Carl Baudenbacher *Editor*

The Fundamental Principles of EEA Law

EEA-ities

Springer

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Preface

Fundamental Principles of EEA Law: EEA-ities

The suffix "-ity" is used to form an abstract noun expressing a state, condition or quality of being. It derives from Latin ("-itas") reaching English from old French ("-ite"). In law in general and in EEA law in particular, there are various notions with this ending. One may even say that the most important fundamental principles of the EEA Agreement are described in such a way.

The extension of the European Union's Single Market to the EEA/EFTA States was and continues to be a singular achievement. The EEA Agreement binds 31 countries: the 28 EU member states (soon to be 27) and 3 EFTA countries, Iceland, Liechtenstein and Norway. It remains to be seen what impact the withdrawal of the United Kingdom from the European Union will have upon the EEA. It is thus all the more important, in these times of political uncertainty, that the essential principles of the EEA are restated and upheld.

This book contains 11 contributions which are dedicated to the most important "EEA-ities". The chapters are written by judges, noted practitioners and eminent academics in their respective fields across the EEA and beyond.

Chapters "Legislative Homogeneity" and "Judicial Homogeneity as a Fundamental Principle of the EEA" introduce the two facets of the seminal principle ensuring a level playing field for citizens and business operators in the EFTA and the EU pillars: *homogeneity*.

Chapter "Reciprocity" addresses *reciprocity*, the twin maxim of homogeneity, which inter alia guarantees that the rights of individuals and business operators are enforceable in court in a similar way in both EEA pillars.

Chapter "The Principle of Sincere Cooperation in EEA Law" is dedicated to *loyalty* and the way in which this principle, stated in the same terms in both the TFEU and the EEA Agreement, has acquired a deeper meaning in the latter through the case law of the EFTA Court.

Chapter "Sovereignty" turns to *sovereignty*, its role in the interpretation of the EEA Agreement and for its institutional balance.

Chapter "Prosperity in the EEA" deals with *prosperity* and the way in which the Agreement has contributed to the creation of an area of stability and peace, where economic growth thrives hand in hand with social welfare.

Chapter "Priority", on *priority*, identifies and describes the most important objectives set in the shaping of the single market from the perspective of the EFTA pillar.

Chapter "The Authority of the EFTA Court" turns to the *authority* of the EFTA Court and its role in securing the uniform interpretation of EEA law in the EEA/EFTA States, with a particular focus on judgments in the form of advisory opinions.

Chapter "Proportionality" sets out the specifics of *proportionality* in the EEA legal order, analysing not only the case law of the European courts (ECJ, ECtHR and EFTA Court) but also the application of the principle by the courts of Iceland, Norway and Liechtenstein.

Chapter "Equality" explores *equality* in EEA law from the perspective of the two-pillar system and the impact this principle has on the establishment of a dynamic and homogeneous EEA.

Chapter "State Liability in the EEA" discusses the scope of the principle of s*tate liability* in EEA law through the prism of the EFTA Court's landmark judgments in *Sveinbjörnsdóttir* and in *Icesave*.

I thank the contributors for sharing their knowledge and experience through these insightful chapters. I am particularly indebted to my legal secretary, Dr. Luísa Lourenço, who coordinated the publication of the book on my behalf, proofread and revised each chapter and liaised with both publishers and fellow contributors, ensuring the book's timely publication.

Luxembourg, Luxembourg Carl Baudenbacher
28 June 2017

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Skúli Magnússon (1969) became Cand. Jur. (University of Iceland) in 1995 and Mag. Jur. (University of Oxford) in 1998. He is at present Judge at Reykjavik District Court and Docent at the University of Iceland as well as chairing the Complaint Committee for Public Procurement and ad-hoc judge at European Court of Human Rights. He served as Registrar of the EFTA Court from 2007 to 2012 and is the author of a number of publications in the fields of European and Constitutional Law as well as Legal Theory.

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John Temple Lang is an Irish lawyer. He was in the Legal Service of the European Commission from 1974 till 1988, when he became a Director in the Competition DG. He left the Commission and went back into private practice in 2000, in Cleary Gottlieb Steen & Hamilton LLP. He is now practising in Ireland. He is a professor in Trinity College Dublin and a Senior Visiting Research Fellow in Oxford. He has written a book and more than 300 articles on many aspects of European law.

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Carsten Zatschler is the Legal and Executive Director of the EFTA Surveillance Authority. He was called to the Bar of England and Wales in 1999 and specialised in EU law, both in an advisory capacity and in litigation in front of national and EU courts. Between 2004 and 2013, he served in the cabinets of successive British Judges at the Court of Justice of the European Union. He is a Fellow of the Centre of European Law of King's College London, a Fellow of the Institute of European Law and a visiting faculty member at the Wirtschaftsuniversität, Vienna. Mr. Zatschler holds law degrees from the University of Cambridge, University of Paris II and the Humboldt-Universität zu Berlin.

Abbreviations

EBA	European Banking Authority
EC	European Communities
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ/Court of Justice	Court of Justice of the European Union
ECJ RoP	Rules of Procedure of the Court of Justice of the European Union
ECSC	European Coal and Steel Community
ECOFIN	Economic and Financial Affairs Council
EEA	European Economic Area/EEA Agreement
EEAS	European External Action Service
EEC	European Economic Community
EES	European Economic Space
EEZ	Exclusive Economic Zone
EFSF	European Financial Stability Facility
EFTA	European Free Trade Association
EFTA/EEA	States Iceland, Liechtenstein, Norway
e.i.f.	Entry into force
EIOPA	European Insurance and Occupational Pensions Authority
EMU	Economic and Monetary Union
ESA	EFTA Surveillance Authority
ESAs	European Financial Supervisory Authorities
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
IMF	International Monetary Fund

IP	Intellectual property
JC	Joint Committee
JCD	Joint Committee Decision
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
RoP	Rules of Procedure of the EFTA Court
SCA	Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice
TAA	Transitional Arrangements for a period after the Accession of certain EFTA States to the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization

Legislative Homogeneity

Dag Wernø Holter

Abstract The fundamental idea and objective of the EEA Agreement is to extend the internal market of the EU to the participating EFTA States, by 'creating a homogenous European Economic Area'. This chapter describes how legislative homogeneity in areas of relevance to the internal market is a condition for the achievement of this objective. It gives an overview of the decision-making procedures established to realise legislative homogeneity by incorporating relevant EU legislation into the Agreement, and points out that the particular features of these procedures reflect the political and legal needs for the Parties to preserve, on the one hand, the decision-making autonomy of the EU, whilst on the other hand respecting the constitutional principles of sovereignty of the EFTA States. As a case in point and an example of how new challenges linked to meeting these different concerns were overcome, it describes the agreement that was reached on how to extend the EU's system of Financial Supervisory Authorities to the EEA. The chapter also discusses whether legislative homogeneity is actually achieved. Finally, it is argued that, in spite of criticism that the EEA Agreement undermines the sovereignty of the EEA EFTA States by not offering sufficient participation in the decision-making processes, the political reality is that these States consider their overall interests to be well served by the Agreement, and that their decision to enter into the Agreement and remain part of it is obviously a way of exercising their full sovereignty.

I would like to thank colleagues at the EFTA Secretariat in Brussels for their support and input. Ilinca Filipescu Chalançon and Tómas Brynjólfsson contributed significantly to section 6 on the Financial Supervisory Authorities. Georges Baur and Marius Vahl read the manuscript and offered valuable comments. Juliet Reynolds provided efficient copy-editor's work. Any errors or inaccuracies remain my responsibility, and the opinions expressed are mine and do not in any way engage the EFTA Secretariat or anyone else.

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1 Introduction

According to the Oxford Dictionary, *homogeneity* is 'the quality or state of being all the same or all of the same kind'. With such a definition, it is of course difficult to apply this notion as a description of Europe, or indeed of the European Economic Area. *Legislative homogeneity* is certainly a narrower notion, in particular when it refers not to the totality of legal systems but rather to a defined area such as the internal market. Still, it must be considered quite wide ranging and ambitious when taken as an objective for the development of European cooperation and integration. The subject of the following reflections will be what this objective actually implies, to what extent it has been achieved within the EEA, and what it takes to ensure that this 'state of being all the same' is upheld. Since the author of these reflections is not a lawyer by profession, the approach will be more general and political than legal.

2 The Notion of Homogeneity in the EEA Agreement

The objective of achieving a 'common market' is an essential element of the original Treaty on the establishment of the European Economic Community (Treaty of Rome) of 1957. The Treaty did not, however, use the term 'homogeneity', but spoke more modestly of 'approximating economic policies' (Article 2) and of an 'approximation of national law to the extent necessary for the functioning of the Common Market' (Article 3(h)).[1] Nor was the term used in the European Commission's White Paper of 1985 on 'Completing the Internal Market'. That being said, the idea of a homogenous legal area as a prerequisite for attaining the objective of a well-functioning internal market without barriers to trade was obviously an underlying idea in the paper and its concrete proposals.[2]

The renewed impetus to complete the internal market as set out by the Commission's White Paper, and the adoption of the Single European Act as a basis for strengthening political cooperation and facilitating the decision making necessary for achieving these objectives, constituted the most important backdrop to the initiative that eventually resulted in the conclusion of the Agreement on the European Economic Area between the European Community and the Member States of the European Free Trade Association in 1992.[3] A development towards

[1] See http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT&from=EN (text of the Treaty in French; English text not available on this official site).

[2] See http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf.

[3] The European Union was formally established with the entry into force of the Maastricht Treaty on 1 November 1993; the term European Community is used here for the period preceding this date, and is also the term used in the EEA Agreement. EFTA was founded in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Finland became an associated member in 1961 and a full member from 1986; Iceland joined in 1970. Denmark and the UK left EFTA to become members of the EC in 1973; as did Portugal in 1986. Liechtenstein had

stronger integration and a better-functioning internal market within the EC, promising to be economically beneficial, was clearly perceived in the EFTA States as a challenge, as well as an incitement to seek closer cooperation. So when, in January 1989, the then Commission President Jacques Delors launched the initiative, suggesting that 'we can look for a new, more structured partnership with common decision-making and administrative institutions to make our activities more effective and to highlight the political dimension of our cooperation in the economic, social, financial and cultural spheres',[4] the reactions of the EFTA States were very positive and even enthusiastic. At their meeting at the level of Heads of Government in Oslo, two months later, they expressed their readiness to enter into a process that should lead to 'the fullest possible realization of free movement of goods, services, capital and persons, with the aim of creating a dynamic and homogenous European Economic Space'.[5] The notion of homogeneity was thus formally and explicitly introduced.

In the EEA Agreement itself, the concept holds a rather prominent place. Already in the fourth recital of the Preamble, reference is made to 'the objective of establishing a dynamic and homogenous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level'.[6]

The 15th recital of the Preamble then points to the need for homogenous implementation of rules and regulations, by affirming 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'.

In Part I of the Agreement, 'Objectives and Principles', the fundamental objective of 'creating a homogenous European Economic Area' is confirmed in Article 1. The implications of this objective are explicitly developed in Part VII on 'Institutional Provisions', where Article 102 states that '[i]n order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall

been associated with EFTA through an agreement with Switzerland, and became a full member in 1991. When the EEA Agreement was signed in May 1992, the EFTA Member States were Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. Switzerland did not ratify the Agreement, following the negative outcome of a referendum in December 1992. The EEA Agreement entered into force on 1 January 1994 (due to outstanding questions regarding their relationship to Switzerland, Liechtenstein only became a full member as of 1 May 1995). Austria, Finland and Sweden left EFTA to become members of the EU in 1995.

[4]Speech before the European Parliament on 17 January 1989. Quoted from Bryn and Einarsson (2010), p. 21.

[5]Ibid., pp. 21 f.

[6]All quotes from the EEA Agreement are taken from the printed version published in European Economic Area—Selected Instruments, EFTA 2012. The text of the Agreement is also available on EFTA's website: http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf.

take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement'.

In the same part of the Agreement, under the heading 'Homogeneity, Surveillance Procedure and Settlement of Disputes', Article 105 points to 'the objective of the Contracting Parties to arrive at as uniform an interpretation as possible of the provisions of the Agreement and those provisions of Community legislation which are substantially reproduced in the Agreement' as the basis for the actions of the EEA Joint Committee. The Joint Committee shall 'keep under constant review the development of the case law of the Court of Justice of the European Communities and the EFTA Court' and 'shall act so as to preserve the homogenous interpretation of the Agreement'.

3 Homogeneity: A Prerequisite for the Functioning of the Internal Market

The fundamental idea and objective of the EEA Agreement was to extend the internal market of the EC to the participating EFTA countries. These seven countries (at the time, see footnote 3) were already the most important economic and trading partners of the Community and, since the establishment of EFTA in 1960, had been part of the broader European integration processes initiated in the 1950s. It was therefore obviously in the interest of both sides to look at ways of facilitating the further extension and development of their economic relations. Given the ongoing development of the internal market within the Community, with the ambitious goals that had been formulated and adopted, traditional free trade arrangements would clearly not meet this objective; the most efficient means would be to explore how the EFTA countries could get as close as possible to becoming equal participants in this market.

The realisation of the internal market is itself built on the idea of a homogenous legal area as far as laws, regulations and standards of relevance to the free movement of goods, services, capital and persons are concerned. Extending the internal market to participating countries outside of the Community would thus logically entail an extension of this homogenous legal area to these countries. As we have seen, this is also clearly formulated as the objective of the EEA Agreement. In doing so, the Agreement points to two basic conditions for achieving this objective: the first being homogenous legislation, which in turn requires an institutional set-up and adequate procedures for decision making; and the second being homogenous implementation requiring uniform interpretation and again an institutional set-up to ensure this.[7]

[7]The present text will focus on homogenous legislation; homogenous implementation and interpretation will be dealt with in other contributions. See in particular the chapter by Philipp Speitler, Judicial Homogeneity as a Fundamental Principle of the EEA.

4 Decision Making in the EEA

As mentioned above, when launching his initiative, Commission President Delors suggested 'common decision-making' as one of the constituting features of the new partnership. When different parties aim at establishing a 'structured partnership' and, in particular, at developing a 'homogenous European Economic Area, based on common rules and equal conditions of competition', common decision-making would indeed seem to be a logical idea. This element of Delors' proposal was of course also welcomed by the EFTA States. At the outset, it could easily be perceived as a totally new—and quite unexpected—approach by the European Community, opening up for a partnership between the two groups of countries of a qualitatively new kind.

It did not take long, however, before this idea encountered difficult hurdles. In the negotiating process, it became clear that the Community side could not agree to anything that might threaten or undermine its decision-making autonomy. To understand the depth of the Community's objections, it is important to bear in mind the particular nature of this cooperation, a cooperation *sui generis*, between sovereign states but with strong elements of supranationality and institutions at Community level with their own, clearly defined roles in the decision-making processes.

Preserving decision-making autonomy would also prove to be an important concern on the EFTA side, although in a different perspective. EFTA was—and is—an intergovernmental cooperation based on the traditional principles of international law. For the EFTA States, it was necessary to maintain sovereignty and not to introduce elements of the supranationality built into the Treaties of the Community. It could be recalled in this context that EFTA was established in 1960 precisely as a response to the Treaty of Rome, as an alternative to the cooperation that was taking shape among the Community States, and an alternative approach to European integration, based on the principles of intergovernmental cooperation and focusing mainly on free trade.

At an early stage of the process, during exploratory talks before the formal negotiations were initiated, an idea was introduced to establish a model for decision making for the EEA that would imply procedures for continuous consultation between the Community and the EFTA States, acting as two 'autonomous pillars', at every level of the process. This model was informally referred to as a type of 'osmosis' between the two, leading up to a final common but separate decision in each of the pillars. But when the formal negotiations started, it became clear that also this was deemed too far reaching by the Community. The rejection of a model of this kind may have come as an unpleasant surprise to the EFTA States, in particular since the model had been discussed in the joint high level steering group that had prepared the negotiations, but should have been quite predictable based on an objective analysis of the differences between the fundamental principles for decision-making within the Community and in the EFTA States. Parallel processes, where the two sides would develop legislation together by consulting at

all levels in order to reach common decisions, would obviously have led to a situation where governments and parliaments of the EFTA States would have exerted direct influence on the Community's own decision-making. One could easily argue that this would have turned the legislative processes for the internal market into a traditional intergovernmental cooperation. The model would therefore have been incompatible with the principles of the Treaties and unable to accommodate to the mandate given by the Treaties to the Community institutions. It would have affected the role of the Commission, and not least the strengthened role that had recently been given to the European Parliament by the Single European Act. It was then hardly conceivable that the Parliament—whose newly extended powers also meant that any comprehensive cooperation agreement entered into by the Community would need to be approved by an absolute majority of its members—would have accepted such a model, had it been pursued.[8]

The reason for referring to this early stage of the discussions on decision-making in the EEA is of course that it offers an interesting background for understanding the actual result of the negotiations, as well as the principles underlying the decision-making procedures as they are presently established in the Agreement. The challenge facing the negotiators was to find a way to ensure legislative homogeneity through mechanisms for adopting and implementing common legislation within separate entities that were based on different principles for cooperation between states. This whilst on the one hand preserving the Community's decision-making autonomy, and on the other hand respecting the constitutional principles of sovereignty of the EFTA States.

The agreement that was finally concluded included all existing relevant Community legislation ('acquis communautaire') for the areas covered by the EEA Agreement in 22 Annexes, which then became binding for the participating EFTA States. It furthermore established an institutional set-up whereby new or amended legal acts in the same areas could be incorporated through common decisions, and where independent EFTA institutions would be responsible for surveillance and judicial interpretation, mirroring the Community institutions. This was probably the most innovative aspect of the agreement, providing it with a particularly dynamic character and even introducing a certain element of supranationality through the surveillance and judicial arrangements.

Decisions to incorporate new legal acts are taken 'by agreement between the Community, on the one hand, and the EFTA States speaking with one voice, on the other' within the EEA Joint Committee, which holds formal meetings approximately once a month, with the EU now represented by the European External Action Service (Arts 92, 93 and 94). Meetings of the Joint Committee are prepared by the four Joint Subcommittees (which now meet together) covering the different

[8]My account of the early ideas for a decision-making model is mainly built on an internal briefing, in which I took part, by Norwegian officials to members of the Norwegian Delegation to the EC before the start of formal negotiations. The original model for 'reciprocal osmosis' is briefly touched upon, but not discussed or compared to the model that was eventually agreed, in Norberg and Johansson (2016), p. 24.

areas of the EEA Agreement. Once legislation has been incorporated into the Agreement by a Decision of the EEA Joint Committee, the legal act must be transposed into national legislation in the three EEA/EFTA States in accordance with the provisions of their national legal systems.

Joint Committee Decisions are prepared by the EFTA Secretariat, based on discussions among and input from the EEA/EFTA States, generally in the framework of a number of working groups on the EFTA side and formally agreed in the EFTA Subcommittees and Standing Committee of the EFTA States. As the Agreement stipulates that the participating EFTA States shall be 'speaking with one voice', and as the EFTA cooperation remains a traditional intergovernmental cooperation, this means that consensus among the three EEA/EFTA States is needed before a draft JCD can be submitted to the EU.

Discussions among the EEA/EFTA States may concern the question of the EEA relevance of an EU legal act, i.e. whether or not the act regulates issues within an area covered by the Agreement and should thus be incorporated. They may also concern the need for possible adaptations of the act in question. Adaptations of a technical nature may sometimes be necessary when an EU act shall be adopted by and apply to the participating EFTA States, which generally does not represent any difficulties. More difficulties may, on the other hand, arise from EFTA demands for adaptations or derogations of a substantive nature. When this is requested from the EFTA side, or indeed when the EEA/EFTA States do not accept the EEA relevance of an EU act, discussions are of course needed with the EU. Lack of agreement is sometimes seen to delay and even prevent the adoption of a common decision to incorporate an act.

Respecting the decision-making sovereignty of the participating EFTA States, the EEA Agreement takes into account the possibility of disagreement leading to the non-incorporation of an EU act. Procedures to be followed in such a case are outlined in Article 102 and foresee the possible suspension of the 'affected part' of the Agreement. This is in the direct logic of its main objective of 'creating a homogenous European Economic Area', the legislative homogeneity being the prerequisite for the EFTA States' access to and participation in the internal market.

Article 102 underlines in its first paragraph that, '[i]n order to guarantee the legal security and the homogeneity of the EEA', new legislation should be incorporated 'as closely as possible to [its] adoption by the Community'. A certain 'backlog' of non-incorporated legal acts has, however, been in existence for many years, in many cases due to a lack of agreement between the EEA/EFTA States and the EU. Still, the procedures described in the following paragraphs, although initiated in their first steps on a few occasions, have so far never led to the suspension of a part of the Agreement. This pragmatic approach, which implies that neither side draws the conclusion that the legal acts in question are formally rejected and thus that consultations and negotiations continue, must mainly be understood against the background of the general assessment on both sides that, on the whole, the Agreement has proved to be a dynamic and well-functioning framework for the important economic relations between the parties. The EFTA side cannot ignore, however, that the EU has, on several occasions, pointed to the fact that the 'backlog' of

non-incorporated legislation represents a threat to the basic principle of homogeneity of the EEA.

This brief outline of the decision-making procedures of the EEA is of course not intended to give the complete picture.[9] But it will hopefully have provided a clear overview of the basic principles: in order to ensure the necessary homogeneity of the internal market, to which the three EEA/EFTA States have access through the EEA Agreement, all relevant EU legislation is supposed to be incorporated into the Agreement and implemented in the Contracting Parties' national legislation. The decision-making autonomy of the EU is preserved in the sense that the EEA/EFTA States do not participate in any of the formal processes on the EU side; and their decision-making sovereignty is respected in the sense that the incorporation of relevant legislation is done by consensus decisions in accordance with the principles of traditional intergovernmental cooperation, and observing their respective constitutional processes for transposing new legislation into national law.

5 Decision Shaping in the EEA

The EEA Agreement has been criticised for not allowing sufficient participation by the EEA/EFTA States in the formal decision-making process for new legislation that eventually will apply to them, and that, as a result, the respect of their sovereignty is purely formal and does not reflect any tangible reality. Obviously, it could always be argued that a different—or 'better'—solution to the challenge at hand might have been (or might be) found; however, the previous paragraph has hopefully shown that the agreed outcome of the negotiations on these points was indeed a reflection of the constitutional, legal and political constraints on both sides.

At the same time, the Agreement acknowledges the legitimate interests of the participating EFTA States in being involved in the development of the relevant legislation within the areas that it covers. The Agreement therefore formally opens for participation by the EFTA States in what is generally referred to as 'decision shaping'. This is mainly covered by Articles 99 and 100.

Article 99 stipulates that the 'Commission shall informally seek advice from experts of the EFTA States in the same way as it seeks advice from experts of the EC Member States' when elaborating proposals for new legislation in relevant areas. It further states that '[w]hen transmitting its proposal to the Council of the European Communities, the EC Commission shall transmit copies thereof to the EFTA States'. The article also stipulates that exchanges of views and 'a continuous information and consultation process' could take place within the framework of the Joint Committee 'at the request of one of [the Contracting Parties]' during the period leading to a decision on the EU side. It is finally underlined that the purpose of these consultations is to 'facilitat[e], at the end of the process, the decision-taking in the EEA Joint Committee'.

[9]For a more detailed account of these procedures, see Baur (2016).

Article 100 tasks the Commission with ensuring 'experts of the EFTA States as wide a participation as possible according to the areas concerned, in the preparatory stage of draft measures to be submitted subsequently to the committees which assist the EC Commission in the exercise of its executive powers'. EFTA experts should thus be referred to 'on the same basis as' experts of the EU Member States, and the Commission is supposed to 'transmit to the Council . . . the views of the experts of the EFTA States'.

It should also be added that Article 101 opens for experts from the EFTA States to be 'associated with the work' of a number of other committees 'when this is called for by the good functioning of this Agreement'.

As can be seen, the EEA Agreement goes quite far in allowing for participation at expert level by the EEA/EFTA States in the different fields covered by the Agreement, although this participation is generally only in the preparatory stages of the development of legislation and other decisions, and informal in the sense that EFTA experts will not have the right to vote and thus not be in a position to weigh in on decisions in a formal way. This does not, however, preclude the possibility of exercising influence, in particular in areas where the EFTA States may contribute with specific expertise and/or have particular interests.

The EEA/EFTA States have also regularly prepared and submitted so-called 'EEA/EFTA Comments' on issues or policy areas under discussion on the EU side, typically when the Commission is in the process of preparing concrete proposals based on broader policy documents, such as white papers. Although not directly described in the Agreement itself, the submission of an EEA/EFTA Comment may of course be considered an element in the 'continuous . . . consultation process' foreseen in Article 99, and EEA/EFTA Comments are also formally taken account of and commented upon within the EEA Joint Committee.

It is often argued that these formal possibilities to participate in a mostly informal way in the decision-shaping process represent a potential for influence, the onus for which is very much on the EFTA States themselves to exploit. This has, on many occasions, been a focus of debate in the EFTA States, in discussions on ways and means to defend their interests in the development of the internal market and, more generally, on the opportunities available to them to play a role in the broader development of European integration as participants in the EEA.

It is, however, quite difficult to assess the extent to which the EEA/EFTA States have actually been able to influence decision shaping in the areas covered by the EEA Agreement. This is also a conclusion in the very comprehensive report on Norway's relations with the EU, commissioned by the Norwegian Government and presented in 2012. After a thorough presentation of the framework established by the EEA Agreement, an attempted analysis of the ways in which Norway has made use of this framework, and an overview of other ways to possibly influence decision shaping such as through bilateral and political contacts, the report concludes that 'it is very difficult to measure to which extent Norway's active European policies yield results. The most important element is probably the current and daily work done on following the actual developments within the EU and conveying this to Norwegian decision makers. This is of great importance, but its impact is impossible to measure. Neither is it easy to measure success or failure on individual issues.