



ARTICLES

POSSIBILITIES AND CHALLENGES OF THE EEA AS AN OPTION FOR THE UK AFTER BREXIT

HANS PETTER GRAVER*

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ABSTRACT: During the period leading to the actual Brexit, the UK will have to negotiate new arrangements for its relations with the EU. To maintain access to the single market, the relations between the EU and the new third country need to be reciprocal and dynamic. A crucial question centres on how this can be achieved while retaining, on the part of the UK, as much sovereignty as possible. The EEA Agreement is an example of an institutional arrangement that seeks to obtain the participation in the single market of countries outside the EU's institutional arrangements. The article presents the solutions reached in that agreement and analyses some of the challenges that it poses.

KEYWORDS: Brexit – EEA Agreement – sovereignty – external relations – association agreements – homogeneity.

I. THE EEA AS AN ALTERNATIVE POST-BREXIT?

How can the UK structure its relations with the EU after Brexit? Is it possible for the UK to maintain access to the internal market and, at the same time, regain sovereignty of Parliament and the courts? These are issues confronting the UK after last year's referendum. The UK already shares the same substantive rules of the internal market with the EU. It is even possible for the UK to unilaterally reproduce the main rules of the single market of the EU Treaties in its own domestic laws. Once the UK withdraws, however, it will no longer take part in the common goal and purpose of the EU. According to the case-law of the CJEU, this may affect the interpretation of the rules, and identically

* Professor of Law, Department of Private Law, University of Oslo; Fellow at the Institute of Advanced Study, University of Durham, h.p.graver@jus.uio.no.

worded rules in the EU and the UK may develop different contents.¹ Outside of the EU, the Commission will no longer monitor the adherence to the rules by UK authorities, and authorities in EU countries will no longer be under an obligation to accept certificates and assurances of compliance by UK authorities. Also, the rules on state aid will no longer apply. This does not mean that the UK will be free to support its industries and businesses in their trade with EU countries: on the contrary, the EU may meet such support with protective measures, and conflicts between the EU and the UK will be governed by WTO rules instead of EU law. There will also be no mechanism to ensure that as the rules develop within the EU, the rules are changed in the UK. All these factors represent not only political challenges for the UK in the future, but also challenges of an administrative and legal nature.

One way to overcome these challenges is the model provided by the European Economic Area (EEA) Agreement. The EEA Agreement is an agreement under public international law. It includes the European Free Trade Agreement (EFTA) countries – Iceland, Lichtenstein and Norway – in the EU's internal market, but does not subordinate these countries to a supranational legal order. It has exceptions as to the scope of the internal market. This way, the agreement represents a case wherein economic integration is limited to some but not all areas, and political integration is excluded.

The EEA brings together the EU Member States and the three EFTA States in a single market, based on the internal market of the EU. Within the scope of the EEA Agreement, the rules of the internal market extend to the whole EEA, with the result that people, services, goods and capital can move freely. The EEA Agreement guarantees equal rights and obligations within its internal market for citizens and economic operators in the EEA. The EEA is, however, not a supranational legal order, and contrary to the EU Member States, the EFTA States retain their legislative and judicial sovereignty. Furthermore, the EEA is limited in scope compared to the cooperation within the EU, and does not include agriculture and fishery, the monetary union or justice and home affairs, to list just some of the differences. In addition to the rules of the single market, the agreement also includes other areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture – collectively known as “flanking and horizontal” policies.

The purpose of this article is to discuss to what extent EEA cooperation is different from EU cooperation and whether it could, in that sense, form a good alternative for the UK to either EU membership or a so-called “hard Brexit”. Assessing the EEA as an alternative for the UK has several dimensions. One of these concerns EFTA's political aspects: to what extent it is likely that Iceland, Lichtenstein and Norway will agree on terms that are acceptable to the UK for its entry into the EFTA and the EEA. Another dimension is the

¹ See Court of Justice, judgment of 9 February 1982, case C-270/80, *Polydor Limited and RSO Records Inc. v. Harlequin Record Shops Limited and Simons Records Limited*.

substantive scope of the agreement, entailing questions as to what extent free movement of persons could be limited within the EEA, also keeping in mind that some of the EFTA States may have an interest in renegotiating the EEA Agreement on this point. I will not address either of these dimensions, as the main point of the article is to shed more light on the EEA as a relatively unknown international cooperation framework, and one that is often mentioned as a possible alternative for the UK after Brexit.

The EEA is an agreement under international public law. It is comprised of a main part, annexes and protocols, and a final act. In addition, it comprises decisions adopted by the Joint Committee of the EEA and by the EEA Council. The EEA includes institutions set up by the EFTA States to ensure an independent surveillance authority, as well as to create procedures similar to those existing in the EU – including procedures for ensuring the fulfilment of the obligations under the EEA Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition. The Surveillance and Court Agreement (SCA) between the EFTA States regulates this.

Ciarán Burke, Ólafur Ísberg Hannesson and Kristin Bangsund provide an overview of the EEA Agreement and of the technical and substantive aspects of the UK rejoining the EFTA and becoming a party to the EEA Agreement.² They compare the EEA solution to the Swiss free trade model from a British perspective and their conclusion is that the Swiss model would entail a measure of uncertainty that could be avoided by opting for an EEA solution. I agree with this assessment. The EEA solution, however, has its own challenges that require a strong political will to overcome. My objective here is to highlight some of these challenges – others must assess whether there will be a sufficient political will in the UK and the EU to overcome them. Equally important, in this respect, are the legal challenges related to the sovereignty of the EFTA States. The important catchword here is “dynamic homogeneity”. For the internal market to function, it must provide for common rules and equal conditions of competition, and equal and adequate means of enforcement. The agreement must achieve this, not only at the time of its signature, but in a sustainable way over time. How can this be achieved without creating a supranational framework, as in the EU? In this contribution, I will first present the main challenge of a lasting relationship between a third country and the internal market of the EU: that of dynamic homogeneity. Next, I will analyse the more specific issues related to legislative and judicial sovereignty. I will then discuss the challenge posed by the fact that the EU changes not only through legislative and judicial action but also through the adoption of new treaties. Finally, I will draw some conclusions.

² See C. BURKE, Ó.Í. HANNESSON, K. BANGSUND, *Life on the Edge: EFTA and the EEA as a Future for the UK in Europe*, in *European Public Law*, 2016, pp. 69–96 for an excellent overview of the EEA Agreement from this perspective. See also the speech by the President of the EFTA Court, C. BAUDENBACHER, *After Brexit: Is the EEA an option for the United Kingdom? The 42nd Annual Lecture of the Centre for European Law*, King's College London, delivered on 13 October 2016, available at www.monckton.com.

II. APPROACHING THE CHALLENGE OF DYNAMIC HOMOGENEITY

Setting up an arrangement with identical rules in the EEA with the EU at the time of the agreement was one thing, ensuring *dynamic* homogeneity quite another.³ There were two basic challenges in achieving dynamic homogeneity. The first was to ensure equal application of the rules within the EU and the EFTA pillars as time passed – the dynamic aspect. The particular challenges here were a combination of the fact that EU law develops through a dynamic interpretation by the CJEU, based on a teleological approach to the rules, with the maintenance of the judicial and legislative sovereignty of the EFTA States. The second was to have a mechanism for including new legislation into the EEA as the *acquis* develops through adoption of new legislation in the EU. An unforeseen challenge was also the degree to which EU law changes through treaty revisions and the adoption of completely new concepts through new treaties, such as EU citizenship, foreign and security policy, justice and home affairs and fundamental rights.

Some mechanisms of dynamic homogeneity were built into the agreement itself. There are institutional mechanisms for homogeneity, surveillance procedure and settlement of disputes. In the preamble as well as in the agreement some more general principles have shown to be of great importance. Art. 3 places a duty of loyalty on the parties and provides that the “Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement”. The principle of loyalty has been used by the EFTA Court to guarantee, in various ways, that EEA law becomes effective law at the national level. The principle affects and strengthens the duty of the EFTA States to make secondary EEA legislation a part of their internal legal order and it imposes duties on the national courts of the EFTA States to give full effect to EEA law.⁴ In Art. 4, there is a general prohibition against discrimination on grounds of nationality. The development of EU law has revealed the power that lies in such general provisions on the duty of loyalty and the prohibition against discrimination on grounds of nationality.

Protocol no. 35 of the Agreement addresses another familiar principle: supremacy. It states that “for cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases”. Art. 7 of the agreement requires that “an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties” and “an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation”.

³ On the principle of dynamic homogeneity in EEA law, see P. HREINSSON, *General Principles*, in C. BAUDENBACHER (ed.), *The Handbook of EEA Law*, Cham, Dordrecht: Springer International Publishing, 2015, p. 355.

⁴ *Ivi*, pp. 357-359.

A number of other provisions are worth mentioning as well. The fourth recital of the preamble proclaims that the EEA is “based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties”. The fifteenth recital of the preamble states that the objective of the Contracting Parties is “to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition”. Furthermore, the eighth recital underlines “the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights”. Together, these recitals have been taken to imply that the EEA is a community of rights, based on equal protection of the rights in the EU and the EFTA pillars of the EEA, ensuring equal conditions of competition within the whole EEA.

It is one thing to state the intention of arriving at and maintaining a uniform interpretation of the rules, “in full deference to the independence of the courts”. To establish the institutional structure for it and to ensure it in practice is, however, another matter. The first attempt of the contracting parties was flouted by the CJEU. In its Opinion 1/91,⁵ the Court rejected the proposed EEA Court, because the proposal conferred matters of interpretation of community law to a body outside of the EU Treaties.⁶

The Court underlined, in para. 14, that the fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically, because an international treaty is to be interpreted not only on the basis of its wording, but also in light of its objectives.⁷ The Court stressed in para. 16 that the rules on free trade in the community have “developed and form part of the community legal order, the objectives of which go beyond that of the agreement” and are thus not ends in themselves, but are means of achieving European integration.

The result of this opinion was that the agreement was renegotiated. Instead of an EEA Court, the EFTA parties agreed to set up parallel institutions in the SCA, thus establishing the EFTA Court. The EFTA Court is an independent court, but is bound to the jurisprudence of the CJEU by Art. 3 of the SCA. This article states:

⁵ Court of Justice, opinion 1/91 of 14 December 1991.

⁶ For a comment on this opinion and the subsequent Court of Justice, opinion 1/92 of 10 April 1992, see B. BRANDTNER, *The “Drama” of the EEA: Comments on Opinions 1/91 and 1/92*, in *European Journal of International Law*, 1992, p. 300 *et seq.*

⁷ *Polydor Limited and RSO Records Inc. v. Harlequin Record Shops Limited and Simons Records Limited*, *cit.*

“In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement”.⁸

The effect is that the EFTA Court is *quasi*-bound by the case-law of the CJEU, while no such obligation rests on the national courts of the EFTA States, since the SCA does not apply to them. This, as we shall see, gives rise to some interesting legal issues.

III. LEGISLATIVE SOVEREIGNTY

Apart from the above-mentioned links between the EEA and the EU, in the light of viewing the EEA as a post-Brexit alternative, another element is also important to highlight: the issue of so-called “legislative sovereignty”. At the time of the creation of the EEA, one challenge to overcome was the hurdle of legislative sovereignty and, at the same time, achieving reciprocity in the protection of rights in the EU and the EEA. From the outset, reconciling these two aims seemed to be impossible.⁹ Not only were the EFTA States reluctant to enter into an agreement that encroached upon their sovereignty, but also the CJEU was sceptical of the EEA Agreement due to its lack of reciprocity.¹⁰ The Court emphasised that the EEA Agreement “only creates rights and obligations between the Contracting Parties, and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up”, whereas the EEC Treaty was presented as “the constitutional charter of a Community based on the rule of law”.¹¹ Indeed, notoriously, EU law is characterised by EU Treaties and legislation having direct effect in the Member States, with supremacy over national law. This way, it differs greatly from international public law where national law determines the extent to which international law is to have effect in the internal legal orders. The EEA Agreement takes public international law as its starting point, but with some important qualifications in the form of explicit duties that the contracting parties have agreed to, for example including EU legislation in the agreement, as well as duties to ensure that EEA rules are given effect in

⁸ Art. 3, para. 2, SCA.

⁹ See H.P. GRAVER, *Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement*, in *European Foreign Affairs Review*, 2002, p. 73 *et seq.*

¹⁰ See H.H. FREDRIKSEN, *The EFTA Court Fifteen Years On*, in *International and Comparative Law Quarterly*, 2010, p. 731 *et seq.*

¹¹ Opinion 1/91, *cit.*, para. 20.

national law. It also prescribes the ways in which EU legislation is to be regarded as valid within the Member States' legal orders.

Being an agreement under public international law, no new obligations can be introduced into the EEA without the consent of every contracting party. The EEA Joint Committee takes decisions on the inclusion of new obligations by agreement between the European Union, on the one hand, and the EFTA States on the other. In the EEA Joint Committee, the EFTA States must, according to Art. 92 EEA, all agree in order for a new piece of legislation to be included in the agreement. If one of the EFTA States opposes a regulation or a directive, the *voice* of EFTA is against including it in the agreement. From the EU point of view, decisions of the EEA Joint Committee have the effect that the territorial scope of an EU rule is widened beyond the European Union to the three EFTA States. EU businesses and citizens are thus given the same rights in the three EFTA countries as within the EU, at the price of accepting that businesses and citizens of these three countries have these rights within the EU. On the EU side, Union law governs the decision-making procedure.¹² On the EFTA side, national law governs the effect of EEA obligations in their internal legal orders. The agreement, however, does contain some obligations to which the national law of the EFTA States should conform.

Whenever the EU adopts a legislative act on an issue that the agreement covers, Art. 102 calls on the EU to inform the other contracting parties in the EEA Joint Committee as soon as possible. The EEA Joint Committee should make a decision concerning the amendment as closely as possible to the adoption by the EU of the corresponding legislation with a view to permitting a simultaneous application in the EU and the EEA. If, at the end of a time limit of six months, the EEA Joint Committee has not taken a decision, *the affected part* of the agreement is regarded as provisionally suspended. This is reciprocity in practice: if the EFTA countries do not take on board amendments to harmonise legislation, the harmonisation of rules in this area is put off. In practice, new EU rules are not formally referred to the EEA Joint Committee before there is agreement, in order to avoid the launch of the time limit and the suspension of common rules in an area while negotiations are taking place. For instance, the Norwegian government at the time did not want to adopt the third postal directive from 2008 that liberalised all postal services. A refusal should have led to the suspension of the two previous directives, with the consequence that there would have been no free movement of any postal services within the EEA. The third directive was not referred to the EEA Joint Committee before there was a change in government in Norway that was willing to adopt it. It was finally adopted in 2015, and free movement was introduced in 2016, four years later than in the EU.

¹² See *Polydor Limited and RSO Records Inc. v. Harlequin Record Shops Limited and Simons Records Limited*, cit.

The understanding of reciprocity that is built into Art. 102 has the effect that failure to adopt new EU rules into the agreement not only potentially hinders free movement due to lack of harmonisation in these new aspects, but it also entails that whole stocks of harmonised rules unravel. Trade of goods and services in the affected area is then governed by the fall-back position of the main part of the agreement, which is by the treaty provisions alone. Restrictions must be justified, but since there are no harmonised rules, they may or may not prevail, depending on the circumstances. Harmonisation disappears overnight by lack of agreement on a change or modification in the existing harmonisation.

The EEA is not only about including new legislation into the agreement, but also about transposing these rules into the national law of the EFTA States. Protocol no. 35 states that the agreement does not require a transfer of legislative powers to any institution of the EEA. Common rules in the EEA consequently must be achieved through national procedures. In its sole Article, the protocol then states that “for cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases”.¹³ This creates an obligation on the EFTA States but does not entail that EEA rules are part of national law without implementation. If a State fails to implement an EEA rule, the EFTA Surveillance Authority may initiate an infringement procedure against that State, and the State may be ordered to implement it by the EFTA Court. There is, however, no direct effect of such rules as within EU law. On the other hand, the State may be liable to compensate any loss incurred by individuals because of the failure to implement EEA rules properly.

In Norway, the EEA Agreement itself is incorporated into Norwegian law by Section 1 of the EEA law, which states that the main part of the agreement is “valid as Norwegian law”.¹⁴ Section 2 states that legislation incorporating Norwegian obligations under the agreement takes precedence over other legislation. Executive orders, regulations and other statutory instruments that incorporate such obligations take precedence over other statutory instruments and over legislation of a later date. Art. 7 of the EEA Agreement states that regulations shall be incorporated as such, and directives by the form and method of implementation chosen by the legislator.

In other words, as long as the EEA Act is not repealed by an express provision by Parliament, the main parts of the agreement (i.e. the rules corresponding to the EU Treaty) are effective in Norwegian law with supremacy over other rules, save for the constitution. This is the same type of supremacy that the UK European Union Act grants EU law in the UK. The main difference is that regulations must be incorporated into national law in the EFTA countries, since there is no transfer of legislative power in the

¹³ Agreement on the European Economic Area, Protocol no. 35 on the implementation of EEA rules, sole Article.

¹⁴ Act implementing the EEA Agreement of 27 November 1993.

EEA. Incorporated EEA law, regulations and directives that have been implemented by legislative acts are effective in the EFTA States with the same supremacy as EU law in the Member States.

This leaves us with three possible categories of relevant EU legislation: EU legislation that is not part of the agreement because it has not yet been included, legislation that is part of the agreement but not correctly implemented into national law, and implemented EEA law. Once a piece of legislation is adopted in the EU, a decision must be taken by the EEA Joint Committee on whether to include it in the EEA Agreement or not. The EFTA has one vote in the EEA Joint Committee, so the all the EFTA countries must agree to the inclusion of an act before it is included in the EEA Agreement. This has the potential of causing frictions, because one State may block the inclusion of legislation that the other States want to include. Before a decision is taken in the EEA Joint Committee, the legislation is not part of the EEA Agreement, no matter how relevant it is to the agreement. Once it is included into the agreement, it is binding in the EFTA States as a rule of public international law. It is first with the transposition of the legislation into national law that it takes effect in national law. This means that there is no direct effect of regulations or direct effect without national incorporation.¹⁵

The lack of direct effect does not mean that the EEA rule is without legal consequences. The EFTA Court has consistently taken a dynamic approach to the agreement, and has developed mechanisms through its case-law to ensure homogeneity and reciprocity with EU law in lieu of supremacy and direct effect.¹⁶ The national courts of the EFTA States have followed suit. The Norwegian Supreme Court decided in *Finanger* that there is a strong interpretative obligation under Norwegian law to interpret national law in conformity with international obligations – EEA law, in particular.¹⁷ The Court referred to the case law of the CJEU, and the majority of the Court stated that the duty to interpret in accordance with EEA law did not entail a duty to interpret national law *contra legem*. The effect, then, is that non-transposed directives are given a sort of direct effect in Norwegian law, but not supremacy. It could be argued that this was not a necessary consequence of the case but was a question of horizontal effect, and was not recognized even in EU law. There is no doubt today, however, that the result applies also to issues of direct effect in cases against public bodies. This was a long-contested issue in

¹⁵ On the doctrine of direct effect and EEA law in Norway see: H. BULL, *European Law and Norwegian Courts*, in P.C. MÜLLER-GRAFF, E. SELVIG (eds), *The Approach to European Law in Germany and Norway*, Berlin: Berliner Wissenschafts-Verlag, 1997, p. 95 *et seq.*

¹⁶ See in detail H.H. FREDRIKSEN, *The EFTA Court Fifteen Years On*, cit., p. 731 *et seq.*

¹⁷ Norwegian Supreme Court, judgment of 14 November 2000, *Veronika Finanger v. The State, by the Ministry of Justice*.

the legal doctrine, until the EFTA Court accepted in 2001 that the EEA Agreement does not entail a doctrine of direct effect independent of national incorporation.¹⁸

However, the story does not end here. Finanger, who had been seriously wounded in a car accident and who claimed compensation under the motor vehicle insurance directives, subsequently filed a case against the government for damages, since the lack of implementation of the directives into Norwegian law deprived her of her insurance.

The EFTA Court had already advised, some years before, that the EFTA States are liable under EEA law for damage and loss due to their breach of obligations under the agreement.¹⁹ This case was an instance of incorrect implementation of a directive. The Court derived a State obligation from the stated purposes and legal structure of the EEA Agreement: namely, that a proper functioning of the EEA Agreement is dependent on individuals and economic operators being able to rely on those rights intended for their benefit. The Court found that the objectives of homogeneity and establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement that the EFTA States are obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive.

In the *Finanger II* case, the Supreme Court accepted State liability as part of EEA law as implemented into Norwegian law.²⁰ The Court stated that it found the arguments of the EFTA Court convincing, and that liability for breach of the agreement must be viewed as a premise underlying the contracting parties' conclusion of the agreement. As such, it must also be regarded as having been included in the Norwegian act that implemented the agreement into Norwegian law. At the same time, the Court rejected a claim that there is a rule of liability under *Norwegian* law for breach of EEA obligations. This means that the EEA rule of liability forms the outer limits of liability of the State.

IV. JUDICIAL SOVEREIGNTY

The case-law of the CJEU is an important part of the EU *acquis* and the EEA Agreement has a special provision in Art. 6, to ensure its inclusion:

“without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establish-

¹⁸ Court of Justice of the EFTA States, judgment of 30 May 2002, case E-4/01, *Karl K. Karlsson v. The Icelandic State*, para. 28: “It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that EEA law does not entail a transfer of legislative powers. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts”.

¹⁹ See generally Court of Justice of the EFTA States, advisory opinion of 10 December 1998, case E-9/97, *Erla María Sveinbjörnsdóttir v. The Government of Iceland*.

²⁰ Norwegian Supreme Court, judgment of 28 October 2005, *Veronika Finanger v. The State, by the Ministry of Justice*.

ing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement”.

As pointed out by the Court of Justice, this article, in its wording, is limited to case-law interpreting *provisions* of the Agreement, and does not include the case-law of the Court as a whole.²¹ It therefore excludes important characteristics of EU law, such as supremacy and direct effect.

The institutional judicial set-up in the EEA is more complex than in the EU. Art. 108 states that the EFTA States shall establish a Court of Justice. However, the EFTA Court is not an EEA Court in the same sense as the CJEU is the main court of the EU. In Art. 106, there is an arrangement to “ensure as uniform an interpretation as possible of the agreement”. The EEA Joint Committee sets up a system of exchange of information concerning judgments by the EFTA Court, the Court of Justice and the General Court and the Courts of Last Instance of the EFTA States. This is done “in full deference to the independence of courts”.²² From this, we could draw the conclusion that there are several EEA Courts – each with an independent and equal status. The reality, however, is somewhat different.

Together with Art. 6 of the EEA Agreement, the SCA creates a vertical relationship between the CJEU and the EFTA Court, since the EFTA Court is under an obligation to interpret the provisions of the EEA Agreement in conformity with the relevant rulings of the CJEU. In practice, however, the relationship is more of a dialogue. The EFTA Court must often rule on issues where there are no CJEU precedents. Here the EFTA Court takes into account the case law of the CJEU, but cases decided by the EFTA Court are also referred to by the AGs and the CJEU when similar issues arise in the EU. The two courts do not always agree. In the practical workings between the courts, homogeneity is understood as a process-oriented concept and it is not accurate to speak of inhomogeneity when the two courts have differing views on a certain issue.²³

The relationship between the EFTA court and the national courts in the EFTA States have at times been more strained, at least when it comes to Norway. In particular, two issues have given grounds for concern. The first is the reluctance of the Norwegian Supreme Court to refer cases to the EFTA Court, while the second is the status of the advisory opinion of the EFTA Court in the following national proceedings.

²¹ Opinion 1/91, cit., para. 27.

²² Art. 106 EEA.

²³ C. BAUDENBACHER, *The Relationship Between the EFTA Court and the Court of Justice of the European Union*, in C. BAUDENBACHER (ed.), *The Handbook of EEA Law*, cit., p. 191.

The relevant provision that governs these relations is Art. 34 SCA. This states in its first paragraph that “the EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement,” and in the second paragraph that “where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion”. In the third paragraph, it gives the EFTA States the possibility to determine that only courts of last instance shall have the right to request advisory opinions.

There are clear parallels between the institution of advisory opinions from the EFTA Court and of preliminary rulings of the CJEU.²⁴ But there are also important differences. When compared with Art. 267 TFEU, we see one main difference in that the CJEU gives “preliminary rulings”, whereas the EFTA Court gives advisory opinions. Another important difference is that the SCA does not include a duty for courts of last instance to refer cases to the EFTA Court. The CJEU emphasised such differences in its Opinion 1/91 where it considered the then-proposed arrangement that the EFTA States might authorise their courts to refer cases to the CJEU for its advisory opinion. The Court rejected this by stating:

“In contrast, it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the EFTA States are to be purely advisory and without any binding effects. Such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding. Even in the very specific case of Article 228, the Opinion given by the Court of Justice has the binding effect stipulated in that article”.²⁵

Through its case-law, the EFTA Court has developed what it has labelled *procedural homogeneity*. Procedural homogeneity entails that “the EEA EFTA States should, by and large, live up to the same standards as the Union pillar with regard to the enforcement and effectiveness of rules, protection of rights, workings of the institutions, etc.”.²⁶ Based on this, some have argued that the EEA Agreement entails an obligation for national courts of last instance to refer cases to the EFTA Court. Although this has no basis in the wording of Art. 34 SCA, such an obligation can be derived from the EEA Agreement itself – in particular, in its principle of loyalty in Art. 3 and the general principle of access to justice and the eighth recital of the preamble to the agreement.²⁷ The EFTA Court itself has not formulated a duty for the national courts in terms of an obligation, but has used language

²⁴ For an overview and comparison, see A. ROSAS, *The Content of Requests for Preliminary Rulings to the European Court of Justice and the EFTA Court – What Are the Minimum Requirements?*, in EFTA Court (ed.), *The EEA and the EFTA Court: Decentred Integration*, Oxford: Hart Publishing, 2014, p. 83 *et seq.*

²⁵ Opinion 1/91, cit., para. 61.

²⁶ See S. MAGNUSSON, *Efficient Judicial Protection of EEA Rights in the EFTA Pillar – Different Role for the National Judge?*, in EFTA Court (ed.), *The EEA and the EFTA Court*, cit., p. 120 *et seq.*

²⁷ *Ibid.*

that, in effect, implies the same. In *Jonsson*, regarding social security for migrant workers, the Court held that:

“It is important, in order to render the EEA Agreement effective, that [...] such questions are referred to the Court under the procedure provided for in Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority if the legal situation lacks clarity (Case E-18/11 Irish Bank, judgement of 28 September 2012, not yet reported, paragraphs 57 and 58). Thereby unnecessary mistakes in the interpretation and application of EEA law are avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU are ensured”.²⁸

It has been argued that not only the principles of loyalty, homogeneity and legal certainty entailed in the EEA Agreement, but also Art. 6 of the European Convention on Human Rights (ECHR) on the right to access to court, demands that national courts of the EFTA States are under an obligation to refer matters to the EFTA Court for an advisory opinion. According to Magnusson, the role of the national judge in an EFTA State is, by and large, comparable to what would be the case in an EU State, and “a great deal of responsibility for judicial protection under EEA law is placed on the national judiciary which, in turn, has to cooperate with the EFTA Court through the preliminary reference procedure when it is confronted with genuine and relevant questions of EEA law”.²⁹ Magnusson argues that the case-law of the EFTA Court is a *de facto* recognized *acquis* of the EEA Agreement and, from this, together with the principle of loyalty, derives the national courts’ obligation “to make a referral to the EFTA Court and subsequently to comply with an advisory opinion when applying EEA law”.³⁰

A main counterargument – and important again in the Brexit debate – is that an important objective of having the EEA Agreement as an alternative to EU membership was to retain legislative and judicial sovereignty of the EFTA States.³¹ This sovereignty is undermined if the national courts of the EFTA States have an obligation to refer matters of EEA law to the EFTA Court. It was obviously intended that the “judicial defence of these rights” referred to in the eighth recital of the Preamble should and could be provided by the national courts of the EFTA States for matters arising under their jurisdiction. The arrangement provided for in Art. 106 EEA is clearly based on the perception of equality in status between the two European courts and the national courts of the EFTA States. This perception still informs the practice of the Supreme Court of Norway. The Court does refer some cases, but more often provides for a direct interpretation of EEA rules

²⁸ Court of Justice of the EFTA States, judgment of 20 March 2013, case E-03/12, *Staten v/Arbeidsdepartementet v. Stig Arne Jonsson*, para. 60.

²⁹ See S. MAGNUSSON, *Efficient Judicial Protection in the EEA – The Role of the National Judge*, cit., p. 131.

³⁰ *Ibid.*

³¹ See also H.H. FREDRIKSEN, C.N.K. FRANKLIN, *Of Pragmatism and Principles: The EEA Agreement 20 Years On*, in *Common Market Law Review*, 2015, p. 671 *et seq.*

based on the jurisprudence of, above all... the CJEU. In its approach to the practice of the CJEU, the Supreme Court applies the provision in Art. 3, para. 2 SCA.³² This provision was formally only directed to the EFTA Court, but in applying it in its own practice, the Supreme Court clearly indicates its equal status to the EFTA Court in deciding difficult issues of interpretation regarding EEA and EU rules.

There may be many reasons for a national judge not to refer a case to the EFTA Court for an advisory opinion.³³ National judges have pointed out some of these reasons. For one, the national court will often prefer to find a solution in national law if the EEA question is not specifically raised by any of the parties. For another, the parties often seem to prefer a solution by the national court, even if a question of EEA law is raised. To request an advisory opinion is cumbersome and demanding both for the parties and the Court, and the parties are often not eager to stay the proceedings to wait for an opinion by the EFTA Court. In practice, referring cases to the EFTA Court usually prolongs the length of the proceedings by a year or more.

The EFTA Court has also insisted that the opinions it gives on EEA law are more than mere opinions. In its first cases, the Court formally labelled the opinion it issued as "Judgement of the Court" but the conclusion was introduced as "the following Advisory Opinion".³⁴ In an intermediate spell, the Court labelled the opinions as "Advisory Opinion".³⁵ From 2000 onwards, the Court went back to calling its opinions "Judgement of the Court".

The Norwegian Supreme Court in *STX* challenged the status of the opinions of the EFTA Court. This was a case regarding posting of workers and minimum rates of pay.³⁶ The case concerned the interpretation of Directive 96/71/EC on the posting of workers,³⁷ and whether the terms and conditions of employment in a collective agreement – which had been declared universally applicable and thus was mandatory within the industry concerned – was compatible with EEA law in the context of the posting of workers. The Norwegian Tariff Board had granted universal application to clauses contained within the agreement regarding the basic hourly wage, normal working hours, overtime supplements and a shift-working supplement, a 20 percent supplement for work assignments requiring overnight stays away from home and compensation for expenses

³² See for a recent example in trademark law: Norwegian Supreme Court, judgment of 22 September 2016, *Pangea Property Partners v. the State by the Complaints Board for Industrial Property Rights*.

³³ See A. BÅRDESEN, *Noen refleksjoner om Norges Høyesterett og EFTA-domstolen (Some reflections on the Norwegian Supreme Court and the EFTA Court)*, in *Lov og Rett*, 2013, pp. 535-546.

³⁴ See Court of Justice of the EFTA States, judgment of 16 December 1994, case E-01/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark*.

³⁵ See for instance Court of Justice of the EFTA States, advisory opinion of 3 December 1997, case E-01/97, *Fridtjof Frank Gundersen v. Oslo Kommune (supported by the Government of the Kingdom of Norway)*.

³⁶ Norwegian Supreme Court, judgment of 5 March 2013, *STX and Others v. The Norwegian State*.

³⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

in connection with work assignments requiring overnight stays away from home. The case was referred by the Borgarting Court of Appeals to the EFTA Court. The EFTA Court decided that Directive 96/71/EC does not permit an EEA State to secure workers posted to its territory from another EEA State compensation for travel, board and lodging expenses when work assignments require overnight stays away from home, unless this can be justified based on public policy provisions.³⁸

When the case reached the Supreme Court, this Court unanimously found that compensation for travel, board and lodging expenses must be regarded as part of the minimum wages, according to the directive. In this, it explicitly came to the opposite interpretation of the EFTA Court. Regarding the status of the opinions of the EFTA Court in national courts, the Supreme Court said that it was not required to apply the opinion of the EFTA Court “untested”, but that it had a duty to form its own independent opinion with regards to the opinion of the EFTA Court. It followed from this that the Supreme Court was not formally prevented from applying a differing interpretation of EEA law.

The reactions to this from the EFTA Court were strong. In a speech at a conference in Norway, the President of the EFTA Court, Carl Baudenbacher, stated “it ain’t over until the fat lady sings” and proceeded to criticise the interpretation of EEA law that the Supreme Court had made in *STX*.³⁹ He then referred to the duty of the EFTA Surveillance Authority to enforce EEA law in cases where the national courts deviate from the opinion of the EFTA Court. He also argued for a duty of the Supreme Courts of the EFTA States to refer those cases to the EFTA Court where the EEA question is not obvious. Even as President of the EFTA Court for three years, he seems to accept the position that there is no obligation to refer cases to the EFTA Court, and that the referring court is not formally bound by the opinion. In a speech in London in October 2016 he said:

“There is no written obligation from courts of last resort to make a reference and the preliminary rulings of the EFTA Court are not formally binding. I do not say that the Supreme Courts in the EFTA States are free to refer and free to follow or not. They are still bound by the duty of loyalty and the principle of reciprocity. But these are obligations that are difficult to enforce so, on balance, the EFTA States and their courts enjoy more flexibility”.⁴⁰

On the other hand, the Supreme Court of Norway has consistently held that opinions and cases from the EFTA Court have a strong persuasive power. In cases where it

³⁸ See: Court of Justice of the EFTA States, judgment of 23 January 2012, case E-2/11, *STX Norway Offshore AS m.fl. v. Staten v/ Tariffnemnda*. See also the presentation of the case given by C. BARNARD, *Reciprocity, Homogeneity and Loyal Cooperation: Dealing with Recalcitrant National Courts?*, in EFTA Court (ed.), *The EEA and the EFTA Court*, cit., p. 151 *et seq.*

³⁹ Speech at the Conference of International Courts on their importance for the Norwegian Legal Order, Tromsø, 19 April 2013, translated into Norwegian and published as C. BAUDENBACHER, *EFTA – domstolen og dens samhandling med de norske domstolene*, in *Lov og Rett*, 2013, p. 515 *et seq.*

⁴⁰ C. BAUDENBACHER, *After Brexit: Is the EEA an option for the United Kingdom?*, cit.

has not asked the EFTA Court or not followed its case-law, it has based its rulings on the case-law of the CJEU.⁴¹ There are therefore no grounds to say that the Norwegian Court has developed its own national approach to EEA law.

V. CHANGES IN THE EU TREATIES

Within the EU, a large part of its development takes place on the basis of treaty revisions. Developments such as the monetary union, citizenship, closer cooperation in justice and home affairs and the Charter of Fundamental Rights of the EU (Charter), often have direct implications for the interpretation and application of the rules of the internal market. For instance, the notion of citizenship has proven to be of increasing importance to the development of the right to free movement of persons.

The EEA has no mechanism to formally update its rules as a follow-up to such changes in the EU. On the other hand, the EFTA Court interprets EEA law in light of new EU rules in order to maintain homogeneity between EEA and EU law, and the Court "is prepared to go to great lengths in order to maintain homogeneity between EU and EEA law".⁴² To the extent that the EEA rules are changed by interpretation, this means that legislation is changed without any collaboration from the EFTA countries. This can be a direct challenge to the sovereignty of the EFTA States, and can be illustrated by reference to the discussion on the effect of the Charter in the EEA.

EU law has shown an expansive development regarding human rights and in its relationship to the ECHR since 1993.⁴³ How, if at all, is this development reflected in the EEA? The answer to this question varies depending on who one asks. The States parties have expressed different opinions.⁴⁴ The Government of Norway argued in *ESA v. Iceland* that the Charter lacks direct relevance for the interpretation of the EEA Agreement because it has not been incorporated into it.⁴⁵ Iceland, on the other hand, relied on the Charter in the same case.

In a consistent line of cases, the EFTA Court has held that the EU fundamental rights also form part of EEA law and fall under the jurisdiction of the EFTA Court.⁴⁶ President Baudenbacher earlier declared that the EFTA Court has "followed suit" with the CJEU in

⁴¹ H.H. FREDRIKSEN, C.N.K. FRANKLIN, *Of Pragmatism and Principles: The EEA Agreement 20 Years On*, cit., p. 674 *et seq.*

⁴² *Ivi*, p. 649.

⁴³ For this development, see E. DEFEIS, *Human rights, the European Union, and the Treaty Route: From Maastricht to Lisbon*, in *Fordham International Law Journal*, 2012, p. 1207 *et seq.*

⁴⁴ For an overview, see N. WAHL, *Uncharted Waters? The Charter and EEA Law*, in EFTA Court (ed.), *The EEA and the EFTA Court*, cit., p. 287 *et seq.*

⁴⁵ Report for the hearing in Court of Justice of the EFTA States, case E-12/10, *ESA v. Iceland*, para. 163.

⁴⁶ For an overview of cases, see D.T. BJÖRGVINSSON, *Fundamental Rights in EEA Law*, in EFTA Court (ed.), *The EEA and the EFTA Court*, cit., p. 273 *et seq.*

its long-standing tradition of referring to the ECHR and the case-law of the European Court of Human Rights.⁴⁷

Legal doctrine is more reserved. Writing on the EEA and the ECHR, Björgvinsson points out that, from a formal point of view, the Convention does not form a part of the EEA Agreement as a binding source of legal norms in the context of the EEA Agreement. Still, the case-law of the EFTA Court strongly supports the conclusion that the norms contained in the Convention – which also reflect a common standard and a common denominator for a minimum standard for the protection of fundamental rights on a European level – are a part of the general unwritten principles of EEA law.⁴⁸

Fredriksen argues that fundamental rights and the EU Charter not only impose obligations on the States, but also on individuals. The question of the Charter's relevance to the EEA must be assessed on a case-by-case basis, and homogeneity must yield to legal certainty when drawing upon EU law that is not formally part of the EEA Agreement will lead to the imposing of new obligations on private subjects or encroachments on the sovereignty of the EFTA States.⁴⁹ Wahl, also writing on the status of the Charter in the EEA, observes that the Charter cannot be binding in the EEA context, but that, on the other hand, it cannot be outright excluded when interpreting and applying EEA provisions.⁵⁰

As pointed out by Fløistad, the question of the inclusion of human rights into the scope of the EEA Agreement is not one of being for or against human rights, but rather of whether the EFTA Court has been given the mandate to make the choices that balancing human rights against other rights and interests entail.⁵¹

This development shows that perhaps the most challenging part of the relations between the EU and the EFTA States regarding sovereignty is the development of the EU that takes part outside of the EEA Agreement. The EU is a community in motion, and a third party that wishes to be tightly integrated with the EU must accept this.

VI. CONCLUSIONS

In this contribution, I have tried to show some of the difficulties that emerge from having a tightly integrated connection to the European internal market without ceding sovereignty to supranational institutions. In the EEA, we see some carefully worked out solutions to this problem. To have identical rules to the EU in some or even many areas is not in itself problematic in terms of sovereignty. The challenge is to convince the EU In-

⁴⁷ C. BAUDENBACHER, *The EFTA Court Ten Years On*, in C. BAUDENBACHER, P. TRESSELT, T. ORLYGSSON (eds), *The EFTA Court Ten Years On*, Oxford: Hart Publishing, 2005, p. 30.

⁴⁸ D.T. BJÖRGVINSSON, *Fundamental Rights in EEA Law*, cit., p. 276.

⁴⁹ H.H. FREDRIKSEN, *Betydningen av EUs Pakt om Grunnleggende Rettigheter for EØS Retten*, in *Jussens Venner*, 2013, p. 378.

⁵⁰ N. WAHL, *Uncharted Waters? The Charter and EEA Law*, cit., p. 295.

⁵¹ K. FLØISTAD, *Fundamental Rights and the EEA Agreement*, in *ARENA Report No. 1*, 2004, p. 89.

stitutions that this is the case. The EEA Agreement with its institutions can be seen as a mechanism to build the mutual trust and confidence necessary for a single market to function. The experience from the EEA shows that it is possible to attain a certain degree of uniformity between the EFTA States and the EU Member States, despite the fact that, in the former, EU rules are not granted supremacy and direct effect. The agreement ensures that not only the EFTA States but also the EU and the Member States are bound by the rules. Under a free trade agreement, a State claiming that another State is not playing by the rules or living up to the requirements can put restrictions and protective measures on goods or people coming from this State. Import duties and trade barriers may be used and applied until the conflict is resolved, for instance by a WTO panel decision. This is of course not possible between the Member States of the EU, but the EU can apply such measures against third countries. The EEA Agreement ensures that such measures also cannot be applied against the EFTA States, but that conflicts must be resolved by referring them to the Commission, the EFTA Surveillance Authority and the courts. As in the EU, such suspicions must be enacted through the institutions that are established to monitor and enforce the agreement.

Obtaining mutual trust comes at a price. The task facing the designers of the EEA Agreement was daunting. They were to construct an agreement that extended the *acquis* of the common market to the EFTA States within the framework of a regular treaty under international law. We must remember that the doctrines of supremacy, direct effect and State liability were already part of the *acquis*, and that some of the EFTA States adhered to the dualist approach to international law. Some observers likened the task to the squaring of the circle, others to the mixing of oil and water. On this basis, the agreement has proved to be “surprisingly resilient”.⁵² An important contributing factor was found in a strong political will both in the EU and in the EFTA States for the agreement to succeed despite all difficulties from a formal point of view.

In light of the Brexit discussion, it is important to note that the carefully established EEA institutional arrangements do not lead to a transfer of sovereignty, but in some cases they come really close. At the same time, the EEA experience proves that a cession of sovereignty to supranational institutions is not a necessary condition to obtain what the CJEU recognizes as being based on special, privileged links. It is a difficult question to decide to what extent this is dependent upon the substantive scope of the agreement, and whether the UK can obtain similar privileged links within a narrower scope that includes less of the market freedoms. This would, in my opinion, be a predominantly political decision. Political will, however, is not sufficient to build confidence in the reciprocity of whatever agreements are concluded; reciprocity has more to do with the protection of rights. And in this matter, what was so wisely said by Lord Chief

⁵² H.H. FREDRIKSEN, C.N.K. FRANKLIN, *Of Pragmatism and Principles: The EEA Agreement 20 Years On*, cit., p. 629 *et seq.*

Justice Hewart of the King's Bench Division still holds true: it depends not upon what is actually done, but upon what might appear to be done.⁵³ The EEA Agreement shows that it is possible to be part of the internal market of the EU, without taking part in the larger project of ever-closer integration into a European Union. The price to be paid, however, is that countries opting for this solution have to accept and enforce rules that are adopted and enacted without their participation in the legislative process of the EU.

⁵³ UK High Court of Justice, judgment of 9 November 1923, *R v. Sussex Justices, Ex parte McCarthy*.

