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Karin Fløistad

The EEA Agreement in a Revised EU Framework for Welfare Services

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Preface

How are the Contracting Parties to the European Economic Area (EEA) Agreement affected by the revised European Union (EU) constitutional framework for welfare services? This is the key question analysed in this book. The term welfare services means a broad range of services wholly or partly financed through public funds such as public healthcare and educational services (Part I), various social services (Part II) and public utilities such as transport and public broadcasting (Part III). This book demonstrates how the EU/EFTA institutions applying EEA law have attempted a homogenous development of the EEA integration process despite the EU's altered constitutional framework, and how these attempts create both substantive (legal doctrine) and institutional problems. The author engages in the debate from the point of view of the EU Treaty revisions reflecting concern for the social dimension of the market integration process. The findings indicate that although these Treaty revisions have not been reflected in amendments to the EEA agreement, a more advanced understanding of the concept of market integration has also emerged in the EEA integration process. These findings add a new element to the supranational character of the EEA Agreement. Despite the inherent challenge posed by European solidarity to sovereign national welfare provision, the EEA Agreement moves into the welfare sphere, giving unprecedented powers in particular to the EFTA institutions. This book analyses the controversial and disputed consequences for the EU Member States of the EEA Agreement to enlarge the geographical area of application for the provisions on welfare services. The urgent need for better transparency of the process is the recurring theme. The EFTA States are not only associated with the EU Member States; they are adapted and arguably almost assimilated into the internal market through the decision making of the EU/EFTA institutions applying the EEA Agreement. The book demonstrates the complexities involved and calls for political decision making on the part of the Contracting Parties to the EEA Agreement.

The origin of this project stems from long before the Brexit referendum in the United Kingdom in June 2016. Since then, all EU external relations agreements have gained renewed interest in particular in regard to their inspiration for the creation of a new form of agreement between the EU and the UK after the UK has left

the Union. The EEA Agreement provides the closest model of integration for non-Member States into the internal market. As such the EEA Agreement is more relevant than ever and certainly high on the agenda both politically and judicially in the Brexit debate. This book sheds light on important aspects of this model of integration in particular with the aim of increasing the understanding of key principles of homogeneity and dynamism.

Oslo, Norway
May 2018

Karin Fløistad

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Chapter 1
Introduction

1.1 Aim and Research Question

How are the Contracting Parties to the European Economic Area (EEA) Agreement affected by the revised European Union (EU) constitutional framework for welfare services? This is the key question analysed in this book. The academic discussion on welfare services in the EU has become rich over the years. However, to date the debate has almost entirely left out the development of EEA law in this field. The present contribution aims to fill this lacuna regarding both impact of EEA law on European Free Trade Association (EFTA)[1] states and on EU Member States as Contracting Parties to the EEA Agreement.[2] A recurring theme is the urgent need for better transparency of the EEA integration process in the field of welfare services and a call for political decision making on the part of the Contracting Parties to the Agreement in this sensitive area.

Here, the term welfare services refers to a broad range of services wholly or partly financed through public funds, such as public healthcare and educational services, various social services and public utilities such as transport and public broadcasting.[3] The research question is asked in the context of the evolution of the EU

[1] EFTA is the European Free Trade Association countries. The EFTA States that are members of the EEA Agreement include Iceland, Liechtenstein and Norway. Switzerland is a member of the EFTA but it is not party to the EEA Agreement. For the sake of simplicity the term EFTA States will be used for Iceland, Liechtenstein and Norway.

[2] This subject was briefly touched upon by Henrik Bull in his contribution on the enlarged EEA after the accession of former Eastern European states in Bull (2006).

[3] See the distinction between core welfare services and the outer ring of the welfare services in Damjanovic and De Witte (2009), p. 54 with further references. Core welfare services include public health services, public education, various social services and housing services and the outer ring of the welfare services include public utilities such as infrastructure, transport, energy and public broadcasting.

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project from an economic community to a union built on a wider system of protection of values.[4] The wider system of protection of values includes some degree of general social protection for European citizens, the balancing of welfare concerns in state aid review and a move to develop a form of European solidarity.

Each EU Member State and EFTA State has independently of the EU and of the EEA Agreement established models for financing and delivering welfare services to its population. These models are different, but they are all based on the principle of universal access and reflect values of community and solidarity. Hence, the provision of welfare services in both the EU Member States and in the EFTA States is organised along national boundaries. The task to set aside public funds for the provision of welfare services and hence also to decide how to spend them is traditionally considered the primary responsibility of each state and is commonly recognised to belong to the category of core state functions.[5] This position is increasingly challenged by the European integration process both in the EU and in the EEA legal orders. The legal framework underpinning the challenge is, nevertheless, different.

In contrast to the revised constitutional framework in the EU legal order introducing new primary law in the Treaty of Maastricht (1993), followed by the Treaties of Amsterdam and Nice (1999, 2001) and finally culminating with the Treaty of Lisbon (2009), the EEA legal order does not include corresponding provisions. The EEA legal order is premised on the legal framework for the original economic community (based on the Treaty of Rome and the single European Act) with the in-principle limited economic objective of extending the market to include the three EFTA States through the four freedoms and the competition rules. The provisions of the main part of the EEA Agreement have not been altered either to encompass a wider system of protection of values or to ensure general citizenship-like social rights or to develop a principle of solidarity between the Contracting Parties.

However, within the scope of the EEA Agreement, the principles of dynamism and homogeneity aim at achieving substantive parity with the developments in the EU legal order. National welfare provision is affected both by the four freedoms, in particular the right to free movement of persons and services, and the competition rules, in particular the prohibition of state aid. Thus, welfare provision is not outside the scope of the EEA Agreement. The principles of dynamism and homogeneity apply, however, according to the wording of the EEA Agreement to the interpretation and application 'of the provisions of this Agreement, insofar as they are identical in substance to corresponding rules of the Treaty'.[6]

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[4] Now Article 1 TEU.

[5] Together with taxation powers and matters of justice and security, see i.a. Communication from the EFTA Surveillance Authority, The Notion on State Aid No 3/17/COL, 18.01.17, see Sect. 2.2 on public powers and generally on the concept of economic activity and undertaking. The Authority's communication parallels the communication from the Commission, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016/C 262/01.

[6] Article 6 EEA Agreement.

The principles of dynamism and homogeneity in the EEA integration process were never seen to include a power for the EU/EFTA institutions applying EEA law to remedy the lack of parallel legal provisions. In other words, a limit to this principle was always perceived to lie here. This understanding was also expressed by the EFTA Court in early case law like Cases E-1/01 Einarsson and E-1/02 Post-doc[7] and is very much in line with the general understanding of the role of courts and the role of surveillance authorities. The institutions act within the agreed framework of the provisions and do not create new treaty provisions.[8]

The EEA integration process has, despite its character of being based on an international agreement, developed certain characteristics of a supranational entity. This can be seen in particular in the field of state liability.[9] The same dynamic is clear from the EFTA institutions' pragmatic approach to principles developed by the Court of Justice of the European Union (CJEU)[10] and the paralleling of soft law in state aid supervision.[11] Hence, the nature of the EEA Agreement has changed significantly as a result of accepting relevant case law from the European courts and administrative practices from the European Commission as legal sources for further developing the EEA integration process. Examples include important court-made principles such as the principle of fundamental rights protection,[12] access to justice and effective judicial protection[13] as well as a number of policy decisions in the field of state aid involving research, development and innovation, environmental protection, regional development and infrastructure to be included in the EEA.[14]

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[7] Both of which are commented on later in Part II.

[8] This position may be contrasted with a statement made by the president of the EFTA Court, Baudenbacher (2013): 'The EEA joint Committee has no competence to change the main part of the EEA Agreement no matter whether the TFEU or the text reference for the EEA Agreement has been amended. The only institutions which may—by way of case-law—'amend' the main part of the EEA Agreement are the EEA Courts: the ECJ, the General Court and the EFTA Court'. For a similar perspective as the author see various contributions from Dr. Pal Wenneras, the last one being in the recent Arnesen et al. (2018), pp. 209–248. See also the Case of Jabbi, E-28/15 analysed later in Part II.

[9] Fredriksen (2013a).

[10] On this, see Arnesen et al. (2018) and Burri and Pirker (2013), pp. 207–229; see also Hreinsson (2014), pp. 349–391.

[11] The European Commission has developed an extensive body of soft law, i.e. Guidelines, Communications and Notices for assessing compatibility of national measures with the prohibition of state aid. Corresponding soft law is applied by the EFTA Surveillance Authority in the EEA.

[12] Referred to by the EFTA Court in a number of cases, see i.a. E-8/97 TV 1000 Sweden v Norway, paragraph 26; E-2/02 Bellona v EFTA Surveillance, paragraph 37; E-2/03 Public Prosecutor v Ásgeirsson Authority, paragraph 23; E-12/10 The Surveillance Authority v Iceland, paragraph 6; E-15/10, Posten Norge AS v EFTA Surveillance Authority, paragraphs 85–86; E-4/11 Arnulf Clauder, paragraph 49; E-28/15 Jabbi. See for an analysis of the legal significance of the EU Charter of Fundamental Rights in the EEA, Fredriksen (2013b), pp. 371–399.

[13] See Case E-15/10 Posten Norge v ESA, paragraph 86; see also EFTA Court (2012); see also the analysis of Case E-3/11 Sigmarsson by Gudmundsdóttir (2012), pp. 2019–2038.

[14] See http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/ Other court-made principles generally seen as part of EEA law are the administrative principle of proportionality and protection of legitimate expectations.

This development of the EEA integration process is to some extent controversial and debated, but the overall picture is one of almost surprising acceptance from all parties involved.[15]

This book intends to engage in this debate from the point of view not primarily of court-developed principles from the CJEU but of the Treaty revisions that reflect the social concerns of the market integration process. The significance of taking this starting point is first of all that this dimension has not been systematically analysed before. However, more importantly, taking this starting point will eventually enable a conclusion that will say something more about the nature of the principles of homogeneity and dynamism and ultimately about the EEA integration process.

The thesis is situated in the context of empirical research. The method may be described as traditional analytical legal positivism. This methodology entails studying and presenting a coherent analysis of the relevant legal sources and material based on the view of the EEA legal order as a dynamic system of law. However, the thesis operates against the rich literature in particular in two fields of theoretical doctrines. First, the discussion in this thesis is informed by the doctrine of the rule of law and theories of democracy.[16] Tension here relates to acceptable legal methodology, the fine distinction between interpretation and creating new rules and the legitimacy of the legal institutions to make largely political choices. This theoretical doctrine also includes the debate surrounding sovereignty and obligations on states in international agreements.[17] The theoretical ground on which this thesis stands may be characterised as a classical approach where the rule of law is seen to impose restraints on the institutions applying the law, in particular by imposing legal limits on law-making power. A crucial matter is the designation of the institution(s) with the final say over interpretation and the power allocation when decisions have political implications. The thesis aims at being informed by the rule of law regarding the issue of restricting the application of discretion. The founding of the EEA was based on the EFTA States choice not to become members of the EU. The theoretical stance in this thesis is informed by this original political choice of the EFTA States and will therefore take a relatively traditional view of the relationship between international treaty obligations and domestic law while recognising the hybrid character of the EEA.

Second, modes of integration provide an important theoretical framework. This doctrine discusses the sophisticated and advanced concept of market integration no longer separated from socially oriented objectives but rather trying to align the

[15] Fredriksen and Franklin (2015), pp. 629–684.

[16] A recent contribution to the rule of law doctrine is Palombella and Walker (2009). This book originates based on an idea to identify a common thread and build a bridge between old and new ideas associated with the rule of law. See also the contribution regarding the EU as a supranational institution taking on a greater range of tasks whose effective performance involves the distribution of politically salient resources and reduces the capacity of the states themselves to perform these tasks, Follesdal and Hix (2006), pp. 533–562.

[17] On legal methodology and the EEA Agreement in the context of international agreements, see Arnesen and Stenvik (2015).

economic and the social dimensions.[18] Hence, this theory discusses the right balance between market- or economic-based integration and social concerns relevant for all the areas discussed in-depth in the various chapters of the thesis. This thesis does not take a normative stance regarding the right balance to align social and economic oriented objectives. Most importantly, the thesis does not take a stance regarding the right way forward for European integration (including the EEA integration process) regarding social issues. However, given that the field under examination includes underlying conflicts between economic policy and social protection the thesis takes a critical stance towards conflicts being resolved judicially or administratively. Based on a rule of law viewpoint this thesis argues for political decision making and clarity of rules to better address the complexities involved.

1.2 The Economic Aim of Creating the Internal Market and Welfare Services

From the very start, the EEA Agreement has to some extent influenced the provision of welfare services. The provision of welfare services touches in different ways on the core European *economic* aim to establish and maintain an internal market. First, the mobility of economically active persons depends on whether welfare services (typically social benefits) are provided on equal terms. Equal terms include the proper safeguarding of acquired welfare rights from the home state for EU/EEA migrants including their families and the treatment of nationals and EU/EEA migrants including their families alike in the host state. Second, the task of controlling state aid also applies to the provision of publicly financed welfare services. The control of state aid is an important means of ensuring that equal conditions of competition within the EEA are not distorted by the actions of states. With the adoption of the EEA Agreement, similar state aid rules to those existing in the EU legal order became applicable to the EFTA States with the EFTA Surveillance Authority responsible for the control of the EEA state aid rules when aid is granted by the EFTA States. For EU Member States the adoption of the EEA Agreement extended the application of the state aid rules to include the territories of the three EFTA States. The Commission is responsible for the control of the EEA state aid rules when aid is granted by the EU Member States.

The early recognition of the importance of the provision of welfare services for the internal market led to two sets of provisions in the Treaty of Rome reflecting the two different ways in which welfare services were addressed. The provision on

[18] Often referred to in the context of defining solidarity is Stjernø (2005). Stjernø defines solidarity as 'the preparedness to share resources by personal contribution to those in struggle or in need and through taxation and redistribution organized by the state', see Hervey (2011), p. 186. The perspective of vulnerability to market principles of complex welfare services based on solidarity is a perspective included in most of the literature on the EU and the national health care systems, see i.a. Hancher and Sauter (2012), Mossialos et al. (2010) and Hatzopoulos (2005), pp. 111–168.

social security to ensure worker mobility and the title of social policy dealt with labour law and gender issues, whereas the provision of public services was dealt with under the Treaty chapter on the rules on competition and were called services of general economic interest (SGEI) and state monopolies. However, given the sensitivity of the matter, the European economic project dealt with the provision of welfare services only insofar as necessary to make the project work.[19]

In the Rome Treaty, the necessity of including social policy seemed to arise essentially in order to ensure equal treatment of EU migrant workers for work-related benefits based on the view that social guarantees are of the essence for the very exercise of free movement of workers. Accordingly, the only explicit legislative competence was inserted among the free movement of workers provision through Article 51 European Economic Community (EEC) Treaty (now Article 48 Treaty on the Functioning of the European Union (TFEU)) paralleled in Article 29 EEA.[20] However, consistent with the European Court's approach in other fields, the CJEU applied the legislation on rights for moving workers in an expansive manner by continuously extending both the personal and substantive scope of these provisions.[21] The CJEU construed the term worker as broadly as possible to include basically any economically active person[22] and applied the principles on cross-border access to virtually all welfare benefits,[23] whereas they were originally assumed only to cover work-related benefits. Nevertheless, an important limitation remained in the Court's practice until the late 1990s. The impact on national welfare provision was limited to *economic* activity in the sense that the welfare rights based on EU law were limited to the economically active movers and their family members.[24]

As to the SGEI, Article 90 EEC Treaty (now Article 106 TFEU) paralleled in Article 59 EEA laid down that the competition and free movement rules were only to apply fully insofar as this application would not obstruct the performance, in law

[19] Damjanovic and De Witte (2009), p. 57.

[20] Regulation 3/58 of the Council 25 September 1958 concerning social security for migrant workers was put in place almost immediately but became of true practical relevance in its adapted version of Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the community which followed shortly after the adoption of Regulation 1612/68 on freedom of movement of workers. Both are later replaced—Regulation 1408/71 by Regulation and 883/2004 and Regulation 1612/68 by Directive 2004/38 and Regulation 492/2011.

[21] See A. P. Van der Mei for a comprehensive analysis of the case law under previous Regulation 1408/71, Van der Mei (2003), See also Giubboni (2007), pp. 360–379; Spaventa (2007).

[22] For early case law regarding the broad definition of a worker; the nature of work, see Case Joined Cases 115 and 116/81 Adoui [2982] ECR 1665, the employment relationship, see Joined cases 389/87 and 390/87 Echternach [1982] ECR 723, the context of work, see Case 196/87 Steymann [1988] ECR 6159 and for part-time, see Case 53/81 Levin [1982] ECR 1035, for a recent case on the term worker, see Case C-46/12 L.N., EU:C:2013:97 discussed in Sect. 4.2.2.

[23] The concept covers all rights or benefits 'whether or not linked to a contract of employment', Case 207/78 Even [1979] ECR 2019, paragraph 22, Case C-249/83 Hoeckx [1985] ECR 973, paragraph 20.

[24] Damjanovic and De Witte (2009), p. 63.

or in fact, of the special general interest task inherent in these services.[25] Achieving this general interest task was, until the late 1980s, perceived as leaving the organisation and provision of these services within the full control of the Member States. Hence, state monopolies were accepted and, to some extent, seen to be both necessary and efficient in order to deliver the entrusted public service responsibility. However, in the late 1980s and 1990s, the process of liberalisation fundamentally changed the former structure of state monopolies for the provision of public services.[26] This change was consistent with the dominant economic theory at the time favouring privatisation and de-monopolisation.[27] The improvement of the efficiency of the provision of SGEI by means of liberalising certain sectors was related to the creation and the maintenance of the internal market. The discretionary powers for the Commission were limited to economic market-oriented public services, and the prohibition of state aid in the Treaty of Rome was limited to the preventive control system targeted at addressing distortions of competition.

1.3 Moving from Economic Community to Union: Significance for State Welfare Services Provision

The project to move the primarily economic community to a union has extended the impact of European integration on the national provision of welfare services to go beyond economic activity. While the core European economic aim remains important, additional European aims have emerged, in particular through various primary law changes in the EU legal order. Further welfare integration measures introducing greater cross-European homogeneity represent an ongoing debate in the EU.[28] This

[25] See the early Commission's Communications on SGEI; 1996, COM (96)443, COM 2001/C17/04 and 2007, COM(2007)725 as well as the 2003 Green Paper, COM (2003)270 and the 2004 White Paper, COM(2004)374, the recent SGEI package consist of the following documents (all paralleled in the EEA); Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016/C 262/01, 2012/21/EU: Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, Communication from the Commission—European Union framework for State aid in the form of public service compensation (2011), Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest.

[26] In sectors like telecom, energy and transport, liberalisation is an on-going project including also increasingly sectors of communal welfare services.

[27] An economic theory which may still be characterised as dominant.

[28] The on-going debate in the EU legal order on the possible need to create greater cross-European homogeneity in the national organisational structures of the welfare state is outside the topic of this book, see for recent studies De Witte (2015), Sauter (2014) and Damjanovic (2013), pp. 1685–1718. For earlier studies see i.a. the discussion in projects on the EU and welfare published in Neergaard et al. (2009, 2010, 2013), Ross and Borgmann-Prebil (2010) and Cremona (2011).

thesis is, however, limited to the legal effects on the provision of national welfare services of the already-introduced legal changes in European integration process based on a wider system of protection of values.

Three central observations are made regarding the more concrete legal impact on the provision of welfare services caused by the revised EU constitutional framework.

First, the EU legal order, in particular through the case law from the CJEU, has extended free movement rights for patients and students based on their status as services recipients to impact more substantially with Member States' provision of publicly funded healthcare and educational services.

Second, the EU legal order, particularly through the case law from the CJEU, has developed to include non-economically active moving Union citizens into the group of beneficiaries of social rights both in the home and in the host state.[29] Limited cross-European solidarity implies that Member States are no longer sovereign to decide on access to welfare benefits for non-nationals.

Third, in the EU legal order, in particular through the decisional practice of the Commission, the scope of the competences to conduct a state aid review has continuously increased to also include almost all social services, significantly increasing the policymaking role of the Commission.[30] Interpreting the state aid review process to include a wide scope of activities in the field of providing welfare services increases EU institutional powers at the expense of EU Member States' own competence to organise their welfare systems. The state aid review entails a detailed and complicated assessment of compatibility where the EU institutions need to balance various policy objectives, including welfare concerns.[31]

The concrete legal impact on the provision of welfare services included in the three observations from the institutional practices—both case law and administrative practice—has in various ways been endorsed by the Member States in amendments to the Treaties and in a number of secondary legislation adopted to this effect, not least through the Citizens Directive legislating large parts of the case law on Union citizenship. This endorsement constitutes precisely the backdrop for the research question asked in this thesis on how the revised constitutional framework affects the Contracting Parties in the EEA.

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[29] The case law is mostly based on an interpretation of the concept of Union citizenship, see Articles 20–25 TFEU and a vast amount of literature on Union citizenship.

[30] The limit of application of competition law to economic activity has not prevented the Commission to intervene in matters of social housing, public broadcasting and various other welfare services, see the 2011 package (revising the 2005-package) on the Commission's general policy support for SGEI and the Broadcasting guidelines from 2009 (replacing the guidelines from 2001), See also the interpretation by the Commission of changes in primary law, i.a. Treaty of Amsterdam, Protocol on the Systems of Public Broadcasting in the Member States (1997) now protocol 29 annexed to the TFEU and Protocol on Services of General Interest, OJ 2007, C 306/158.

[31] For an example of the so-called 'micro-management' of public service media, see the case analysis of Commission practices in the state aid review of public broadcasters in Donders (2015), pp. 68–87. See also the controversy on the Commission's and the Court's intervention in state housing policy, Reynolds (2015), pp. 259–280.

1.4 The EEA Agreement

1.4.1 Scope and Limits to the Dynamic Nature

The EEA Agreement is a special form of association created for states wanting close economic relations with the EU without becoming members of the Union. The Agreement's essential ambition is to strengthen and intensify trade and economic relations between the Contracting Parties. The overall aim of the Agreement is to include the EFTA States in large parts of the internal market while excluding selected areas of cooperation of the EU treaties. The Agreement is restricted to nationals of the EU and EFTA States leaving legislation concerning third-country nationals (TCNs) in principal outside. Furthermore, the Agreement does not cover important parts of the internal market leaving in principal tax harmonisation, the establishment of a customs union and common trade policy also outside the scope.[32] The Agreement applies only to a limited degree to fisheries and agriculture given that the EU Common Fisheries and Agricultural Policies are not part of the Agreement.[33] Finally, the Economic and Monetary Union, the Common Foreign and Security Policy and Justice and Home affairs are not part of the Agreement (Norway and Iceland participate in Schengen but this is an international cooperation outside the scope of the EEA Agreement and hence without the EFTA institutions such as the Authority and the Court playing a role).

The overall aim of the EEA Agreement is to extend the free movement of persons, goods, services and capital to the EFTA States: Iceland, Liechtenstein and Norway to provide for equal conditions of competition and to abolish discrimination on grounds of nationality. The dynamic nature of the Agreement is the mechanism to achieve this overall aim in a constantly evolving internal market.[34] Hence, a basic principle in the EEA Agreement is that it shall be dynamic in the sense that it shall develop in step with changes in EU law that lie within the scope of the EEA Agreement. The dynamic nature is meant to ensure a homogenous development

[32] The extent to which these exempted areas are still affected by EEA law is outside the topic of this book. For instance on the conformity of national tax rules the EFTA Court has handed down four significant cases, see Rust (2014), pp. 459–471.

[33] See also Article 8(3) EEA regarding products exempted from the Agreement. This provision regarding the scope of the Agreement was central in a recent case on agricultural products where the EFTA Surveillance Authority argued for a quite wide reaching application of the Agreement compared to earlier practices, compare Case E-4/04 Pedicel with Case E-1/16 Synnøve Finden, The Court did not agree with the Authority.

[34] Most literature on EEA law has praised the achievements of both the EFTA Court and the CJEU to ensure homogeneity in both of these aspects. For a recent contribution see Arnesen et al. (2018). See also several chapters in EFTA Court (2014); Skouris (2014), p. 5; Norberg (2014), p. 483; Barnard (2014), p. 168, and several analysis by Fredriksen such as Fredriksen and Franklin (2015), pp. 629–684 and for an earlier analysis see Fredriksen (2010a), pp. 731–760 with further references.

between EEA law and the internal market law of the EU.[35] Homogenous development includes both legislative homogeneity and homogeneous interpretation of EEA law and those provisions of EU law that are substantially reproduced in the EEA Agreement.[36] The continued substantial reproduction of provisions is ensured by decisions of the EEA Joint Committee[37] that incorporate novel EU legislation of relevance to the EEA into the Agreement.[38] New legal acts have been added continuously through amendments of the annexes and the protocols of the Agreement since the entry into force on 1 January 1994.[39] Formally, each change of the Agreement through the decisions in the Joint Committee is a new international legal obligation between the Contracting Parties.[40] The EEA Joint Committee is thus the *legislative* organ of the EEA. It is, however, not empowered to make new EEA-specific secondary legislation but only to copy and adjust existing EU secondary legislation.[41] This delimitation of applying this procedure is laid down in Article 102 EEA referring to new legislative acts 'governed by this Agreement'. The outer limits of what is 'governed by' the EEA Agreement are not always clear and hence this political question is decided by the representatives of the Contracting Parties in the EEA Joint Committee with a procedure regarding national constitutional requirements in Article 103 EEA.[42]

As far as legislative homogeneity between the EU and the EEA is concerned, the dynamic nature of the EEA Agreement does not include the main part of the Agreement (i.e. the part where (some) primary EU law is reproduced in the EEA).[43] Under Article 98 EEA, the EEA Joint Committee may only amend the annexes and

[35] The Agreement itself explicitly excludes part of the EU internal market from the association such as agriculture and fisheries see Article 8(3) EEA. It is self-evident that areas excluded from the Agreement are also excluded from the dynamic mechanism.

[36] References to the homogeneity objective can be found in recitals 4, 5 and 14 of the Preamble to the EEA Agreement and Articles 1(1), 6, 102, 105 and 106 EEA, see also the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, OJ L 344, 31.1.1994 (the Surveillance and Court Agreement (SCA)) Article 3.

[37] The EEA Joint Committee is responsible for managing the EEA Agreement. Both the EU side and the EFTA side are represented in the Committee and each block speaks with one voice, see the rules of procedures adopted by Decision No 1/94 on 8 February 1994. The Committee meets on a monthly basis.

[38] Articles 93, 94 and 102 EEA.

[39] See for an overview of this in Europautvalget [2012] NOU 2012:2 Utenfor og innenfor, p. 108.

[40] See the procedure laid down in Article 102 EEA regarding new EU acts 'governed by this Agreement'.

[41] Sejersted (1997), p. 48.

[42] After the legislation has been incorporated into the EEA Agreement through a decision by the EEA Joint Committee it must be incorporated into national legislation, see Article 7 EEA. Decisions of the EEA Joint Committee incorporating legislation cannot be directly challenged before the EFTA Court nor can the EFTA Court decide on the validity of such decisions or of the acts incorporated, see however the EFTA Court's decision in CIBA, Case E-6/01, CIBA and others.

[43] There is however no primary and secondary law in the EEA at least structurally in the Agreement, it is all part of one international agreement, see for a more detailed analysis Fredriksen (2014), pp. 95–113, see for more on this point footnote 102.

some protocols, which means that only, in EU terms, secondary legislation is continually updated. The substantive provisions of the main part of the EEA Agreement, negotiated as they were in 1990–1992, still mirror the corresponding provisions of EU primary law as it stood at that time.[44] Thus, the subsequent amendments to EU primary law accomplished through the Treaties of Maastricht, Amsterdam, Nice and Lisbon are not reflected in the main part of the EEA Agreement and not included in the annexes or the protocols.[45] Thus, the dynamic nature of the agreement to ensure legislative homogeneity does not include EU primary law changes. This phenomenon in EEA law has been described as the widening gap between the EU Treaties and the EEA Agreement.[46] The widening gap includes the revised constitutional framework for the provision of welfare services in the EU legal order which is at centre stage in this project. First and foremost the widening gap challenges the Agreement's basic aim to secure a joint and parallel development of the legal orders of the EU and the EFTA States in areas covered by the Agreement.

1.4.2 Homogeneity as a Fundamental (Constitutional) Principle of the EEA

Homogeneity across the EEA is to be achieved in a particular institutional setting. The institutional setting consists of an EU-pillar and an EFTA-pillar with a set of EEA institutions bridging the two-pillar system.[47] This setting essentially prevents the transfer of legislative- and judicial powers to supranational institutions and ensures that decisions adopted by the EU institutions are not directly applicable to the EFTA States.

The unique two-pillar institutional construction reconciles the aim of economic integration with the aim of preserving sovereignty albeit creating a complex legal regime. In conjunction with the EEA Agreement, the EFTA States signed an agreement on the establishment of a surveillance authority and a court of justice (SCA) to ensure in the EFTA pillar that states fulfil their obligations and respect EEA law.

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[44] Illustrative of this point is the wording in the unchanged article 6 EEA referring to homogenous interpretation between the provisions of the EEA Agreement and the corresponding rules of the *Treaty establishing the European Economic Community* and the *Treaty establishing the European Coal and Steel Community.*

[45] In Part III it will be demonstrated how a protocol being primary law of the EU to some extent has entered the Agreement through a reference in the annexes.

[46] An analysis of the widening gap in the EEA after the Lisbon Treaty can be found in Fredriksen (2012), pp. 868–886.

[47] The already mentioned EEA Joint Committee encompasses surveillance of the implementation of the EEA Agreement, the settlement of disputes and most importantly the incorporation of new EU legislative acts into the Agreement. Other EEA institutions include the EEA Council, and the Joint Parliamentary Committee with consultative functions.

In the EU pillar, the European Commission and the CJEU similarly ensure that the EU Member States fulfil their obligations and respect EEA law.

Academics and practitioners of EEA law almost unanimously pronounce their support for the strength of the homogeneity principle for the successful functioning of the EEA Agreement.[48] Catherine Barnard has characterised this principle as having constitutional significance for the interpretation of EEA law.[49] It is, of course, possible to envisage a different development of the EEA (both historically and in the future) whereby the principle of homogeneity is attributed less importance than the current consensus indicates. The EFTA Court, the European Courts, the EFTA Surveillance Authority and the European Commission could all have built on the provisions in the EEA Agreement more independently of their EU counterparts to resolve questions in individual cases.[50] In other words, the legal interpretation in individual cases could be more or less harmonised with the views of the European Courts and the Commission in identical EU law cases. To the extent that discrepancies between EEA and EU law emerged with a more independent approach, concrete solutions would have to be found to resolve, i.a. questions of reciprocity.[51] Thus, it is possible to envisage a more independent development of EEA law being less subordinated or loyal to the legal solutions found in EU law albeit at cost of homogeneity.

With some very limited exceptions,[52] this is, nevertheless, not what has happened in practice, as is well illustrated by the L'Oréal case.[53] Furthermore, even if there are mixed signals, a more independent approach seems to have limited support from the Contracting Parties of the EEA.[54] All institutions responsible for the interpretation of the Agreement have expressed their effort to rely on the great weight of the

[48] A recent contribution to this is Skouris (2014), p. 5, see also S. Norberg in the same publication in The EEA Surveillance Mechanism in EFTA Court on p. 483 stating that '[The principle of homogeneity] explains the genesis of the EEA Agreement and guarantees its continued existence'. For a different view based on one decision by the EFTA Court see Case E-16/11 EFTA Surveillance Authority v Iceland (Icesave) which has been analysed in the literature as opening up to questioning the earlier emphasis by the Court of similarities between EEA and EU law, see Chalmers (2014), pp. 408–416.

[49] Barnard (2014), p. 168.

[50] Or in their general Communications which are an important part of the decisional practice in state aid law.

[51] Reciprocity is the idea that the EEA not only ensures equal rights for citizens and undertakings from EFTA States in the EU but equally ensures citizens and undertakings from the EU equal treatment in the EFTA States.

[52] Examples from the CJEU include the string of tax cases commented upon by Fredriksen (2012), pp. 874–875. See also the comment by Zimmer (2010), pp. 1–4. These examples represent, however, a limited and specific area of which a solution in practical terms seems to already have been found in Iceland and Norway being parties to the OECD/Council of Europe convention on mutual administrative assistance in tax matters, see Lyal (2014), p. 735.

[53] Cases E-9/07 and E-10/07 L'Oréal, Fredriksen (2010b), pp. 481–499; Magnússon (2011), pp. 507–534; van Stiphout (2009), pp. 7–18; Rognstad (2001), pp. 435–464.

[54] As pointed to by Tarjei Bekkedal less homogenous interpretation may be more controversial politically, see Bekkedal (2008), pp. 146–147.

homogeneity principle and to always strive for homogenous interpretation of EU and EEA law. As already referred to, it has been argued convincingly by academics that this approach has been essential to the success of the Agreement. This author concurs with the broad consensus of the overall importance attributed to the principle of homogeneity and joins the view that the principle of homogeneity has been important for the survival and for the well-functioning of the EEA Agreement.

Taking this as a starting point, however, the question arises of how to reconcile the importance of the homogeneity principle with the lack of substantial reproduction of EU primary law changes in the EEA. The starting point in the next section, is the perspective offered by law on treaties. This perspective is included as one of many reference points for the analysis.

1.4.3 Law on Treaties: National Legal Autonomy

From the point of departure of international law on treaties, it is clear that contracting parties to an international agreement must agree in order for additional legal provisions to be included in an agreement. Clearly, there is therefore, according to standard international law, a requirement of mutual agreement before new provisions can be made part of the EEA Agreement. The revised constitutional framework of the EU is based on a series of Treaty changes made through decisions taken by EU Member States. The EU Member States constitute one of the pillars created to establish the EEA Agreement. The other pillar—the EFTA side—has not played a part in the series of Treaty revisions in the EU. Hence, to make these Treaty revisions applicable in the EEA would amount to only one of the Contracting Parties to the EEA Agreement—the EU side to amend the EEA Agreement. As long as not both the EU and the EFTA side have agreed to include the revised constitutional framework into the EEA Agreement, the provisions are not as such part of the Agreement. Clearly, when the provisions are not part of the Agreement, they are not judicially binding EEA law and cannot in principle be applied by the EU/EFTA institutions when applying EEA law. The institutions are limited in their function to apply only the provisions that have been made part of the EEA Agreement. Therefore, based again on law on treaties as a reference point, the institutions cannot apply the revised constitutional framework in the EU when they apply EEA law.

A different starting point would undoubtedly deviate from the fundamental position of every state to be legally autonomous in its relation with other states and international organisations as demonstrated in the Vienna Convention on the Law of Treaties. If the revised constitutional framework of the EU was made part of the EEA without the EFTA States' consent, this would be equal to the EU deciding EFTA States' international legal obligations singlehandedly and effectively removing national legal autonomy for the EFTA States.

Hence, the Norwegian Government only stated the obvious in the intervention made in Case E-26/13 Gunnarsson referred to in paragraph 48 of the decision, saying that 'the legal basis for this is Article 21(1) TFEU, which has no equivalent

in the EEA Agreement. […] Union Citizenship falls outside the material scope of the annexes to the EEA Agreement'.[55]

However, anyone familiar with EEA law is aware of the complicated hybrid of the EEA Agreement placing itself somewhere in between an ordinary international treaty and the supranational system of the EU legal order. This hybrid structure also means that there is a much more complicated answer to the question of how to meet the challenge of the explained legal phenomenon of the EEA Agreement than the answer provided by applying international treaty law.[56] The aim of the next section is to help set the stage for the more detailed discussion in the subsequent chapters starting with the EU based on new aims and values.

1.5 The EU Based on New Aims and Values: An Overview of Primary Law Changes After the Signing of the EEA Agreement 1 May 1992

1.5.1 The Treaty of Maastricht

The Treaty of Maastricht entered into force 1 November 1993 and changed the name of the EEC removing the term 'economic' from the European Community (EC). This change had at least symbolic importance.

Thus, with the Maastricht Treaty, the development of a social dimension became more important. The character of the system began to change in new directions, which also may be derived already from the formulation of Article 2 EC and the insertion of new activities in Article 3 EC.[57]

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[55] Reply to questions by the Court from the Kingdom of Norway, 9 April 2014. The same position is clear from Case E-28/15, Jabbi see also Case E-12/10 EFTA Surveillance Authority v Iceland. However, in the last case the Icelandic Government referred to several Articles in the Charter of Fundamental Rights for their defence, see Report for the Hearing, paragraph 92 even if the Charter as such has not been made part of EEA law.

[56] Nils Wahl has analysed the legal significance of the Charter of Fundamental Rights in the EEA taking the same starting point for the analysis, namely to state that formally the provisions simply do not exist in the EEA. Then he engages in a debate on how the courts influence each other's case law in the field of fundamental rights, see Wahl (2014), pp. 281–298.

[57] See in particular subparagraphs (i)–(t): (i) a policy in the social sphere comprising a European Social Fund; (j) the strengthening of economic and social cohesion; (k) a policy in the sphere of the environment; (l) the strengthening of the competitiveness of Community industry; (m) the promotion of research and technological development; (n) encouragement for the establishment and development of trans-European networks; (o) a contribution to the attainment of a high level of health protection; (p) a contribution to education and training of quality and to the flowering of the cultures of the Member States; (q) a policy in the sphere of development co-operation; (r) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development; (s) a contribution to the strengthening of consumer protection; (t) measures in the spheres of energy, civil protection and tourism.'

To complete the picture, it is also appropriate to mention the objectives of the EU enshrined in the Treaty of the European Union (TEU) from Maastricht in Article B emphasising the following:

> The Union shall set itself the following objectives:
>
> […]
>
> – to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion […].

Furthermore, the concept of Citizenship of the Union was introduced in Maastricht through Articles 8 and 8A (now Articles 20–25 TFEU). As will be demonstrated later, these provisions have introduced into the catalogue of EU-based rights, rights of access to social welfare far beyond the economically active citizens. The Maastricht Treaty also included provisions on social policy (now titles X and XI TFEU), education (now title XII TFEU), culture (now title XIII TFEU) and public health (now title XIV TFEU) into the primary law of the EU.[58] The legal significance of the new provisions regarding education and public health is analysed in Part I. The provisions on Union citizenship are analysed in Part II and the provisions on culture are included in Part III.

1.5.2 The Treaty of Amsterdam

The social dimension concerning aims and values is further underscored with the Treaty of Amsterdam, which entered into force 1 May 1999. For instance, it may be mentioned that in the preamble of the TEU, it is stated that the Contracting Parties are

> DETERMINED to promote economic and social progress for their peoples […].

Other important changes in primary law relevant for welfare services are the insertion of Article 16 EC (now in a revised version as Article 14 TFEU) on the value of public services and a new protocol on public service broadcasting (now Protocol 29 annexed to the TFEU on the system of public broadcasting in the Member States). These provisions are analysed in Part III.

[58] The EEA Agreement has elements from the Maastricht Treaty included in the main part of the Agreement given the parallel time period of negotiations. The free movement of capital provision in Article 40 EEA provides an example.