providing the Commission with valuable experience and advice, they may forward their states’ position, in order to avoid surprises and problems for the state later in the process.<sup>141</sup>

Meanwhile, the EFTA/EEA states may only participate as experts in groups that prepare ‘*a field which is governed*’ by the EEA agreement. Today this means that out of approximately 1000 groups, Norway as an example, may participate in 300-400 committees.<sup>142</sup> On one hand, this is a predictable outcome of the agreement, as it would not be natural to participate in others. On the other hand, it depends on interpretation. If interpreted narrowly, fields that are not mentioned in the agreement but still influenced by it will fall outside the scope. Only a realistic approach to the impact of the EEA agreement in the EFTA/EEA states will provide influence according to the objective in article 99.

It is highlighted by the Norwegian expert group that the right to participation as experts is accepted by the Commission, but not always well-known among all commissioners and EU member state representatives.<sup>143</sup> This fact leads to the necessity of negotiating the framework of the participation

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<sup>138</sup> NOU 2012:2 ‘*Inside and Outside*’ p 171

<sup>139</sup> EFTA Bulletin ‘*Decision shaping in the European Economic Area*’ 1-2009 March p 21

<sup>140</sup> NOU 2012:2 ‘*Inside and Outside*’ p 173

<sup>141</sup> EFTA Bulletin ‘*Decision shaping in the European Economic Area*’ 1-2009 March p 21

<sup>142</sup> Ibid

<sup>143</sup> NOU 2012:2 ‘*Inside and Outside*’ p 171

before several of the meetings.<sup>144</sup> As long as this is a success for the EFTA/EEA state, the legal basis is clear and the right to participation should not lead to problems. On the other hand, if the EEA Agreement had been amended accordingly, influence would be secure and predictable, not coincidental.

The EU member states are sometimes asked to provide comments when the EU is developing policies. If the area is EEA relevant, the EFTA/EEA states will also be asked to provide a written comment.<sup>145</sup> Altogether the EFTA/EEA states have sent more than 100 comments, though the annual number has decreased in recent years.<sup>146</sup>

#### 4.4 Article 100

Article 100 in the EEA agreement provides that experts from the EFTA/EEA states shall be granted '*as wide a participation as possible according to the areas concerned, in the preparatory stage*', where EU member states are also conferred. This preparatory stage is where the comitology committees operate.<sup>147</sup> The comitology committees consist of representatives from the EU member states, and they supervise how the Commission effectuates the decisions from the Council and the Parliament. The comitology committees ensure that the Commission takes due account of each member state.

Since these committees '*shall*' be consulted in the preparatory stage of new legislation and therefore will influence the decision making process, the EFTA States are only granted observer status.<sup>148</sup> The influence of the EFTA/EEA states in this process is secondary and potential.

#### 4.5 Article 101

According to this article, the EFTA States shall also be consulted in committees when '*this is called for by the good functioning of this Agreement.*' These committees in question are listed in protocol nr.37 to the EEA agreement. From 2009, EFTA/EEA states could participate in 26 groups.<sup>149</sup> The listed groups are mainly concerned with the four freedoms and competition. To secure the good functioning of the agreement, these committees should cover not only the four freedoms, but include the flanking areas that the EEA agreement influences.

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<sup>144</sup> Ibid p 171

<sup>145</sup> EFTA Bulletin '*Decision shaping in the European Economic Area*' 1-2009 March p 23

<sup>146</sup> Ibid p 23

<sup>147</sup> EFTA Bulletin '*Decision shaping in the European Economic Area*' 1-2009 March p 22

<sup>148</sup> NOU 2012:2 '*Inside and Outside*' p 172

<sup>149</sup> EFTA Bulletin '*Decision shaping in the European Economic Area*' 1-2009 March p 23

## 4.6 The European Parliament

The European Parliament is composed of representatives elected by referendum from each of the EU member states. The Parliament is co-legislator with the Council, and the two organs discuss and adopt proposals from the Commission (TFEU article 4).

Due to the increased role of the Parliament in the EU decision-making process after the Lisbon Treaty, channels of information and influence for the EFTA/EEA states had to change. In the preamble of the EEA agreement, it says that ‘*cooperation between the members of the European Parliament and of the Parliaments of the EFTA States*’ is desirable. This provides a legal basis for the contact. This contact has not been used extensively however, and limits itself to the exchange of information between the parliamentary representatives of EFTA, and representatives of the European Parliament.<sup>150</sup> After the Lisbon Treaty, there has been increased contact at a high political level in Norway and the European Parliament, as well as the *Storting* establishing a Brussels office.<sup>151</sup> Also, a position has been created in the *Storting* administration whose task is to follow the work of the European Parliament, partly from Norway and from Brussels.<sup>152</sup> Even though the representatives of the European Parliament may be open to influence, there are many states in addition to the EFTA States who seek to influence the elected representatives, and in such a situation it may be difficult to get support for one’s view.<sup>153</sup>

In relation to the Parliament, being an EFTA/EEA state is clearly different from being an EU member state, as they do not have a national representative in the Parliament. The influence is secondary. The change in the power structure in the EU is an example of how development in the EU is happening without proper amendments in the EEA agreement, which to this date is customized for influencing the Commission. The consequence is that the EFTA/EEA states have had no possibility of influencing legislation that might become EEA law.

## 4.7 The Council

The EU Council is co-legislator with the European Parliament (TFEU article 4). The Council coordinates the member states’ economic policy, approves the budget, sign contracts of behalf of the EU, coordinates the foreign and defence policy as well as coordination of police forces and the courts in the member states.<sup>154</sup> Thus, the Council is given an important role in the EU system.

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<sup>150</sup> NOU 2012:2 ‘*Inside and Outside*’ p 181

<sup>151</sup> *Ibid* p 182

<sup>152</sup> *Ibid* p 182

<sup>153</sup> *Ibid* p 182

<sup>154</sup> [http://europa.eu/about-eu/institutions-bodies/council-eu/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/council-eu/index_en.htm) accessed 05.04.2012

There is no legal basis in the EEA agreement that secures the EFTA/EEA states influence in the different configurations in the Council. In order to obtain information and the possibility of influencing the Council, the Nordic EU ambassadors meet once a month before the Council meetings.<sup>155</sup> The state that hosts the rotating Council is also regarded as an important channel of influence, which for example Norway tries to influence by accrediting the embassy in the state with one extra diplomat during the six months of the presidency.<sup>156</sup>

Another possibility is to be invited to the informal Council meetings between the ministers, along with other non-member states.<sup>157</sup> Here representatives from other EU organs attend, and there is a possibility to make an informal path for national interests if the EFTA/EEA representative in question has an active profile and an agenda for the meeting.<sup>158</sup>

#### 4.8 Independent Committees

The past years have witnessed an expansion in the development of independent EU committees. The reasons are both because of the limited capacity of the Commission as well as a necessary separation between law and politics in the EU.<sup>159</sup> The tasks of these committees are both helping in forming EU policies as well as supervising the following of the policies, or purely informational work.<sup>160</sup>

As a starting point, independent committees represent a problem for the EFTA/EEA states, as access to these is not granted through the EEA agreement. If the EFTA/EEA states want to participate, the EFTA/EEA states must negotiate a right for each different Committee. This is even the case if the area in question is regulated in the EEA agreement.<sup>161</sup> If the EFTA/EEA states are granted access, it will be with observer status only.<sup>162</sup>

These independent committees may still be an important source of information for the EFTA/EEA states. The committees may additionally serve as the connecting point between networks of national governments, which the EFTA/EEA states may seek to influence informally.

#### 4.9 Remarks

The above indicates that legislative powers have been transferred from the EFTA states to the EU organs, despite this not being explicitly stated in the EEA Agreement. The EFTA/EEA states are

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<sup>155</sup> NOU 2012:2 *'Inside and Outside'* p 178

<sup>156</sup> *Ibid* p 178

<sup>157</sup> *Ibid* p 178

<sup>158</sup> *Ibid* p 178-188

<sup>159</sup> *Ibid* p 176

<sup>160</sup> *Ibid* p 176

<sup>161</sup> *Ibid* p 176

<sup>162</sup> *Ibid* p 176

secured a limited amount of influence through the EEA agreement, but this influence is not proportional compared to the amount of incorporated EU law in the EFTA States. Another aspect is the lack of amendment in the EEA agreement which regulates the right to influence. Consequently, more power is given to the EU, and the supranational character of the EEA Agreement becomes even more visible.

When the objective of the agreement pursuant to the preamble, is to establish a '*dynamic and homogenous*' European Economic area, there are no obvious reasons why the legal basis for influence in the EEA agreement should not be amended according to the changes in the Lisbon Treaty. Amendments would give the EFTA States increased stability and security for their manner of influence. Amendments in this regards would make sure the EFTA/EEA states retained the sovereignty they had from the beginning.

The EFTA States have changed their methods of influencing, without demanding a formal update of legal basis in the EEA agreement. An updated legal basis should be a natural consequence of changes in the EU, as it would not hurt the objective in the agreement. The reason must be a lack of willingness, in order not to hurt the political cooperation environment, because the consequences of the latter are unpredictable. This is an example of a weak legal procedure, which is arguably harming the proper functioning and future of the EEA agreement.

Thus when the agreement is functioning, the power is executed by a supranational organ whose decisions are legally binding. The overall reason for this development is the lack of balanced legal criteria and an unequal balance of power between the parties.

## **5 Views from other European States**

### **5.1 Introduction**

How the EEA agreement is viewed by other European states will contribute to highlight the character of the agreement. Furthermore, if other states assess the EEA agreement as an attractive manner of accessing the internal market without the conditions attached to an EU membership, the non-EU member states would increase their political power.

Through its 20 years of existence, the EEA agreement has not been an alternative for other European states. To be a part of the EEA agreement, one must either be an EU member or a member of EFTA. Unlike the EU, there are no entrance criteria to become a member of EFTA.

As said by the previous Commission President Romano Prodi<sup>163</sup>, the EEA agreement facilitates for its contracting parties to be *'as close to the EU as it is possible to be without being a member.'*<sup>164</sup>

Furthermore in relation to the neighbouring states, he emphasized that *'it is worth seeing what we could learn from the way the EEA was set up and then using this experience as a model for integrated relations with our neighbours.'* This indicates that the EU has an interest in close cooperation with their neighbouring countries and that the EEA agreement can be the right tool. At the same time, as we have seen the EEA agreement might result in more homogeneity than predicted at the first glance. In the following it will therefore be assessed how the EEA agreement would fit as an alternative model for some of the other states in Europe. The states that will be examined are chosen as a result of their own assessments of a change in their relationship with the EU or that they have openly expressed that the EEA seems to be an interesting alternative.

## 5.2 Switzerland

Switzerland was part of the negotiations for the EEA agreement in 1990-1991, but the agreement was rejected by a referendum in 1992.<sup>165</sup> By their unwillingness to lose parts of their sovereignty but at the same time acknowledging the EU as an important trade partner, Switzerland has chosen an alternative between EU membership and the EEA agreement. The latter is a relationship consisting of bilateral free trade agreements; the first free trade agreement from 1972 (*'Bilateral I'*), a series of agreements from 1999 (*'Bilateral II'*) and agreements from 2004. In sum, there are over 120 agreements which substantially cover almost the same as the EEA agreement.<sup>166</sup> As an example, *'Bilateral I'* covers free movement of persons and goods, as well as research, transport and public procurement. The character of the agreements is diverse; some are static while others obligate Switzerland to incorporate new relevant regulations and directives, meaning they are dynamic.

The most important difference from the EEA agreement is firstly that there are no common permanent institutions. Conflicts are solved by one of the 27 ad-hoc committees. These committees do not have deadlines nor are they under an obligation to deliver a decision.<sup>167</sup>

### 5.2.1 Points of view from the EU

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<sup>163</sup> Romano Prodi *'A wider Europe- A Proximity Policy as the key to stability'*. Sixth ECSA-World Conference. Brussels 5-6<sup>th</sup> December 2002. Speech/02/619

<sup>164</sup> Ibid

<sup>165</sup> NOU 2012:2 *'Inside and outside'*, p 310

<sup>166</sup> Ibid p 310

<sup>167</sup> Ibid p 310

Already after the negative referendum of the EEA agreement in 1992, the Commission stated that *'it would be inappropriate for Switzerland to obtain all the advantages of an Agreement which it has rejected'*.<sup>168</sup> The comment reveals a restrictive attitude towards the expansion of this trade relationship. At the same time it signals to third parties that this kind of trade relationship is restricted both in substance and in accessibility.

The EU's concern regarding the lack of a permanent institutional structure and its consequences was confirmed on the Councils meeting in Brussels 2010. The report from the meeting stated that the cooperation has *'turned in the course of the years into a highly complex set of multiple agreements. Due to a lack of efficient arrangements for the take-over of new EU acquis including ECJ case-law, and for ensuring the supervision and enforcement of the existing agreements, this approach does not ensure the necessary homogeneity in the parts of the internal market and of the EU policies in which Switzerland participates. This has resulted in legal uncertainty for authorities, operators and individual citizens.'*<sup>169</sup>

From this statement, it is not clear which solution the EU envisages for Switzerland. If a solution to ensure the *'necessary homogeneity'* shall be sought in the already existing possible legal models, Switzerland must either become an EU member or an EFTA member. An alternative is to establish a Court on a permanent basis to supervise the current FTAs. Considering that the substance of the agreements is already close to covering as much as the EEA agreement, a permanent institutional structure will position it even closer. The question however arises if this will be profitable for the EU.

### 5.2.2 The view from Switzerland

Though the EU has several times acknowledged that they are not completely satisfied with the situation, Switzerland has been content. Meanwhile, as a result of the Council's recent and several comments, Switzerland is now communicating that they are willing to look for other alternatives, according to a recent report.<sup>170</sup> In the report the relationship with the EU is examined based on three criteria from the Swiss side<sup>171</sup>. The criteria are firstly that Switzerland shall have co-decision making power and retain sufficient room for deciding its own policies. Secondly, the EU shall remain willing to co-operate and to find bilateral solutions. Last, the economic framework conditions shall not change to Switzerland's disadvantage. In principle, these criteria exclude both EU membership and EEA membership, because Switzerland demands co-legislation power.

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<sup>168</sup> The Commission of the European Union *Future Relations with Switzerland* Communication from the Commission, COM(93)486 final, p 3

<sup>169</sup> The Council *Council Conclusions on EU relations with EFTA countries* (3060th General Affairs Council Brussels, 14 December 2010) para 42

<sup>170</sup> Federal Department of Foreign Affairs FDFA; Federal Department of Economic Affairs FDEA, Swiss Confederation *Switzerland's European Policy - An overview of the Federal Council's Report on the Evaluation of Switzerland's European Policy 2010*

<http://www.europa.admin.ch/dokumentation/00437/00460/01549/index.html?lang=en> accessed 14.03.2012

<sup>171</sup> *Ibid* p 4

When the Swiss report is evaluating alternatives, the EEA agreement is assessed as an attempt ‘to unite two contradictory objectives’<sup>172</sup>, the legislative autonomy and the homogeneity principle. Judging from the report, EEA membership does not seem likely as a Swiss option, mostly reasoned by the lack of influence on the decision-making process.

### 5.2.3 Reflections on this arrangement

Several arguments favour that the existing arrangement should be satisfactory, taking into consideration that the trade relationship consists of free trade agreements between sovereign parties. On the other hand, EU law is *sui generis*, and does not have the characteristics of other international law constructions, which FTAs usually are based upon. The reason for the EEA agreement not being comparable to other international agreements is the nature of EU law with direct effect and supremacy. As a consequence, EU law operates slightly different in Switzerland than in the EU member states. A structure with ad-hoc committees serves as an effective system to solve problems related to the application of EU law in Switzerland. The lack of permanent institutions is strengthened by the fact that not all agreements between the EU and Switzerland are of a dynamic nature, making the supervision of the agreements even more important.

As many of the agreements are linked together with a so-called ‘guillotine’ clause; the termination of one agreement may lead to the termination of several.<sup>173</sup> If changes shall be made within the current framework, new agreements must be negotiated.

In this arrangement, Switzerland has retained its sovereignty and treats the EU as any other international partner. At the same time, problems attached to the specific nature of the EU become visible, as for example lacking direct effect to ensure the same application of EU rules within Switzerland. Even though this relationship has been satisfactory for many years, due to the characteristics of EU law, the arrangement has failed to become a permanent success. The relationship is therefore about to change.

EU membership is portrayed as more attractive than the EEA agreement in the official report from Switzerland. In terms of influence, the Swiss Ministry of Foreign Affairs recognises Switzerland as a medium-sized state, but emphasizes that experience shows that even small states may have ‘an influence that extends beyond their numerical representation in EU bodies.’<sup>174</sup> Given the fact that Switzerland is the current EFTA state most reluctant to transfer sovereignty, it is worth noticing that EU membership is regarded as more favourable than the EEA agreement.

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<sup>172</sup> Ibid p 11

<sup>173</sup> NOU 2012 :2 ‘Inside and Outside’ p 310

<sup>174</sup> Federal Department of Foreign Affairs FDFA; Federal Department of Economic Affairs FDEA, Swiss Confederation *Switzerland’s European Policy - An overview of the Federal Council’s Report on the Evaluation of Switzerland’s European Policy 2010* p 12  
<http://www.europa.admin.ch/dokumentation/00437/00460/01549/index.html?lang=en> accessed 24.05.2012

A result of the parties' reports is that the European Commission and the Swiss Government in July 2010 put together a working group to find a mutual more beneficial solution.<sup>175</sup> To enter an agreement which is almost identical to the EEA Agreement, would give signals from the EU that every state have the possibility for an individual agreement. This would cost a large amount of resources for the EU, and it is doubtful that it will serve their interest. As the Swiss people are euro-sceptics in general,<sup>176</sup> the outcome is not definite. The solution will in either way contribute to the EU debate in Europe, and in particular to the debate in Norway and Liechtenstein, bearing in mind the potential Icelandic EU membership.

### 5.3 The United Kingdom

The United Kingdom started the negotiations for EC membership in 1961, but it was not until the French president Charles de Gaulle withdrew as president in 1969 that the UK was politically accepted and became a member state in 1973. President de Gaulle had the opinion that the UK had a “*deep-seated hostility*” and “*lack of interest*” towards the European Community, and that their economy was too different to fit into the European model.<sup>177</sup>

#### 5.3.1 Exemptions and consequences

It is possible that president de Gaulle made a point regarding the lack of interest. Since 1973, the UK has obtained several opt-outs from important developments in the EU. One example is the opt-out clause in the Maastricht Treaty of 7<sup>th</sup> February 1992 regarding the common currency. This clause states that the ‘*powers of the UK are the field of monetary policy which are not affected by the Treaty*’.<sup>178</sup> As a consequence, the UK retains the pound sterling and the power of devaluation, thus retaining a great part of their sovereignty in the monetary sector. This is different from, as an example, the ‘political opt-out’ from the EU Charter of Human Rights. The EU Charter in large codifies principles that are already established through case law, and to which all member states are bound, leaving the opt-out without substance to a wide extent.

UK Prime Minister David Cameron refused to take a part in the formation of a new financial treaty to regulate the member states economy due to the euro crisis. Although he had support in the UK and from his Conservative Party, he received criticism from his EU colleagues. French president Nicolas Sarkozy characterised the veto as ‘*unacceptable*’.<sup>179</sup> This refusal is the last of many opt-outs during

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<sup>175</sup> NOU 2012:2 ‘*Inside and outside*’ p 312

<sup>176</sup> Referendum ‘*Yes to Europe!*’ 76.8% voted ‘*no*’ March [2001]

<sup>177</sup> [http://news.bbc.co.uk/onthisday/hi/dates/stories/november/27/newsid\\_4187000/4187714.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/november/27/newsid_4187000/4187714.stm) accessed 27.05.2012

<sup>178</sup> Maastricht Treaty 1992 ‘*25 PROTOCOL on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland*’ Official Journal C 191, 29 July 1992

<sup>179</sup> Gavin Hewitt ‘*David Cameron blocks EU-wide deal to tackle euro crisis*’ (BBC News 9 December 2011)

the past years, revealing a strong tendency not to willingly integrate as originally agreed. At the same time, the debate regarding EU membership has increased the past years.

In a speech<sup>180</sup> given by David Cameron, he stated that ‘*We’ve a right to ask what the European Union should and shouldn’t do.....and change it accordingly.... An opportunity to begin to refashion the EU so it better serves this nation’s interests...*’ This statement expresses the view that the UK has an independent position in the EU. This is per definition not correct. New laws are decided between the Council and the European Parliament to whom also the UK has transferred legislative powers. The UK has the identical opportunities as the other member states to participate in and influence the EU organs in this process. Furthermore will exemptions be contrary to the nature of EU membership. As an EU member, acceptance is given to the EU as sole legislator; sovereignty has been transferred to the EU. There is no clause in the TEU/TFEU stating that transfer of sovereignty can be withdrawn. The UK must as a starting point abide by the result of the majority according to the voting rules.

Furthermore, exemptions and opt-outs may negatively influence the political environment, which is an important factor within the EU. In these terms, it cannot be excluded that the exemptions may have long-term consequences.

A final point is that David Cameron wants to ‘*refashion*’ the relationship with EU. What this means is uncertain, but it implies that we may expect some changes in the EU-UK relationship in the future.

### 5.3.2 Future alternatives and debate in society

The Prime Minister has said that ‘*Leaving the EU is not in our national interest*’. Furthermore he has stated that; ‘*Outside, we would end up like Norway, subject to every rule for the single market made in Brussels but unable to shape those rules.*’<sup>181</sup> By his comments, David Cameron criticizes the position the EFTA/EEA countries may in practice be subject to.

Altogether, it is not clear what David Cameron views as the best position for the UK in relation to the EU, at this point, he argues both the opportunity to get exemptions for what is not in the UK’s interest, and for retaining UK’s influence. As David Cameron speaks on behalf of ‘*we sceptics*,’<sup>182</sup> a reduction of the EU ties is maybe what he and the Conservative party wants. The opinion of the people, the decisive factor in the end, is not clear.

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<http://www.bbc.co.uk/news/uk-16104275> accessed 20.03.2012

<sup>180</sup> The Prime Minister David Cameron ‘*Foreign Policy in the National Interest*’ (The Lord Mayor’s Banquet 2011)

<sup>181</sup> Ibid

<sup>182</sup> Ibid

In the article '*Tiptoeing Out*'<sup>183</sup>, the columnist Martin Hutchinson is of the opposite opinion to Cameron. Hutchinson states that the '*UK would be a natural*' partner to the EEA agreement. Regarding '*the City*'<sup>184</sup>, he says that strictly euro-zone matters will leave the UK anyway. His view is supported by other columnists in the field. Justin Stares points out that with only EEA membership, the fishery policy, agricultural policy and the common defence policy will be left outside the EU sphere, '*all detested by some eurosceptics.*'<sup>185</sup> Furthermore it is emphasized that in addition to the four basic freedoms, the UK could cooperate with the EU in other voluntarily areas, as well as the economic support the UK would be expected to give would be less. It is correct that for example agriculture and fisheries are not a part of the EEA agreement. Meanwhile, it is more to the EEA than the four freedoms.

On the other side, it is uncertain how the EU would react to a change of UK's status. According to the TFEU article 46 paragraph 5 a, member states can withdraw from membership of the EU. Meanwhile, there are no established procedures for downgrading a membership to a free trade agreement or to only EEA participation. As the UK has not formally launched a wish to do so, no signals have come from the EU in this matter.

The reaction of the current EFTA/EEA states towards UK participation may be presumed positive. All the states have generally a steady and positive relationship with the UK, as well as the UK being a powerful state which would contribute to the institutional system, making both the administrative and financial burden lighter. Also the UK would provide the EFTA block with more political power. One negative aspect is that the UK could have too much power compared to the other states, making the necessary cooperation and unanimity, difficult.

The question regarding the EEA agreement has not been thoroughly examined at UK governmental level. At the moment it is clear that the UK is not entirely satisfied with the situation, but the EEA debate seems to end at the influence issue. The UK has always been a great power in Europe, alongside France and Germany. The chances that the UK will reduce its possibility of influence and power are therefore small.

#### 5.4 The European small territorial states

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<sup>183</sup> Martin Hutchinson, '*Tiptoeing Out*' (*Breaking News* 15 December 2011) <http://www.breakingviews.com/eea-could-be-right-place-for-uk-in-europe/1620321.article> accessed 20.03.2012

<sup>184</sup> The City of London is a distinct legal entity in London; a financial centre.

<sup>185</sup> Justin Stares '*What exactly would the UK gain from leaving the EU?*' ( *PublicServiceEurope.com* 08 November 2011) <http://www.publicserviceeurope.com/article/1090/what-exactly-would-the-uk-gain-from-leaving-the-eu> accessed 20.03.2012

In the Council's 2010 conclusions, the EU view is that the relationship with the microstates should be towards the '*progressive integration into the internal market*'.<sup>186</sup> In the following it will be assessed whether the EEA agreement would be an appropriate legal model in this relation for the micro states, as well as for the Faroes.

#### 5.4.1 San Marino

In February 2011, the Department of Foreign Affairs in San Marino published a report on their relationship with the EU.<sup>187</sup> Currently it consists of bilateral trade agreements. In the report, the EEA agreement is not mentioned explicitly, but a common solution for the micro states is desirable.

This signalled that the EEA agreement has been found not to be an appropriate tool for the needs of the micro state. On the other hand, the report does not state specifically why the EEA would not be appropriate. In any case, EEA membership for San Marino does not seem likely in the near future.

#### 5.4.2 The Faros

The Ministry of Foreign Affairs in the Faroes assessed in 2010 how to build the most beneficial relationship with the EU.<sup>188</sup> The Faros are not a state, but they have self-governance under Denmark. When Denmark became an EU member in 1973, the Faros chose to remain outside, resulting in being treated as a third country in relation to the EU.<sup>189</sup>

Legally, the Faros cannot become a party to the EEA agreement, as it demands either EU membership or EFTA membership. Denmark is already an EU member, and therefore the Faros cannot become an EU or an EFTA member. Meanwhile, '*The Foreign Policy Powers Act of 2005*' allows for EFTA membership as a part of Denmark in respect of the Faros.<sup>190</sup> The latter is dependent though on the political will in Denmark. The question is if this would pave the way for a Faroese EEA membership.<sup>191</sup>

For the Faroes, EEA membership will be positive to the education and business sector, but it will also bring an economic and administrative burden.<sup>192</sup> This detailed examination of consequences suggests that EFTA and EEA participation are presented as realistic alternatives.

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<sup>186</sup> Para 9

<sup>187</sup> Secretariat of State for Foreign and Political Affairs of the Republic of San Marino '*Summary of the final report prepared by the Technical Group for the Assessment of new Policies for the Integration with the European Union San Marino*' February 2011

<sup>188</sup> Minister of Foreign Affairs of the Faroes '*The Faroes and the EU - possibilities and challenges in a future relationship*' May 2010

<sup>189</sup> Ibid p 9

<sup>190</sup> Ibid p 53

<sup>191</sup> Ibid p 53

<sup>192</sup> Minister of Foreign Affairs of the Faroes '*The Faroes and the EU - possibilities and challenges in a future relationship*' May 2010, p 54

The report recognises that Norway and Iceland are positive to a Faroese EFTA membership, while Switzerland and Liechtenstein are not.<sup>193</sup> The political situation may thus hinder the participation, not the legal character of the agreement itself.

### 5.4.3 Andorra

Andorra and the EU currently have a Customs union.<sup>194</sup> The relationship also consist of a Cooperation agreement from 2004; the latter without substantial results.<sup>195</sup> Andorra's currency is the euro,<sup>196</sup> as well as they *de facto* are Schengen members, and have a taxation agreement.<sup>197</sup>

In 2007, the relationship and the possibilities for substantial development between Andorra and the EU were presented in a research from the Andorran Minister of Foreign Affairs.<sup>198</sup> The background for this report was the growth of Andorran economy, and that policies and programs within the EU could contribute to this growth.<sup>199</sup> In order to benefit from the EU on a future and sustainable term, Andorra expects to have to take part in the four freedoms.<sup>200</sup>

Several options for cooperation with the EU are discovered in the research. Andorra evaluates the Swiss model as an alternative. Meanwhile, Andorra acknowledges the EU point of view that a Swiss model is probably not applicable to others, as the EU do not approve of 'cherry picking'.<sup>201</sup>

The EEA agreement is regarded as interesting, especially due to the fact that Liechtenstein, which is of the same size as Andorra, has managed the structure of the EEA agreement. Meanwhile, *'the EEA Treaty, of 1992, has since been overtaken by important developments in the EU's economic policies falling outside the precise internal market agenda of the EEA ....looking ahead for a model for the next decade, the EEA could be viewed as both too much (excessive detail with the 1,000 directives) and too little (in excluding new areas of EU policies).'*<sup>202</sup> The EEA agreement is thus evaluated not too detailed in one way and not detailed enough in the other. In sum, the EEA agreement is not an attractive future constellation for Andorra, who is aiming for an integrated future with the EU.

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<sup>193</sup> Ibid p 55

<sup>194</sup> 'Agreement in the form of an Exchange of Letters between the European Economic Community and the Principality of Andorra - Agreement between the European Economic Community and the Principality of Andorra - Joint Declarations' [1990] OJ L374

<sup>195</sup> Michael Emerson 'Andorra and the European Union' Centre for European Policy Studies (CEPS) Brussels 2007 p ii

<sup>196</sup> 'Monetary agreement between the European Union and the Principality of Andorra' [2011] OJ C 369/01

<sup>197</sup> Michael Emerson 'Andorra and the European Union' Centre for European Policy Studies (CEPS) Brussels 2007 p 3

<sup>198</sup> Michael Emerson 'Andorra and the European Union' Centre for European Policy Studies (CEPS) Brussels 2007

<sup>199</sup> Ibid p ii

<sup>200</sup> Ibid p 4

<sup>201</sup> Michael Emerson 'Andorra and the European Union' Centre for European Policy Studies (CEPS) Brussels 2007 p 4

<sup>202</sup> Ibid p 18

Full EU membership is also a possibility, but only ‘*with a special institutional arrangement to avoid congestion in EU decision-making.*’<sup>203</sup> A so-called ‘*virtual membership*’ could be a possibility around 2020.<sup>204</sup> A membership arrangement like this does not have a precedent. EU membership with a separate institutional arrangement, have similarities to the EEA agreement and the EFTA institutions. It is questionable if such an arrangement would be in the interest of the EU, when the EEA agreement can offer a set of well-functioning criteria.

It is worth noticing that the EEA agreement is not a future alternative for Andorra because of the dynamics of the agreement, despite Andorra being a small country, comparable to existing parties.

### 5.5 Remarks on the EEA agreement as an alternative model

Today there are several indications that the non-member states in Europe are open-minded regarding their relationship towards the EU. In other relations it is the EU who signalises change. In comparison with the existence until now, the EEA agreement may substantially change in terms of increase or decrease, comparable only to when the previous EFTA States left the EEA agreement in 1995.

It appears to be a difference between how the large and powerful states estimate the agreement, and the approach of the smaller states. It seems that the EEA agreement is not an alternative for the bigger states due to the lack of decisive influence. The latter does not seem to be decisive for the smaller states, as the influence is hardly mentioned in the reports from the micro-states.

Furthermore, the agreement is both too extensive and too underdeveloped. The reason is that the legal structure in the EEA Agreement has not been strong enough to secure a predictable future of integration favouring the EFTA States.

If the EFTA block was to have a new large member state, the influence on the EU could increase. It is likely that the political power of the non-EU member states in the EEA area would increase. Additionally, if one state joins it will be likely that others would also evaluate as the agreement as sufficient. If larger states were to join, a stronger legal character is likely to be demanded, which again would benefit all existing members.

New members of EFTA and the EEA must be approved by the EEA Council.<sup>205</sup> In general, Norway does not favour the entrance of the micro-states.<sup>206</sup> The Norwegian Foreign Minister said in his annual

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<sup>203</sup> Ibid p 4

<sup>204</sup> Ibid p 27

<sup>205</sup> EEA agreement art.128

<sup>206</sup> NOU 2012:2 ‘*Inside and outside*’ p 313

speech to the *Storting* in May 2011<sup>207</sup>, that accession ‘*would not be appropriate for these states*’. One of the reasons given was that ‘*Their needs and capacities differ from Norway’s*.’ It is true that their interests may differ from Norwegian interests. Norway is by far the biggest actor of the EFTA/EEA states with its approximately 5 million inhabitants. This is also visible when decisions are made within the EFTA pillar, where Norway tends to dominate.<sup>208</sup> Despite its small size and population in a global perspective, Norway has got resources and engagement worldwide, comparable to other important actors. This is a part of the reason why further association with the European micro-states will not be beneficial for Norway in a global perspective.<sup>209</sup>

If Iceland accesses the EU, the EFTA/EEA pillar is left with Liechtenstein and Norway. In this case, the administrative structure in the EFTA Court and the Joint Committee must change. If this happens, maybe there will be a place for a new micro-state after all.

## 6 Conclusions and Recommendations

The aspects discussed above, reveals the difference between formal and real application of the articles in the EEA Agreement. This research reveals that the legal structure in the EEA Agreement has the ability to let homogeneity prevail before sovereignty, and even to introduce constitutional principles in order to obtain the homogeneity aim. In the following, some suggestions in order to unite the formal and real application of the EEA Agreement will be presented.

### 6.1 Conditions

The core of the identified problem is that the principle of homogeneity seems to prevail in the majority of case law from the EFTA Court. This is problematic due to the formal approach of the EFTA states, which is sovereignty and dualism.

The question is *why* this weakness should be solved, as the Agreement has sustained for 20 years. The answer is that for the first time, there are implications that the composition of the EFTA block may change, and EU’s reaction remains uncertain because of the lack of legal regulation in the agreement. As Norway and presumably Liechtenstein still want to participate in the EEA agreement, its legal structure is vital in order to predict the future.

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<sup>207</sup> Minister of Foreign Affairs, Mr Jonas G. Støre ‘*Biannual address to the Storting on important EU and EEA matters*’ [2011] May 19<sup>th</sup>. [http://www.regjeringen.no/en/dep/ud/Whats-new/Speeches-and-articles/speeches\\_foreign/2011/address\\_storting\\_eu\\_eea\\_matters.html?id=643648](http://www.regjeringen.no/en/dep/ud/Whats-new/Speeches-and-articles/speeches_foreign/2011/address_storting_eu_eea_matters.html?id=643648) accessed 22.03.2012

<sup>208</sup> NOU 2012:2 ‘*Inside and outside*’ p 318

<sup>209</sup> NOU 2012:2 ‘*Inside and Outside*’ where the author says that the view of the Foreign Minister may be based on the Norwegian view of Norway p 313

Another consequence which should favour legal amendments also from the EU is the fact that when the EEA agreement is not amended according to all changes in the EU treaty, it is not certain that legal development in the Community is reflected within the EFTA States. As a result, the internal market rules in the EEA agreement may not be the same internal market rule as within the EU.<sup>210</sup> This means that the reluctance against having detailed legal obligations to ensure homogeneity, may actually have resulted in weakening the homogeneity, despite the increasing supranationality in the EEA agreement.<sup>211</sup>

## 6.2 Reflecting original expectations

One possibility is that the EEA agreement should reflect what the original comprehensions were. As a first step, the principle of sovereignty should be secured through a legal basis both in the EEA agreement and in the SCA. In this manner, the EFTA Court would have the mandate to equally balance the aim of homogeneity and the sovereignty. If the use of the right of reservation is accepted by the EU, thus letting the EFTA states decide not to implement the Third Postal Directive without legal or political counter measures, it may serve as an incentive to amend the agreement in this manner.

The independence of the EFTA Court should be codified, preventing the constant search for legitimacy from the ECJ. Instead, it would serve the EFTA states in a better manner if the EFTA Court took the special nature of the EEA Agreement into consideration. As long as there is a court to ensure the dynamic application of EU law, the EFTA Court will function according to its purpose.

Furthermore, article 81, 99, 100, 101 regarding the possibility for the EFTA states to influence the decision making process, should be amended accordingly to the changes from the Lisbon Treaty. If the EEA agreement was dynamic in this respect, the EFTA states would at all times have the influence which was accepted in the original negotiations.

## 6.3 Reflecting reality

The other possibility is to let the EEA agreement reflect its reality. Consequently, there should be a provision stating that direct effect is applicable where needed to obtain homogeneity in the entire European Economic Area.

Seen from an EFTA point of view, a formal acceptance of direct effect could challenge their dualist approach and the EFTA states would not completely retain their formal sovereignty. From a political

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<sup>210</sup> Hans Petter Graver 'Supranationality and legal autonomy in the EEA agreement (2002 European Foreign Affairs Review, 7:73-90, part II) p 90

<sup>211</sup> Ibid p 90 – Gravers conclusion is that the lack of legal obligations does in fact contravene homogeneity, last paragraph

point of view, this might lead to debates whether the state should still participate in the agreement, and perhaps a referendum regarding the participation in the EEA agreement. In the event of a negative referendum, the EFTA states would probably have to withdraw. This is likely to be the reason behind the inexplicit use of direct effect in case law, in order not to encourage this process. If the latter is correct, it means that the EFTA judges are not completely impartial from their home state, which is a breach of SCA article 30.

Furthermore, article 6 in the EEA agreement should be updated so as to comprise all ECJ decisions, not only those prior to the signing of the EEA agreement. The situation today, is that the EU member states are legally obliged to follow ECJ decisions; there is no equivalent in the EEA agreement. At first glance, the EFTA/EEA states are left with a margin of appreciation, supported by the mere existence of the EFTA Court. However, in practice there is no margin of appreciation; *de facto*, the use of ECJ decisions by the EFTA Court is so extensive that it could hardly have been a significant difference if there was a legal obligation to follow all ECJ case law completely. However, if article 6 had included the obligation to follow all ECJ rulings, the existence of the EFTA Court could arguably be questioned.

#### 6.4 Concluding remarks

If the above proposals could lead to unpredictable counter measures or perhaps a termination of the agreement, it means that the EEA agreement is not strong enough to tackle its own consequences. It is likely that the present legal conditions are results of the historic conditions at the time; the fear of being left out from the internal market. For Norway, this was combined with the negative referendum to EU membership in 1972, and that an EU membership seemed unlikely. Because it was arguably more important to secure cooperation with the fastest growing power in Europe than to fully secure one's own independent position, the EEA agreement arguably consists of too many compromises from the EFTA side.

This examination has revealed that in order to obtain homogeneity between the applications of EEA law in the EFTA States and within the EU, the EFTA States' sovereignty has lost more territory than originally expected. In this context, the result of the process regarding article 102 and the Third Postal Directive is both uncertain and important. From the above examinations it cannot be expected that the procedure in article 102 will be followed according to the Norwegian comprehension. However, what one may conclude from the negotiations and procedures to come, will be decisive in order to understand the reality of article 102 and thus the character of the EEA Agreement. Due to the fact that legal sanctions are not mentioned in this article, the use of sanctions will be a proof of how politics and power between the parties are the decisive factors governing the EEA Agreement.

The way other European states evaluate the EEA Agreement confirms the weak position of the EFTA block. If the EEA Agreement was a strong and predictable legal agreement, the agreement should be more attractive as an alternative for other European States when it gives access to the internal market without being EU-members. As this study reveals, there is no state that seem to have the EEA Agreement as their first choice when it comes to their EU-relationship. This is due to the fact that its unpredictable legal structure impairs the possibility for the EEA Agreement to be recognized as a real alternative to EU membership. Consequently, the parties to the EEA Agreement will probably remain the same as they are today as long as the agreement sustains. As expressed by Andorra, the EEA Agreement is both too narrow and too extensive.

Will the EEA Agreement sustain? As the above indicates, the answer will not rely on the legal structure of the Agreement but on the will to cooperate between the parties. For the EU, the Agreement will most likely sustain as long as it serves their interest while being beneficial, as it has been the last 20 years. The EFTA States on the other hand, has already agreed to more supranationality than originally expected, as the aforementioned discussions on principles, case law and influence reveal. There is a difference between formality and reality. What could jeopardize the Agreement from the EFTA side is perhaps a public discussion on this topic. The latter may happen relating to the Third Postal Directive and article 102. If this difference is set on the public agenda, the EFTA governments might be pressured to demand more sovereignty from the EU, a demand with unknown consequences. The other alternative is perhaps to renegotiate the Agreement if both parties agree, or termination.

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