



The EEA 25 Years On:
Resting on the laurels or
facilitating mutual trust and
dynamic homogeneity also in
future?

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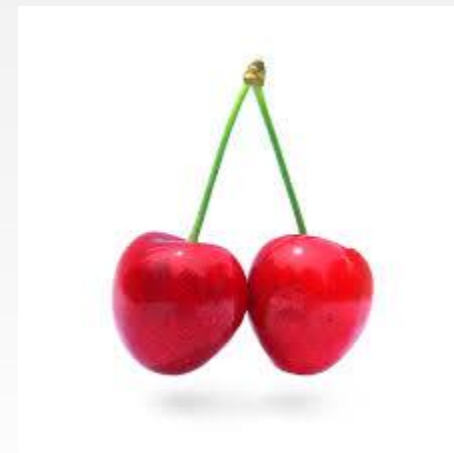




The compromises that explain the EEA

The overarching political compromise: Agreeing on which cherries to pick and their price

- EU perspective: accepting (some) EFTA State cherry picking in order to access their markets whilst preserving the autonomy of the EU legal order
- EFTA perspective: tailor-made exemptions from the *acquis communautaire* as compensation for the lack of decision making rights
 - Fisheries and agriculture (I and N)
 - Free movement of goods and persons (L)
 - EU policies beyond the internal market





The compromises that explain the EEA

The legal compromises:

- I. A two-pillar structure with independent institutions, but with shared responsibility to maintain homogeneity
 - No judicial dispute resolution mechanism for cross-pillar disputes!
 - EU acceptance of the prerogatives of the national courts of the EFTA States
- II. No general transfer of legislative powers (no EU-style direct effect), *but*
 - national implementation of the Main Part of the Agreement *in toto* in the dualist EFTA States
 - obligation to implement regulations and directives
 - 'quasi-primacy' of implemented EEA rules (Protocol 35)
 - unwritten principle of State liability (*Sveinbjörnsdóttir*), and
 - direct effect *in EU Member States* by virtue of EU law (\neq reciprocity)
- III. Limited transfer of sovereignty in certain areas
 - Competition law, but now also other parts of the internal market *acquis* as a result of the 'agencification' of the EU



Why does it work?

- Because all Contracting Parties wants it to!
- Because no better alternative is politically feasible
- Because circumstances have allowed for pragmatism also on the EU side



Will it continue to work?

- I. The EU Charter of Fundamental Rights
- II. The two-pillar structure
 - EU Agencies with decision-making powers, 'One stop shop'-solutions, cross-pillar disputes between national authorities etc.
- III. The judicial protection offered in the EFTA pillar
 - Judicial review of copy/paste-decisions from ESA
 - Judicial review of Commission equivalence decisions
 - The ECtHR and the *Bosphorus* doctrine
- IV. The ECJ's emphasis on the legal basis for the mutual trust between the Member States
 - The common values (Art. 2 TEU)
 - The procedural and institutional guarantees for the rule of law
- V. The EU's more principled and less pragmatic approach in other contexts (UK, Switzerland, Poland etc.)
- VI. The never-ending increase in the complexity of the regulation of the internal market



The Charter and the Common Values

- Will the reference in the Preamble to the construction of a Europe based on peace, democracy and human rights, and the EFTA Court's emphasis of the EEA States common ECHR-obligations suffice?
- Amendment to Protocol 1 on horizontal adaptations
 1. The European Economic Area is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Contracting Parties in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
 2. Fundamental rights, as guaranteed by the Charter of Fundamental Rights of the European Union and by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Contracting Parties, shall constitute general principles of EEA law.
 3. The Charter of Fundamental Rights is not adapted for the purposes of the Agreement. It is relevant to the extent necessary for the proper interpretation and application of the Agreement, with a view to maintain a homogeneous European Economic Area with equal protection of fundamental rights.



Improved judicial protection

- Open up for *Foto Frost* referrals from the EFTA Court to the ECJ
- Operationalize Art. 107/Protocol 34 EEA as follows:
 1. 'Where a question concerning the validity of an act of an institution, body, office or agency of the European Union arises in a case pending before the EFTA Court, that court, as a court common to the EFTA States, may, if it considers this necessary, request the Court of Justice of the EU to decide thereon.
 2. The Court of Justice of the EU shall only have jurisdiction to give preliminary ruling on the act's validity as a matter of EU law, leaving it to the EFTA Court to draw the EEA law consequences thereof.
 3. A draft decision of an institution, body, office or agency of the European Union addressed to the EFTA Surveillance Authority or an EFTA State is to be considered an act within the meaning of this provision.'



Improved judicial protection (cont.)

- Introduce an obligation on the highest courts and tribunals of the EFTA States to refer questions of interpretation of the EEA Agreement to the EFTA Court
 - By replacing Art. 34(3) SCA as follows:
 3. Where any such question is raised in a case pending before a court or tribunal of an EFTA State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the EFTA Court.



Improved judicial protection (cont.)

Improved judicial protection in the EFTA pillar will:

- Facilitate EU/CJEU trust in the institutional set up of the EEA
- Strengthen the relationship between the EFTA Court and the ECJ
- Relieve the EFTA Court of the undesirable task of indirect review of EU acts
- Strengthen the position of the EFTA Court within the EFTA pillar
- Consolidate the two-pillar structure
- Prevent *ex post* ECtHR review of EFTA Court decisions (ref. *Bosphorus*)



Tackling the increased complexity of EEA law

I. Strengthening of ESA

- More people and better (longer) contracts!
- Will allow ESA to
 - Offer even better advice to the EFTA Court
 - Promote the EEA Agreement in even more cases before the CJEU
 - Cooperate even better with the Commission
 - Keep up with the EU Agencies (at least to some extent)

II. Strengthening of the EFTA Court

- Additional judges to sit in important cases
- Strengthen the appointment procedure (cf. Art. 255 TFEU)
- Formalized cooperation with the ECJ's AGs and/or its Research and Documentation Directorate?
- Allowing for dissenting opinions?



A personal favourite from the first 25 years:

- E-7/15 *ESA v. Norway*
 - Failure to fulfil obligations under Dir. 2008/50/EC on air quality