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Homogeneity vs. Decision-Making Autonomy in the EEA Agreement

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A. Introduction

When the European Community (Community or EC) and its member states on the one hand and the member states of the European Free Trade Association (EFTA) on the other hand[1] negotiated the Agreement on the European Economic Area (EEA Agreement), they had the objective of establishing a "dynamic and homogeneous 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."[2] They were determined "to provide for the fullest possible realization of free movement of goods, persons, services and capital within the whole European Economic Area, as well as for strengthened and broadened cooperation in flanking and horizontal policies."[3]

The result of the negotiations was the most comprehensive association agreement ever concluded by the EC. As the European Court of Justice (ECJ) put it in its judgment in the *Ospelt* case:

> one of the principal aims of the EEA Agreement is to provide for the fullest possible realization of the [four freedoms] within the whole European Economic Area, so that the Internal Market established within the European Union is extended to the EFTA States.[4]

As is obvious from such ambitious objectives, the EEA Agreement requires much more from the Contracting Parties than an approximation of their laws.

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1 The European Free Trade Association (EFTA) is an inter-governmental organisation established in 1960. Its member states are Iceland, Liechtenstein, Norway and Switzerland. Although Switzerland is a member state of EFTA, it is not part of the EEA Agreement. It has rejected to participate in the EEA Agreement in a referendum on 6 December 1992. Nonetheless and for the purpose of convenience, the term 'EFTA States' as used in this contribution should be understood as referring to those EFTA States only, that participate in the EEA Agreement, namely Iceland, Liechtenstein and Norway.

2 Recital 4 of the Preamble to the EEA Agreement.

3 Recital 5 of the Preamble to the EEA Agreement.

4 Judgment of 23 September 2003 in *Case C-452/01*, *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, N. 29.

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First, the EEA Agreement requires more than just *approximation* of laws in so far as the Contracting Parties transform large portions of EC legislation that are relevant for the Internal Market into rules of public international law under the EEA Agreement, i.e. they are expected to 'incorporate' the EC legislation in question into the EEA Agreement. Consequently, the EFTA states are to apply the same rules as the EC, rather than just approximate their rules to those of the EC. This means that the substance of the EC legislation concerned not only applies between the EC member states, but also between the EFTA states and the EC member states.

Second, the EEA Agreement requires more than the approximation of just *laws*. The conclusion of the EEA Agreement means that the EFTA states take into account all other relevant rules applicable within the Community. This is exemplified by the fact that Article 1(1) EEA requires all Contracting Parties to respect the same 'rules', rather than just the same 'legislation':[5] the use of the word 'rules' indicates that the EEA Agreement goes beyond simply taking over EC legislation. Among the non-legislative rules that the EFTA states face in the context of the EEA Agreement are first and foremost the rulings of the Community's courts (see Recital 15 of the Preamble to the EEA Agreement and Article 6 EEA).

This 'respect of the same rules by all the Contracting Parties' is what the Contracting Parties intended to achieve when they defined the objective of the EEA Agreement as creating a 'homogeneous European Economic Area' (Article 1(1) EEA). The term 'homogeneity' thus entails that the same rules apply and that these rules are given the same interpretation throughout the European Economic Area. In other words, in the area covered by the EEA Agreement, individuals and economic operators should be treated in the same manner regardless of whether Community law or EEA rules are applied.[6] This led another author to state (at the time of conclusion of the EEA Agreement) that the EEA Agreement entailed a 'collective and reactive' *ex-post facto* implementation of EC law in the European Economic Area.[7] Yet another author described the political power-balance in the EEA Agreement as follows: "[i]n EEA law it is the EU pillar that is responsible for the dynamic evolvement while the EFTA pillar is responsible for homogeneity. The EU makes the rules and the EFTA accepts and implements them."[8]

However, and notwithstanding the fact that the EFTA states would apply and interpret the relevant EC legislation in the same manner as this is done within the EC, the Contracting Parties would retain their decision-making autonomy. This

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5 Note in this context that Articles 99 and 102 EEA, which deal with legislative measures, use the word 'legislation' rather than the word 'rules'. *See also* S. Norberg *et al.*, The European Economic Area, EEA Law, A Commentary on the EEA Agreement 104 (1993).

6 Norberg *et al.*, *supra* note 5, at 177.

7 F. Weiss, *The Oporto Agreement on the European Economic Area – A Legal Still Life*, 12 Yearbook of European Law 385, at 421 (1992).

8 S. L. Jervell, Lovgivningen i EØS – Beslutningsprosessen, gjennomføringen og konsekvensene 81 (2002). Other contributions on this subject include: F. Sejersted, *Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA Agreement*, *in* P. C. Müller-Graff & E. Selvig (Eds.), The European Economic Area – Norway's Basic Status in the Legal Construction of Europe 43, at 44 (1997).

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means, on the one hand, that the EFTA states would remain outside the political institutions that adopt the EC acts, that are subsequently to be incorporated into the EEA Agreement,[9] as well as outside the judicial bodies that deliver the rulings that are relevant for the Internal Market. On the other hand, the EFTA states would not be directly bound by new legislation adopted by the EC that is relevant for the Internal Market.

With a view to reconciling these two principles of homogeneity and decision-making autonomy, the Contracting Parties agreed to set up an institutional system, which is unequivocal about the aim of homogeneity, but at the same time provides safeguards for the EFTA states' decision-making autonomy. These safeguards are to effectively counter-balance the principle of homogeneity.

In fact, without these safeguards for their decision-making autonomy the EFTA states would probably not have been in a position to accept the EEA Agreement: no democratic state can give a commitment to submit itself to foreign legislation and judges without being provided substantial guarantees.

This contribution will therefore describe the conditions under which the EFTA states are able to submit themselves to Community legislation and become integral part of the Community's Internal Market without having to become fully fledged member states of the Community. Also, this contribution will show that the EFTA states are not in a position of having to accept any and all legislative demands expressed by the Community, but that there is ample of room for negotiation between the Contracting Parties.

Against this background it will be suggested that the principle of homogeneity is essentially of a political nature and that therefore, it is up to the Contracting Parties to assess on a case by case basis what degree of homogeneity they consider necessary and sufficient for the good functioning of the EEA Agreement.[10] This holds true both at legislative and judicial level.

B. Safeguards in the Field of Legislative Homogeneity

As mentioned in the introduction, the Contracting Parties are expected to incorporate virtually all EC legislation that is relevant for the Internal Market into the EEA Agreement. While this requirement is not a strict legal obligation,[11] the Contracting Parties have politically committed themselves to incorporate relevant EC legislation as much as possible and to the extent this is necessary for the good functioning of the Internal Market.

The EFTA states did not take this 'leap of faith', i.e. commit themselves to introduce future legislation into their respective legal orders without knowing

[9] M. Emerson, M. Vahl & S. Woolcock, Navigating by the Stars: Norway, the European Economic Area and the European Union 1 (2002).

[10] *See also* T. van Stiphout, *Achieving Legal Homogeneity in the Field of Free Movement of Capital*, Rit Lagadeildar, N. 31 *et seq*. (2006).

[11] *See also* N. Fenger, M. Sánchez Rydelski & T. van Stiphout, *European Free Trade Association (EFTA) and European Economic Area*, *in* R. Blanpain (Ed.), International Encyclopaedia of Laws 116 (2005).

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its nature and content unless they would be given certain procedural guarantees and other safeguards. These procedural guarantees and other safeguards were the political and constitutional prerequisites for the EFTA states' acceptance of the EEA Agreement.

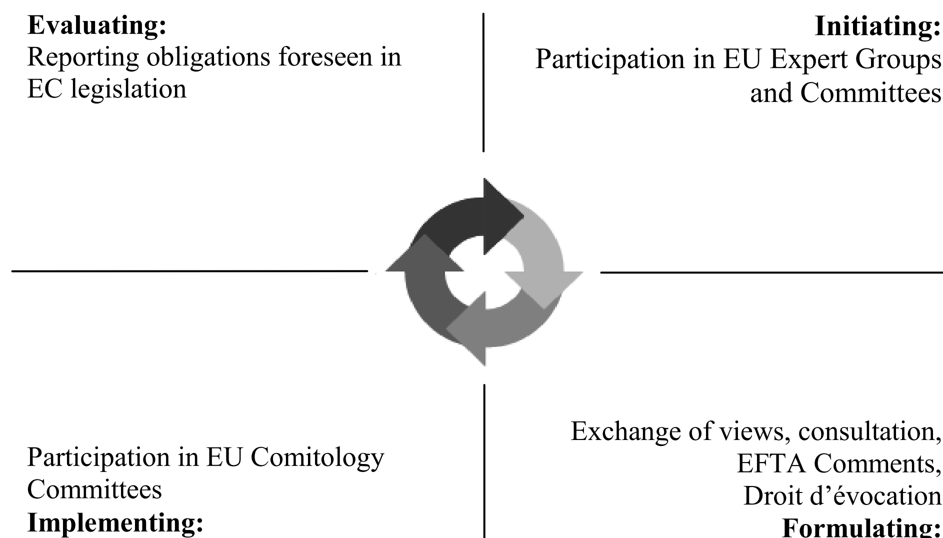
One of the most important procedural guarantees, on which ratification of the EEA Agreement hinged, was participation by the EFTA states in the shaping of the legislation, which they were subsequently to incorporate into the EEA Agreement.

Consequently, an analysis of how the principle of homogeneity is counter-balanced in the field of legislative homogeneity must take into account this right to participate in the Community's decision-shaping phase.

I. EFTA Participation in EC Decision-shaping

Pursuant to the EEA Agreement, the EFTA states have the right to participate in the Community's decision-shaping phase at all stages of the policy cycle. Accordingly, the EFTA states are not only involved when the Community initiates new policies through green papers, white papers, communications, etc. (see Article 99(1) EEA), but also when the competent legislative bodies are about to make the necessary decisions to adopt these policies (see Articles 5 and 99(2) and (3) EEA). In addition, the EFTA states contribute to EC decision-shaping at the implementing stage, when the policies that were adopted in the formulating stage are to be implemented through the comitology process (often through new decisions, albeit subordinated ones) (see Article 100 EEA) as well as at the evaluating stage, when the decisions and their implementation are assessed (see Paragraph 5 of Protocol 1 EEA).

Fig. 1: EFTA participation in the Community's policy cycle



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It can be seen from fig. 1, above, that the level and nature of the EFTA states' involvement in the EC decision-shaping process differs depending on the stage of the policy cycle, at which one is situated.

First, in the initiating phase of a new policy, i.e. when a new policy is being conceived in the EC, the European Commission is under an obligation to consult experts from the EFTA states in the same way as it consults experts from the EC member states (Article 99(1) EEA). This means that the EFTA states are in very close contact with the relevant Commission officials and experts from the EC member states and try to bring issues that are of importance for the EFTA states into the debate.

At the end of the initiating phase, the Commission will normally present a proposal, which marks at the same time the start of the formulating stage. During this stage, the EFTA states have the possibility to continue influencing the EC decision-shaping process through exchanges of views and consultations in the EEA Joint Committee,[12] position papers (so-called 'EFTA comments') and the *droit d'évocation* set out in Article 5 EEA, i.e. the right to request at any time that an issue be discussed at the level of the EEA Joint Committee or at the Ministerial level (EEA Council).[13]

In practice, the EFTA states prefer to make use of position papers, which they transmit to the responsible bodies and key stakeholders at the appropriate moments. The *droit d'évocation* and the exchanges of views and consultations foreseen in Article 99(2) and (3) EEA are only rarely used for negotiating and discussing issues pertaining to decision-shaping. The reason for this is that substance discussions between the Contracting Parties on legislation to be incorporated into the EEA Agreement normally take place at the expert level.

Subsequently, at the implementing stage, the EFTA states are regularly represented as observers at the comitology committee meetings in accordance with Article 100 EEA. They participate in virtually all comitology committees, and only in exceptional cases have the EFTA states faced difficulties with regard to their participation in such committees.

Finally, the EFTA states are entirely integrated at the evaluating stage. Pursuant to Protocol 1 to the EEA Agreement, the EC Commission and the responsible body in the EFTA pillar[14] are to cooperate with and consult each other and exchange information when they fulfil their reporting obligations foreseen in EC legislation that has been incorporated into the EEA Agreement.

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[12] The EEA Joint Committee is the body that is responsible for the day-to-day management of the EEA Agreement and is the EEA Agreement's main decision-making body. It is established by Art. 92 EEA.

[13] *See* Art. 5 EEA: "A Contracting Party may at any time raise a matter of concern at the level of the EEA Joint Committee or the EEA Council according to the modalities laid down in Articles 92(2) and 89(2) [EEA], respectively."

[14] Pursuant to Paragraph 5 of Protocol 1 EEA, either the EFTA Surveillance Authority or the Standing Committee of the EFTA States will be responsible for the reporting in question.

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Experience shows that the EFTA states' involvement in the EC decision-shaping is more effective during the initiating, implementing and evaluating stages than during the formulating phase.[15] As one commentator once put it:

> [a]s soon as the traditional horse-trading and making up of package-deals starts then the influence of the EFTA States stops. From then on, all political inputs will come from the Member States of the Community and from the European Parliament.[16]

This conclusion is almost a logical consequence of the principle of decision-making autonomy, which implies that the EFTA states do not have the right to vote.

However, other factors also contribute to limit the influence that the EFTA states enjoy during the formulating phase: first, the formulating phase is the phase during which the formal differences between the status of EC member state and of non-Member state are the most apparent; and second, at the formulating stage, the EFTA states are faced with the difficult task of trying to influence the content of a very concrete official draft measure, as opposed to a measure, the content of which is still relatively undetermined.[17]

Notwithstanding this relatively limited effectiveness of the EFTA states' right to participate in the formulating phase of EC legislation, the general system of EFTA participation in EC decision-shaping allows the EFTA states to effectively take care of their concerns. In fact, the EC only seldom adopts legislation that cannot be reconciled with the EFTA states' concerns (see Section B.II. below).

In addition, with regard to the principle of homogeneity, the EFTA states' involvement in the EC decision-shaping process helps the EFTA states to fully understand the rationale behind and to be aware of the content of the new legislation well before they have to take a decision on the incorporation of the legislation into the EEA Agreement. This facilitates the process of incorporating EC legislation into the EEA Agreement and therefore facilitates the achievement of a high degree of legislative homogeneity.

II. Decision-Making Under the EEA Agreement

While the EFTA states' participation in the EC decision-shaping process undoubtedly has a positive effect on homogeneity, it cannot safeguard the EFTA states' decision-making autonomy. The latter is safeguarded by the fact that the adoption of a piece of legislation within the EC does not bind the EFTA states in any way. For a piece of EC legislation to have any legal effect in the EEA Agreement, all Contracting Parties have to agree to its incorporation into the EEA Agreement. Accordingly, the decision-shaping phase described above is followed by a decision-making phase.

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15 *See also* Jervell, *supra* note 8, at 35 & 72.

16 *See* O. Due, *The EFTA Court and its Responsibility to the European Court of Justice*, *in* G. O. Zacharias Sundström (Ed.), The Fifth Nordic Conference on EFTA and the European Union 52, at 58 (1994).

17 *See also* Fenger, Sánchez Rydelski & van Stiphout, *supra* note 11, at 121.

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Decision-making under the EEA Agreement is the competence of the EEA Joint Committee,[18] which exercises this competence through the adoption of Decisions of the EEA Joint Committee providing for the incorporation of a piece of EC legislation into the EEA Agreement. When doing so, it effectively concludes public international law agreements in a simplified form, which translate the EC acts in question into a rule of public international law that is detached from the EC's legal order.[19]

The procedure leading up to a decision of the EEA Joint Committee starts upon adoption of a piece of legislation by the EC institutions. Upon such adoption, the EFTA states examine the legislation and assess whether it takes their concerns into account.

If the EC legislation in question does not sufficiently take into account the EFTA states' concerns, the EFTA states might aim at obtaining special derogations from the legislation in question. Such special derogations can be envisaged because the principle of homogeneity does not require the EEA Joint Committee to agree to the incorporation of the EC act concerned without any discussions as to the content of the EC act in question. Hence, and notwithstanding the principle of homogeneity, there is room for negotiation at the EEA decision-making phase.

When the Contracting Parties negotiate at the EEA decision-making phase, they are not negotiating a possible amendment to the EU legislation to be incorporated into the EEA Agreement. They only determine specific adaptations to the EC legislation, which will apply between the EFTA states on the one hand, and the EC and its member states on the other hand. The legal relationship between the EC member states and between the EC and its member states remains subject to the EC legislation as adopted by the EC institutions.

This being said, as the EFTA states could already take care of most of their concerns in the decision-shaping phase (see Section B.I. above), explicit negotiations almost never take place during the EEA decision-making phase.

If explicit negotiations take place at the decision-making phase, they normally concern whether the piece of legislation should be incorporated into the EEA Agreement at all, or matters that are specific to the EFTA states or the EEA Agreement.

The arguments used in these negotiations differ depending on the subject matter of the discussions. If the discussions concentrate on whether the legislation should be incorporated into the EEA Agreement at all, the main argument used by the Contracting Parties is that the piece of legislation does not concern a field that is covered by the EEA Agreement, i.e. that the EC act in question is not 'EEA relevant'. Only in exceptional cases will an EC act that is considered EEA relevant by both the EFTA states and the EC not be incorporated into the EEA Agreement.

If on the other hand, the discussions relate to a specific situation prevailing in one of the EFTA states, the EFTA states seek to obtain so-called 'country-specific adaptations'. These country-specific adaptations become necessary because the

[18] Regarding the term decision-making, *see also* Fenger, Sánchez Rydelski & van Stiphout, *supra* note 11, at 116.

[19] Fenger, Sánchez Rydelski & van Stiphout, *supra* note 11, at 85.

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situation in an EFTA state may differ substantially from the one prevailing in any EC member state and the EC act does not cater to these specific situations.[20] As a consequence, if the EC act were to be applied as it is in an EFTA state, it could fail its objective, be excessively expensive for the EFTA state concerned or even be counter-productive. The country-specific adaptations aim at correcting these negative aspects of the EC act in an EFTA state and are not uncommon in the EEA Agreement.

Finally, if the negotiations concern matters that are specific to the EEA Agreement, the discussions can be of a rather technical nature. In these cases, the issue to be addressed is to make the necessary adaptations in order to adapt the EC act in question to the institutional framework of the EEA Agreement.

For instance, sometimes an EC act has to be adapted in order to take into account the fact that it is not the Commission but the EFTA Surveillance Authority that guarantees the EFTA states' fulfilment of their obligations under the EEA Agreement.

With regard to the principle of homogeneity, the possibility to negotiate this kind of adaptations is a double-edged sword. On the one hand, the very possibility of such adaptations might incite the EFTA states to try to reach in the decision-making phase what they failed to do or achieve in the decision-shaping phase. It is obvious that the principle of homogeneity suffers both as a result of the delay in the incorporation of the piece of EC legislation caused by the additional negotiations and as a result of the adaptations eventually agreed upon. On the other hand, the possibility of adaptations can open the doors to compromise solutions in cases where an EFTA state has political difficulties with one of the provisions of a piece of EC legislation. In such situations, it may sometimes be better for homogeneity to incorporate an EC act with an adaptation than to negotiate for several years with the aim of incorporating the piece of legislation without adaptations.

Whatever the case may be, the EEA Agreement gives each Contracting Party the possibility to cut negotiations short, if it deems that they do not progress quickly enough or progress into the wrong direction: should the Contracting Parties not be able to reach an agreement on the incorporation of a piece of EC legislation into the EEA Agreement, Article 102(4) EEA allows each Contracting Party to start a process, at the end of which the relevant part of the Annex to the EEA Agreement concerned could be temporarily suspended (see Article 102(5) EEA).[21]

However, the suspension of a part of an Annex may only be envisaged after the EEA Joint Committee has tried to find a mutually acceptable solution (see Article 102(3) EEA) or examined all other possibilities for maintaining the good functioning of the EEA Agreement (see Article 102(4) EEA). In particular,

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[20] Among the arguments that have been used in the past are the small size of Liechtenstein (more than ten times smaller than the smallest EU member state) or the low population density and the existence of very isolated communities in Iceland.

[21] The suspension of part of an Annex to the EEA Agreement entails that the Contracting Parties would be temporarily relieved from their obligations *vis-à-vis* each other in the area of the EEA Agreement concerned. For more information on the suspension of a part of an Annex to the EEA Agreement, *see* Fenger, Sánchez Rydelski & van Stiphout, *supra* note 11, at 129.

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Article 102(4) EEA Agreement requires the EEA Joint Committee to examine the possibility to take notice of – and thus accept – the equivalence of legislation.

The procedure of Article 102(4) EEA has hitherto only been invoked twice: first in 2002, during the negotiations regarding Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering,[22] and a second time in 2006 regarding Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.[23]

This means that in more than thirteen years of operation of the EEA Agreement, the suspension of a part of an Annex has never materialised. This practice concerning Article 102(4) EEA shows that, notwithstanding the fact that the EEA Agreement has become increasingly unbalanced with three EFTA states on the one side and 27 EU member states on the other side, the EEA Agreement successfully reconciles its somewhat contradictory objectives of legislative homogeneity and decision-making autonomy of the Contracting Parties.

C. Safeguards in the Field of Judicial Homogeneity

As already indicated in the introduction, the EEA Agreement does not only require the EFTA states to take over EC legislation relevant to the Internal Market, but also other rules, in particular the relevant rulings of the Community courts. This is so, because if the EEA Agreement only foresaw the incorporation of EC legislation into the EEA Agreement, there would be no guarantee that the same rules would be applied in the same manner throughout the entire European Economic Area.[24] Indeed, if EC legislation incorporated into the EEA Agreement were to be applied and interpreted independently by the ECJ on the one hand and the EFTA states' courts or the EFTA Court on the other hand, it would only be a matter of time until the legislative homogeneity arrived at during the negotiations of the EEA Agreement and subsequently maintained through decisions of the EEA Joint Committee, would be undermined.

In order to prevent such disintegration of homogeneity in the EEA, the Contracting Parties designed a system that would reconcile the contradictory objectives of respecting the independence of the courts of the different Contracting Parties (i.e. decision-making autonomy of the Contracting Parties) and of arriving at, and maintaining, a uniform interpretation and application of the EEA Agreement with the corresponding provisions of EC law (i.e. homogeneity).[25] With a view to

[22] OJ L 344, 28.12.2001, at 76.
[23] OJ L 229, 29.6.2004, at 35.
[24] *See also* Fenger, Sánchez Rydelski & van Stiphout, *supra* note 11, at 68.
[25] The original idea of creating a joint judicial body, an EEA court, was rejected by the ECJ as being contrary to EC law (ECJ, Opinion No. 1/91 (*see infra* note 33)).

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clarifying this aim, Recital 15 of the Preamble to the EEA Agreement states the following:

> In full deference to the independence of the courts, 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 […].

In designing this judicial system, the Contracting Parties agreed that it was necessary to treat future relevant rulings of the ECJ concerning the interpretation of EC law differently from those that pre-dated the signature of the EEA Agreement. In other words, the Contracting Parties agreed to differentiate between the processes to be applied in order to arrive at a homogeneous European Economic Area and those that are directed at maintaining this homogeneity.

The rationale behind this difference in treatment is that it was relatively easy for the EFTA states to commit themselves to respect all relevant ECJ rulings that were known on the date of signature of the EEA Agreement, while it was impossible to do so with regard to all future rulings of the ECJ: political and constitutional reasons prevented them from giving "a 'carte blanche' undertaking with regard to future rulings of a court which is not theirs."[26]

I. ECJ Case Law Pre-dating the Signature of the EEA Agreement

The key provision dealing with the question of how to ensure homogeneity of the EEA Agreement at the judicial level is Article 6 EEA. It determines the impact in an EEA context of the judgments delivered by the ECJ before the signature of the EEA Agreement, i.e. before 2 May 1992.

It stipulates that:

> [w]ithout prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community […] and to acts adopted in application of [this Treaty], shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the [ECJ] given prior to the date of signature of this Agreement.

Although this provision mentions only the ECJ, the EFTA Court does not make a distinction between judgments delivered by the ECJ and judgments delivered by the EC Court of First Instance ("CFI"). In one of its first judgments, the EFTA Court held that the reference to the ECJ in Article 6 EEA has to be understood to refer to the CFI as well.[27]

The effect of Article 6 EEA is in essence that the EFTA states take over all the relevant case law of the Community courts. Thus, and in principle, the EFTA states have accepted and taken over in one go the meaning given by the Community courts to the provisions of the EC Treaty and the EC secondary legislation.[28]

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[26] Norberg *et al.*, *supra* note 5, at 190.

[27] Judgment of 21 March 1995 in *Case E-2/94*, *Scottish Salmon Growers Association Limited v. EFTA Surveillance Authority* [1994-1995] EFTA Court Report 59, at 64.

[28] Norberg *et al.*, *supra* note 5, at 104.

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However, the obligation to comply with the case law of the EC courts is not unlimited. First, the EFTA states only took over case law concerning provisions of the EEA Agreement that are identical in substance to provisions of the EC Treaty or to acts adopted in application of the EC Treaty.

As pointed out by several authors,[29] the use of the expression 'identical in substance' as opposed to an expression such as 'identically worded' constitutes a circular reasoning. As such, it is only after a provision of the EEA Agreement has been interpreted that one can assess whether the said provision is indeed identical in substance to the corresponding provision of the EC Treaty.

In practice, however, this circular reasoning has not caused real difficulties. Article 6 EEA is clearly understood as meaning that EEA rules should be interpreted in conformity with the EC rules whose wording has been reproduced in the EEA Agreement, and that mere technical or linguistic differences in the wording will not suffice to bring a provision outside the scope of Article 6 EEA.[30]

Second, even if a provision falls within the scope of Article 6 EEA, there is no absolute obligation to interpret and apply the EEA rules in conformity with the rulings of the ECJ and the CFI. The introductory phrase to Article 6 EEA and the introductory phrase of Recital 15 of the Preamble to the EEA Agreement clarify that Article 6 EEA is without prejudice to the development of future case law and without prejudice to the independence of the courts in question.

For the ECJ and the CFI, the proviso means that the ECJ and the CFI can deviate from their rulings prior to the date of signature of the EEA Agreement not only in respect of purely EC internal matters, but also in matters that concern the EEA Agreement. If Article 6 EEA did not contain the proviso regarding future development of case law, the ECJ might have been free to develop its case law in respect of purely EC-internal matters under the EC Treaty, but not in respect of situations involving an EFTA state under the EEA Agreement. Hence, without the said proviso in Article 6 EEA, homogeneity in the EEA Agreement could have been undermined.

For the EFTA states' courts and the EFTA Court, in turn, the proviso concerning future development of case law, in combination with the deference to the independence of the courts, means that they do not have to blindly follow the case law of the ECJ and the CFI that pre-dates the signature of the EEA Agreement. On the one hand, the EFTA states' courts and the EFTA Court can follow the Community courts' new case law that deviated from the Community courts' case law prior to the date of signature of the EEA Agreement,[31] and on the other hand, neither EFTA states' courts nor the EFTA Court might regard themselves bound to follow a very old precedent of the ECJ, if they considered that the ECJ itself would depart from it.[32]

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29 *See for example*, H. Bull, *EØS-avtalen – litt om avtalens struktur og om prinsippene for gjennomføring i norsk rett*, 1992 Lov og Rett 583, at 595.

30 *See also* Fenger, Sánchez Rydelski & van Stiphout, *supra* note 11, at 68.

31 Advisory Opinion of 14 May 1997 in *Case E-5/96*, *Ullensaker kommune and Others v. Nille AS* [1997] EFTA Court Report 30.

32 Fenger, Sánchez Rydelski & van Stiphout, *supra* note 11, at 68.

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Therefore, and in a similar way as with adaptations (see Section B.II. above), the proviso concerning the future development of case law in Article 6 EEA has two sides to it. On the one hand, it allows the ECJ to apply changes to its case law concerning purely EC-internal situations under the EC Treaty to situations that involve EFTA states under the EEA Agreement. On the other hand, it opens up the possibility for the EFTA states' courts and the EFTA Court to deviate from the relevant case law of the Community courts if they deem this appropriate and necessary.

Consequently, while the Contracting Parties have clearly stated the objective of arriving at a homogeneous interpretation of the EC and EEA rules in accordance with the rulings of the ECJ prior to the date of signature of the EEA Agreement, Article 6 EEA does not prohibit a court from an EFTA state or the EFTA Court from delivering a ruling that would be in conflict with precedents of the ECJ or the CFI. Therefore, Article 105 EEA foresees a mechanism that is designed to ensure the continuous good functioning of the EEA Agreement in case of deviating case law.

Pursuant to Article 105 EEA, all judgments of the Community courts and of the EFTA Court are to be transmitted to the EEA Joint Committee in order to enable the Contracting Parties to keep under constant review the case law of these courts and to act so as to preserve the homogeneous interpretation of the EEA Agreement. However, Article 105 EEA does not specify how the homogeneous interpretation of the EEA Agreement is to be achieved.

In fact, all Article 105 EEA provides is a forum, within which the Contracting Parties can discuss the differing case law with the aim of arriving at an "as uniform an interpretation as possible of the provisions of the EEA Agreement and [the corresponding provisions of EC law]" (see Article 105(1) EEA). Also, Article 105(3) EEA explicitly foresees the possibility of a failure of this effort and provides for the application of the provisions on the settlement of disputes in case of such a failure.

The dispute settlement procedure that would be applicable in the case of deviating case law on provisions of the EEA Agreement, which are identical in substance to the corresponding provisions of the EC Treaty, is Article 111(3) EEA. This means that, in theory, the Contracting Parties could agree to submit the dispute on the question of which interpretation is 'correct' to the ECJ, or failing this, take safeguard measures (Article 112 EEA) or apply Article 102 EEA *mutatis mutandis*.

It goes without saying that the option of calling upon the ECJ to settle the dispute on the 'correct' interpretation of the EEA Agreement is purely theoretical. Given the constitutional and political circumstances in the EFTA states (see introduction to Section C. above) it would be unacceptable for the EFTA states to submit their difference of views with the Community to a Community court. Similarly, the Community would not have an interest to submit to the ECJ a dispute on the 'correct' interpretation of the EEA Agreement resulting from deviating case law, as doing so would place the ECJ in an uncomfortable position that resembles the situation in which the judge is at the same time a party to the dispute: the ECJ

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would have to take a position on whether it is the EFTA Court's ruling or its own ruling that should be considered representing the correct interpretation of the EEA Agreement.

Therefore, the only procedures that can be used in practice to solve a possible dispute created by deviating case law between the courts are Articles 102 and 112 EEA. In other words, in case of a failure of the discussions foreseen in Article 105 EEA, the Contracting Parties might either start the procedure with a view to adopting safeguard measures (Articles 113f. EEA), to find an acceptable solution (see Article 111(3)(2) EEA, second indent, in conjunction with Article 102(2) EEA), or to otherwise maintain the good functioning of the EEA Agreement (see Article 111(3)(2) EEA, second indent, in conjunction with Article 102(4) EEA). In other words, the solution to be found by the Contracting Parties is not necessarily a solution preserving absolute homogeneity, but a solution that is politically acceptable for all parties involved.

Finally, the third limitation to the scope of Article 6 EEA can be deducted from its very wording: Article 6 EEA does not apply to rulings of the Community courts that are delivered on 2 May 1992 or later. These rulings are to be dealt with on the basis of the following provisions and principles.

II. Case Law Subsequent to the Signature of the EEA Agreement

Regulating the question of how judicial homogeneity could be achieved with regard to ECJ case law subsequent to the signature of the EEA Agreement was one of the politically and legally most sensitive aspects of the process leading up to the conclusion of the EEA Agreement.

On the one hand, the ECJ held in Opinion 1/91[33] that the EEA Court originally foreseen by the Contracting Parties was contrary to the EC Treaty. It justified this finding by referring to a risk that the EEA Court might be called upon to interpret the term 'Contracting Parties' in Article 2(c) EEA and in doing so affect the allocation of responsibilities set up by the EC Treaty between the EC and its member states. Consequently, the existence of the EEA Court as originally foreseen could affect the autonomy of the Community legal order.

The ECJ also found that on the basis of the system originally foreseen, the EEA Court could not only interpret the provisions of the EEA Agreement, but also the corresponding provisions of the EC Treaty, and that this would be contrary to the ECJ's monopoly in assuring the interpretation and application of EC law in accordance with Article 220 EC. In fact, the ECJ was of the opinion that it could be too strongly influenced by the jurisprudence of the EEA Court. Consequently, the Contracting Parties had to design a system, which would make it absolutely clear that the ratification of the EEA Agreement would not condition the future interpretation of Community rules.

[33] ECJ, Opinion No. 1/91, [1991] ECR I-6079, in particular N. 46.

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On the other hand, a too strict obligation on the EFTA states' courts and the EFTA Court to follow the Community courts' case law dated after the signature of the EEA Agreement would have faced serious constitutional and political obstacles regarding the acceptance of future judgments given by "foreign courts".[34]

Given these constitutional and political difficulties in both the Community and the EFTA states, the Contracting Parties only expressed their common aim "to […] maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement."[35] They did not explain how they intended to maintain the homogeneity that they arrived at through EEA decision-making and Article 6 EEA.

In particular, no substantive Article of the EEA Agreement requires the Community courts, the EFTA states' courts or the EFTA Court to take into account their counterparts' rulings on the interpretation and application of those EEA rules that are identical in substance to the corresponding EC rules.

Nevertheless, Section 1 on 'Homogeneity' in Chapter 3 (Homogeneity, surveillance procedure and settlement of disputes) of Part VII (Institutional provisions) of the EEA Agreement (see Arts. 105 *et seq*. EEA) gives an indication as to how the Contracting Parties intended to ensure judicial homogeneity with regard to case law subsequent to the signature of the EEA Agreement.

Article 106 EEA foresees an exchange of information concerning the judgments of the ECJ, the CFI, the EFTA Court and the EFTA states' courts of last instance in so far as they concern the interpretation and application of the EEA Agreement and provisions of the EC Treaty, which are identical in substance to provisions of the EEA Agreement. The exchange of information even encompasses judgments concerning EC secondary legislation that has been incorporated into the EEA Agreement.

It can be deducted from this provision that the Contracting Parties intended to maintain homogeneity through the institutionalisation of a certain 'judicial dialogue' between the EFTA Court, the ECJ and the CFI as well as the Courts of last instance of the EFTA states. In other words, the courts in question would pay due account to the judgments on the interpretation and application of provisions, which are identical in both the EEA Agreement and the EC legal order, delivered by their counterparts.

Accordingly, the EFTA states obliged the EFTA Court to pay due account to the principles laid down by the relevant rulings of the Community courts given after the date of signature and which concern the interpretation of the EEA Agreement or rules of the EC Treaty that are identical in substance to the provisions of the EEA Agreement (see Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice,[36] ("SCA").

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[34] Norberg *et al.*, *supra* note 5, at 105 (1993); S. Norberg, *The EFTA Court*, *in* R. Plender *et al*. (Eds.), European Courts, Practice and Precedents 77, at 102 (1997); *see also* introduction to C above.

[35] *See* Recital 15 to the EEA Agreement in the introduction to C above.

[36] OJ L 344, 31.1.1994, at 3.

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The Community, in turn, did not bestow the same obligation upon the Community courts: Neither Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area[37] nor any other rule of Community law contains a provision, which requires the Community courts to pay due account to the principles laid down by the relevant rulings of the EFTA Court. Requiring them to do so would have been very difficult both from a political and legal perspective after the above mentioned Opinion 1/91 (see footnote 33 above).

Also, the ECJ has never explicitly stated that it considers itself obliged to pay due account to the relevant rulings of the EFTA Court, be it on the basis of the purpose and the structure of the EEA Agreement in general or on the basis of the above mentioned Article 106 EEA in particular.

This being said, the ECJ acknowledged that both the ECJ and the EFTA Court recognised that there was a "need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly."[38]

This does not necessarily mean that the ECJ would pay due account to the EFTA Court's judgments. It only means that the ECJ would not treat a situation involving an EFTA state differently from a purely intra-Community situation. However, an argument could be made that the fact that the ECJ mentions both the EFTA Court and the ECJ when referring to the "need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly" indicates that the ECJ would accept that it is equally responsible for judicial homogeneity as the EFTA Court. Therefore, it would have to pay due account to the EFTA Court judgments in the same way as the EFTA Court has to pay due account to the relevant ECJ rulings.[39]

Whatever the case may be, already in 1997 the ECJ referred to a judgment of the EFTA Court in order to substantiate its findings.[40] In a later ruling concerning case C-192/01 Commission/Denmark,[41] the ECJ even systematically referred to the findings of the EFTA Court in order to substantiate its solution: in order to justify the use of the precautionary principle, for which there was no clear-cut precedent in the case law of the Community courts, the ECJ referred to EFTA

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[37] OJ L 305, 30.11.1994, at 6.

[38] *See for example*, Judgment of 23 February 2006 in *Case C-471/04*, *Offenbach am Main-Land v. Keller Holding GmbH* [2006] ECR I-2107, N. 48.

[39] *See in this context also* C. Baudenbacher, *The Legal Nature of EEA Law in the Course of Time*, *in* D. T. Björgvinsson (Ed.), Afmælisrit Tor Vilhjálmsson 39, at 48 (2000), who argues that the obligation for the ECJ to pay due account to the EFTA Court's rulings follows from the spirit of the EEA Agreement.

[40] Judgment of 9 July 1997 in *Case C-34/95*, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB* [1997] ECR I-3843, at 37; for other examples, *see* Judgment of 25 January 2001 in *Case C-172/99*, *Oy Liikenne Ab and Pekka Liskojärvi v. Pentti Juntunen* [2001] ECR I-745, at 21 and Judgment of 9 September 2003 in *Case C-236/01*, *Monsanto Agricoltura Italia SpA and Others v. Presidenza del Consiglio dei Ministri and Others* [2003] ECR I-8105, at 106.

[41] Judgment of 23 September 2003 in *Case C-192/01*, *Commission v. Denmark* [2003] ECR I-9693.

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Court's findings in the case *EFTA Surveillance Authority v. Norway*,[42] where the EFTA Court fully recognised that the precautionary principle had a firm place in the EEA Agreement.

Consequently, and even though the ECJ has not been explicitly obliged to take into account the case law of the EFTA Court, the ECJ seems to pay due account to the principles laid down by the relevant rulings of the EFTA Court, which concern the interpretation of EEA rules that are identical in substance to the corresponding provisions of EC law and to feel equally responsible as the EFTA Court with regard to the duty to maintain a homogeneous interpretation of the EEA Agreement.[43]

This being said, neither Article 3(2) SCA nor the ECJ's practice will suffice to guarantee homogeneity within the EEA Agreement. The decision-making autonomy as expressed in Recital 15 of the Preamble to the EEA Agreement, in the introductory sentence of Article 3(2) SCA and in Opinion 1/91 of the ECJ leaves all the courts concerned with a *marge de manœuvre* that can lead to deviating case law.

The achievement of homogeneity is only facilitated through the mechanism of Article 105 EEA (see Section C.I. above), which applies without distinction to case law pre-dating and subsequent to the signature of the EEA Agreement. As it is the case with the case law pre-dating the signature of the EEA Agreement, in the case of a failure to come to an agreement at the end of the discussions foreseen in Article 105 EEA, the Contracting Parties cannot do much more than start the procedure with a view to adopting safeguard measures (Articles 113 *et seq*. EEA), to find an acceptable solution (see Article 111(3)(2) EEA, second indent, in conjunction with Article 102(2) EEA), or to otherwise maintain the good functioning of the EEA Agreement (see Article 111(3)(2) EEA, second indent, in conjunction with Article 102(4) EEA). In other words, if a difference in case law appears between the EFTA Court and a ruling of the Community courts given subsequent to the signature of the EEA Agreement, the solution to be found by the Contracting Parties is again not necessarily a solution preserving absolute homogeneity, but a solution that is politically acceptable for all parties involved.

D. Conclusion

Although the principle of homogeneity seems at first sight to require the EFTA states to perform a collective and reactive *ex-post facto* implementation of EC

[42] Judgment of 5 April 2001 in *Case E-3/00, EFTA Surveillance Authority v. Norway* [2000–2001] EFTA Court Report 73.

[43] Note that the same does not hold true with regard to judgments from the courts of last instance of the EFTA States. Although these courts are entitled to interpret EEA rules that are identical in substance to EC rules, the ECJ has not yet referred to a judgment of such a court of last instance of an EFTA State. Also note that "paying due account to the principles laid down by the relevant rulings of the EFTA Court, which concern the interpretation of EEA rules that are identical to the corresponding EC rules" does not prejudge in any way the findings of the ECJ or condition the future interpretation of Community rules.

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law in the EEA, the above analysis shows that the principle of homogeneity is effectively counter-balanced by the equally important principle of decision-making autonomy.

Indeed, while the EEA Agreement takes as a starting point the fact that the Contracting Parties should aim at arriving at a homogeneous European Economic Area and in doing so facilitates the achievement of this aim by allowing the EFTA states to participate in the EC decision-shaping process, it explicitly foresees that the Contracting Parties can agree to different degrees of homogeneity in the EEA Agreement.

In the field of legislative homogeneity, the Contracting Parties may agree to incorporate the legislation with adaptations, rather than to incorporate the legislation as is. If they fail to agree to such adaptations, the Contracting Parties could also agree not to incorporate the legislation in question, while at the same time recognising that the Contracting Parties have equivalent legislation. They could even agree not to incorporate the legislation in question without any recognition of equivalence of legislation, while recognising that the non-incorporation of the legislation does not impair the good functioning of the EEA Agreement. It is only as a very last resort that the Contracting Parties would consider that the non-incorporation of a piece of legislation would have such a negative impact on the functioning of the EEA Agreement, that it would be necessary to temporarily suspend the part of the Annex to the EEA Agreement concerned by the legislation in question.

The same holds true in the field of judicial homogeneity. Neither the EFTA states' courts or the EFTA Court nor the ECJ or the CFI are under a strict obligation to follow the case law of their counterparts. The EEA Agreement foresees the possibility of deviating case law and provides a forum within which such deviations could be discussed. The EEA Agreement even foresees that in the case of a failure of these discussions, the principles set out in the previous paragraph can apply *mutatis mutandis*.

Accordingly, the principle of homogeneity should not be understood to be an absolute principle. Rather, it is a political guiding principle, which sets out an aim that can be achieved to different degrees. It is up to the Contracting Parties to assess on a case by case basis what degree of homogeneity they consider necessary and sufficient for the good functioning of the EEA Agreement.