Max Weber Programme/Law Department Conference

"Integration without EU membership in Europe"

San Domenico di Fiesole,
Villa la Fonte, 23/24 May 2008

The impact of EU values on third countries' national legal orders: EU Law as a point of reference in the Norwegian legal system

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Norway has entered into several treaties with the states that are members of the European Union, that has resulted in EU values and laws in the areas covered by these treaties have the same impact on the Norwegian legal orders as it has on that of the member states. Most notable is the Agreement on the European Economic Are signed on the 2nd of May 1992 (the EEA Agreement).

The EEA Agreement[1]

Neither Norway nor Iceland and Liechtenstein are members of the European Union. These states are however parties to the EEA Agreement to which all EU member states also are party. The Agreement, that entered into force on the1st of January 1994, was originally conceived as an agreement between the then remaining EFTA member states – Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland – and the member states of the European Communities. Switzerland however never ratified the agreement, and it entered into force in relation to Liechtenstein only on the 1st of May 1995. Due to the accession of Austria, Finland and Sweden to the European Union on the 1st of January 1995, the Agreement now applies to the states that are members of the Union and Iceland, Liechtenstein and Norway. As the Union has been enlarged special enlargement agreements have been entered into[2]with the consequence that the EEA Agreement applies between all states members of the EU and the three EFTA EEA states.

The aim of the EEA Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with a view to creating a homogeneous European Economic Area (Article 1 (1)) with equal conditions of competition. In effect the Agreement extends the internal market to the EEA EFTA states by providing mechanisms whereby a large part of the EU legal texts are made applicable within the entire geographic area covered by the Agreement.

Article 1(2) of the Agreement sets out the topics that are covered by the agreement and these are dealt with in further detail in different parts of the treaty. These are:

[1] The EEA Agreement is rather complex and my purpose here is only to describe certain features of the Agreement, namely those that ensure the impact of EU law on Norwegian legislation. A description of the Agreement may be found in EEA Law, A commentary on the EEA Agreement, by Sven Norberg and others. The book was issued in 1993A main Norwegian work is: EØS-rett by Fredrik Sejersted and others, 2.nd edition, 2004.

[2]. In addition the Agreement was amended as a consequence of the accession to the European Union by Austria, Finland and Sweden. Furthermore references to "the Swiss Confederation" in the text have been deleted by an Adjusting Protocol.

- free movement of goods (part II of the agreement);
    - free movement of persons, services and capital (part III of the agreement);
    - competition (part IV of the agreement); and
    - cooperation in fields such as research and development, education and social policy (part VI of the agreement).

The purpose of the Agreement is as mentioned, to create a common legal area where the EEA laws are identical with those applied within the European Union with respect to the common internal market, and to provide mechanics to assure that those laws are implemented, interpreted and applied in a manner that assure that the result will be the same.

The EEA Agreement does not include

- the common trade policy, i.e. the EEA forms a free trade area and not a customs union with common external customs border;
- the common agricultural policy;
- the common fisheries policy;
- the common policy on indirect taxation; and
- the common economic and monetary policy.

There are some fundamental institutional differences between the EEA Agreement and the EU Treaty:.[3]

Ratification of the Agreement does not entail a transfer of legislative power from a Contracting Party to an institution of the EEA.

- The EEA organs, though inspired by the Community system, are unique.
- The dynamic development of the Agreement is provided for through the provisions on the decision-making procedure, including the provisions on the consequences of failure to reach agreement. Those provisions differ from those applying within the Union
- Furthermore, there is no majority voting. All decisions in the EEA are taken by consensus between the Community and its Member States, on the one hand, and the three EEA States, on the other.

The Agreement was drafted during the last years of the eighties and the beginning of the nineties. The binding treaty with respect to the common market was then the EEC Treaties.[4] The main part of the Agreement follows to a large extent the structure of these treaties. In all appropriate areas, the provisions of the Agreement were drafted identically, or as closely as possible, to the corresponding provision of the EEC Treaties.[5]Rules that had been subject to extensive interpretation were not reformulated but left as they were, and the main part of the Agreement reflects with regard to the four freedoms and the competition and other areas as far as possible the then applicable EEC primary legislative texts.

[3] These differences have been there from the very beginning of the EEA regime.
[4] Mainly the treaty of Rome, But I use here the term in the wide meaning
[5].

An integral part of the Agreement is the protocols to the Agreement. They cover many different specific issues, such as provisions on horizontal adaptations, rules of origin, fish, simplification of border formalities, and mutual assistance in customs matters, existing agreements and certain institutional questions. The provisions dealing with institutional questions are generally not based on EEC legislation.

Secondary legislation (regulations, directives, decisions and certain non-binding instruments adopted by the EC institutions) in the areas covered by the Agreement was brought into the Agreement through references to EC acts listed in the Annexes. Each Annex[6] covers a specific sector of the acquis communautaire. The necessary adaptations of the EC acts to the EEA situation were achieved through Protocol 1 On Horizontal Adaptations. These constitute a substantial source of law. At the time of entry into force of the Agreement around 1 600 EC legal acts had been made part of the Agreement, and had to be transposed to national legislation in the EFTA EEA states.

The main parts of the Agreement establish the foundation in general for a homogeneous and dynamic EEA, together with the Protocols as supplementary basis and the Annexes. In order to secure that the homogeneity of the EEA Agreement is not jeopardized by divergent interpretations, the Agreement provides that its provisions, in their implementation and application, shall be interpreted in conformity with relevant rulings by the ECJ, that had been given prior to the signature of the Agreement,[7] with the proviso that this applies without prejudice to future developments of case law, see article 6.

Part VII of the EEA Agreement contains institutional provisions and should be characterized by the words: dynamic and homogeneous. The main purpose of the institutional set up of the Agreement is to allow the EEA Agreement to develop in step with developments of Community law in areas covered by the Agreement. The result should in principle be the same whether a Community legal rule or an EEA rule applies. The principle of homogeneity also applies to developments of EEC/EU secondary legislation adopted after the entry into force of the Agreement. This is achieved through the EEA Council, the EEA Joint Committee, the Joint Parliamentary Committee and the EEA Consultative Part VII of the Agreement provides for the establishment of these institutions. The two first mentioned institutions are composed of representatives of the Contracting Parties; while the latter ones are composed of representatives of the corresponding organs on the two sides.

This part of the Agreement in addition regulates the decision-making procedure that is needed in order to achieve a parallel development of EC/EU law and EEA law. To some extent it follows the corresponding decision-making procedure in the Community. While preparing new legislation the Commission shall not only consult experts from the member states but also experts from the EFTA EEA States.

The decision-making bodies under the Agreement are as mentioned the EEA Council and the EEA Joint Committee. The Joint Committee has in the Agreement been mandated to make the formal decisions on the implementation and operation of the Agreement, including all necessary amendments of the Annexes and most of the Protocols. Decisions are taken by consensus between the two sides, each side speaking with one voice. Since no legislative competence has been transferred from the

[6] There are 22 annexes.
[7] I.e. prior to 2nd May 1992

Contracting Parties to any of the EEA organs, the Parliament in each EFTA EEA State has maintained its legislative competence, or, in other words, the right to accept or not to accept a particular amendment of the Annexes or Protocols of the Agreement. Article 102 regulates the consequences of a failure of the Parties to reach agreement on amendments of any of the Annexes. An EFTA EEA state has the formal possibility to hinder the adoption of any legal text, as the Agreement requires unanimity. This is often erroneously called the "veto right", but should rather be seen as a right of reservation. If the reservation concerns a legal act adopted within the Union that falls clearly within the scope of the Agreement the use of this right will create a conflict with the principle of a harmonious, dynamic and uniform development within EU and the EFTA EEA states. If a solution has not been found within six months, the affected part of the Annex in question shall be "regarded as provisionally suspended, subject to a decision on the contrary of the EEA Joint Committee". [8] This far the possibility of reservation has not been.

The institutional construction of the Agreement has been described as a two-pillar system. However, in reality it consists of two pillars and a crossbeam, consisting of the joint EEA organs where representatives from the EFTA EEA states and the EU meet. The purpose of the crossbeam is to ensure that the EFTA EEA states follow up on their obligation to take over and implement EU law.

Chapter 3 of part VII of the Agreement contains provisions on homogeneity, surveillance procedure and settlement of disputes. The purpose of these procedures is to ensure the faithful application of EU values and legislation within the EFTA EEA states. With regard to homogeneity, the Agreement establishes a duty for the EEA Joint Committee to keep under constant review the development of case law of the ECJ and the EFTA Court, which the EFTA EEA states undertook to establish under the Agreement. The provisions on surveillance procedure oblige the EFTA EEA states to establish a Surveillance Authority (ESA) together with the Court. In accordance with the provisions of the Agreement ESA has the mandate to monitor the fulfilment by the EFTA EEA states of their obligations under the Agreement, while the EFTA Court has the mandate to decide i. a., actions emanating from the surveillance of the EFTA EEA states and appeals against decisions by the ESA in competition cases.

As mentioned previously the EFTA EEA states undertook to implement around 1 200 regulations, directives and other documents upon ratifying the Agreement. The number of secondary EU legal texts that now have been incorporated into the Annexes of the Agreement has now increased to around 6 000.[9]

As a supplement to the EEA Agreement Iceland, Liechtenstein and Norway had to conclud three additional treaties. The most important of these is the Agreement Establishing a Surveillance Authority and a Court of Justice between the EFTA States.[10] According to article 5 of this Agreement the most important task of ESA is to ensure that the EFTA EEA states live up to their different obligations under the EEA Agreement. In certain areas it gives ESA additional powers of control, similar to those that the Commission has.

[8] Article 102 (5)
[9] Information from the Norwegian foreign ministry. According to the Internal Market Scoreboard No 21 issued February 2008 by ESA 1672 Internal Market directives were incorporated into the EEA Agreement as of 31 October 2007.
[10] Signed in Oporto on May 2nd 1992. The ESA/EFTA Court Agreement entered into force on the same day as the EEA Agreement.

The control carried that the Authority carries out is directed against national authorities, not actions by individuals. ESA ensures that national authorities in the three states have transposed the EEA rules into national legislation timely and correctly. The decision by the EEA Joint Committee to incorporate a legal text into the Agreement triggers the obligation on the EFTA EEA states to transpose the act into national law. As the EEA Agreement is not supranational the EFTA EEA states have to adopt national legislation that gives the incorporated regulations legal effect as well as adopt national legislation that implement directives and other texts as binding national legislation. ESA supervises the transposition of the EEA rules continuously, and will take necessary action when non-compliance has been identified. Under the ESA/EFTA Court Agreement the EFTA EEA states have vested ESA with the powers to take whatever action it deems appropriate in response to possible infringements. ESA may refer the case to the EFTA Court, cfr. Article 31 of the ESA/EFTA Court Agreement,. This is intended to give the Authority the same powers as the Commission, cfr. Article 226 of the EC Treaty.

The Surveillance Authority has also been given powers to control how the authorities in the EFTA EEA states fulfil their obligations under EEA law, their obligations under the treaty as well as under secondary legislation. The Authority may on its own initiative decide to investigate a matter or may do so on the basis of a complaint. As a rule the complaints are made by private persons, companies or organisations alleging that they have suffered due to faulty implementation or application of the Agreement. The Agreement prescribes a procedure for the handling of such complaints and infringements, similar to the one found in the EU system.

In three areas where control has been considered important, ESA, as the Commission, has been given supervisory powers beyond its general competence. These areas are: procurement by government organs; government support; and competition.

The EFTA Court has three Judges but has no Advocate General.

The main areas of competences of the Court fall into two categories: direct action against an EFTA EEA State or against ESA, and secondly requests by the national courts of the EFTA EEA states for advisory opinions regarding the interpretation of EEA rules. Both categories have parallels within the EU system However there are notable differences in the context of advisory opinions as the EFTA EEA states are under no obligation to request such opinions from the EFTA Court, and, while rulings from the ECJ are binding at least on the requesting court, the opinions by the EFTA Court are explicitly advisory.

The implementation of the EEA Agreement and the ESA/EFTA Court Agreement into Norwegian law

From a Norwegian legal point of view the two Agreements are international treaties and, as Norway by tradition adheres to the dualistic tradition, the provisions of them are not by themselves applicable in Norway, though binding on the state. By tradition, however, it is generally presumed by Norwegian courts and authorities that apply Norwegian legislation, that legislation is in harmony with – conforms with – the international public law obligations of Norway.

Article 7 of the EEA Agreement regulates the transposition into national law of the Agreement itself and the acts referred to in the Annexes. In order to fulfil this obligation Norway adopted a statute on the implementation in Norwegian law of the main part of the EEA Agreement.[11] Paragraph 1 of this statute incorporates the main part of the Agreement as Norwegian law, and according to paragraph 2 all statutory provisions that purport to fulfil Norway's obligations according to the Agreement shall in case of conflict have supremacy. Paragraph 5 of the statute allows Norwegian authorities to give ESA and the EFTA court confidential information in certain cases.

Regulations are made part of Norwegian internal legal order through incorporation without any change, neither with regard to form nor context that could jeopardize the homogeneous application. It follows from Article 7, sub-paragraph (b) that Norway with regard to directives has a choice with respect to both form and method for the implementation. The implementation of such acts may, as is the case within the European Union, be made in accordance with the preferred national technique, as long as the content of the EEA act is preserved. However, the level of detail in the acts very often narrows the choice of form and method for the implementation. In addition as mentioned one of the tasks of ESA is to supervise that the transposition is carried out in a manner that provides for full implementation of the directive in question. This very often will limit the choices available to the legislative drafter.

The interpretation by then courts and the administration of legislation emanating from the EEA system has to be performed in harmony with similar rules in the other EEA States (here including the European Union). Hence the jurisprudence not only from the EFTA Court but also from the ECJ plays an important part. As mentioned Article 6 of the EEA Agreement, rulings by the ECJ made prior to the date of entry into force of the Agreement have been made part of the Agreement. I think it is fair to say that jurisprudence of the two Courts by and large has developed in harmony. The EFTA EEA states found to their amazement through the decision by the EFTA Court in the case Sveinbjörnsdottir[12] against Iceland that the doctrine of state liability in the case of faulty implementation of a directive, also applied within the EEA. This topic was not dealt with in the Agreement and opinions in legal theory had differed on whether such liability could also apply under the EEA Agreement, but had agreed that the basic was one of whether the Agreement was a treaty or it had supranational traits. In its decision the EFTA Court used a supranational argumentation, underlining the mechanics of the EEA Agreement to ensure harmonious interpretation, the principle of loyalty and the rights that are conferred on the individual in the EEA through the Agreement.[13]

The impact of EU law and values on the Norwegian legal order

In the areas covered by the EEA Agreement EU law and values have had a extensive impact on the Norwegian legal order as EU law and values in these areas largely have been transposed as Norwegian law and values. In these areas the powers of the Norwegian legislators to adopt new and different rules based on other values, is almost non-existent, unless either the transposed EU text has been changed, or Norway has withdrawn from the Agreement, cfr Article 127.[14]

[11] Statute 27th November 1992 nr. 109.
[12] See REC 1998 page 95, paragraphs 59 and 60
[13] Norway tried in a later case to raise the issue in order to achieve a reversal of the opinion of the Court, cfr. Karlsson against Iceland, REC 2002 page 248, see especially paragraphs 29-30 where the court states that the Agreement even tough it is not directly applicable, may contain the basis of liability.
[14] An intended withdrawal has to be notified in writing with at least twelve months' notice.

The surveillance mechanics that have been established in accordance with the EEA Agreement and the ESA/EFTA Court Agreement also ensure that there is no departure from the rules that are part of the EEA Agreement either in the transposition of such texts or in the application by the administration of the transposed rules.

Norwegian courts have to apply the statutory rules and regulations that have been transposed to Norwegian law. When interpreting such texts the judges have to utilize the same methods as those applied by the ECJ and the EFTA Court, and not the methods that are used when interpreting Norwegian legal texts that do not have the same background.

There are noticeable differences in the manner in which legal texts are prepared and drafted in Norway and in Brussels, and the method of interpretation utilized in connection with an "ordinary" statutory provision differs from the one used in Brussels and principally by the courts in Luxembourg when interpreting EU law.

A committee elaborates very often proposals of new legislation, and the proposed texts together with the explanatory memoranda are sent interested parties for their comments. The government then puts forward a proposal to the Parliament for a new statute on the basis of this. In the explanatory text the minister will often explain the purpose of the proposals. Traditionally Norwegian legal texts are worded in a rather general manner and the preparatory works play an important role as a background for the interpretation of the adopted legal texts. The purpose of a statute is only occasionally expressed in the provisions of the statute itself and Norwegian legislative drafting does not know the concept of preambles.[15]

The Norwegian domestic legislative process as described is often curtailed when it comes to the transposition of EEA secondary legislative texts. The wording of such texts is generally more detailed than is the tradition in Norway. One the other hand it is often more fragmented than is the case with national legislation To a large extent they carter to non-Nordic legal systems, and that may make it difficult for the Norwegian legislative drafter to understand their impact fully. Furthermore EEA-based texts have to be interpreted in light of the preamble as well as the fundamental principles of the four freedoms. Often the legislative process is hasty and the result is not always as thorough as is the case with "ordinary Norwegian legislation".

Norwegian judges have had to accustom themselves to the use the Vienna principles on treaty interpretation after the inclusion as Norwegian law of the European Convention on Human Rights and the UN covenants on human rights. However, the fact that EEA legal texts with the exception of regulations very often have been transposed into ordinary Norwegian legal language, and that the provisions of a statute may only partially be based on an EEA text make a difference. And very often it may be difficult for both the parties and the judges to a case to distinguish between the different origins of the applicable law in a given case. The extensively purposive method of interpretation also tends to create difficulties. On the other hand the traditionally general wording of Norwegians statutory texts have historically allowed the courts, especially the Supreme Court, to interpret legal texts in a dynamic way in order to make it possible to apply it to new developments. This method of

[15] In the case of regulations adopted in accordance with enabling statutes, the administration often elaborates the first draft, but it is then submitted for comments to the interested parties.

interpretation has become more difficult as the legislation transposing EEA texts as a rule is much more detailed.

Even though many areas , such as taxation and vat, are not covered by the EEA Agreement, it is a fact that EU legislation in these areas also have an increasing impact on Norwegian law.

An attempt at evaluating the Norwegian experience.

The question of EU membership is most difficult in Norway. This far there have been two referenda on the issue, in 1972 and 1994, and both times a majority of those voting, voted no. The present coalition government had to adopt a platform that makes the issue moot until the next general election – September 2009. Under the paragraph 93 of the Constitution a vote in favour of membership requires a majority of three fourths of the members of the Storting (parliament), and two thirds of its member must be present.[16]

The EEA Agreement is very important from a trade point of view as Norway to a large extent has its main trading partners with the states that are members of the European Union. On the other hand the EEA Agreement is extremely undemocratic as it does not allow for participation by the EFTA EEA states in the decision-making process in relation to legal texts that later become part of the EEA Agreement.[17] There is under the Agreement a right to "veto" the inclusion of a legal text in the EEA Agreement, but as mentioned the Agreement provides for the possibility of suspension of the affected part of the annex. As the EFTA EEA states have this far not availed themselves of this possibility it is an open question how the EU side is going to react, if or when the EFTA EEA states were to avail themselves of this possibility. Presently however there are two directives/drafts that certain parts of the Norwegian society argue very strongly should be "vetoed".[18]

The EEA Agreement was elaborated on the basis of the EEC treaties, and the provisions of the Agreement have not been revised in step with the many revisions of the treaty basis for what is now the European Union, i.e. the Maastricht agreement, the treaty of Amsterdam and the treaty of Nice. The renumbering of the articles of the Maastricht treaty through the treaty of Amsterdam causes difficulties when studying the EEA Agreement as the references in the agreement are to the old numbering. If – or when – a constitutional treaty were to be adopted by the EU member states, the difficulties caused to the upholding of the EEA Agreement may prove to be insurmountable. Already, however, the changes in the wording of several provisions that have taken place as a result of the changes in the constitutional foundations of the European Union create serious difficulties in maintaining the harmonious development and interpretation of the two systems. One example here is the changes in the provisions on free movement of capital after the adoption of the EEA Agreement. The interpretation of these within the EU may be influenced by the rules on en economic and monetary union. Another is the impact that the rules on EU citizenship may have on the interpretation of the provisions on free movement of persons. As mentioned the mechanics established by the EEA Agreement ensure a dynamic development of secondary legislative texts, but as there is no similar

[16] Another issue is whether this paragraph enables Norway to join the European Union at all. But in the end this is mainly a question of political will, even if the legal basis may be dubious.
[17] As previously mentioned the Agreement provides for the participation by experts in the preparatory process, but after that all influence has to be exerted through lobbying either of EU member states of EU organs.
[18] The Services directive, and the directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks

procedure in relation to the Agreement itself, it may disintegrate and create an increasing gap between the two systems. To what extent this will endanger the harmonious and dynamic interpretation of the EEA Agreement remains to be seen. One option is to interpret the provisions of the Agreement in light of the new rules, but this will cause difficulties, as the EFTA-EEA countries are not bound in any way by these new texts. The EFTA Court has had to address the issue a couple of times, and has been reluctant to accept that the new formulations found in the EU Treaty have a binding effect in the EEA Agreement connection. But on the other hand the Court has chosen to interpret the obligations under the Agreement in the light of the new-formulated EU texts.

Impact of EU law and values on the Norwegian legal order in other areas than those covered by the EEA Agreement

The EEA Agreement covers those areas that according to the Maastricht treaty belong to the so-called first pillar of cooperation, which is generally speaking a continuation of the collaboration between the EU member states under the Treaty of Rome. Norway also cooperates extensively with EU within the so-called third pillar. Most important in this context is the Agreement concluded by the Council of the European Union and Iceland and Norway concerning the latters association with the implementation, application and development of the Schengen acquis of 18th of May 1999.[19] The agreement is structured differently from the the EEA Agreement as it does not create any new special institutions for the participation by Norway and Iceland. Instead it opens for partial participation by representatives from these two states in relevant EU organs. However, the obligation to assure a harmonious and dynamic interpretation and administration of the provisions of the aquis is as strong under this agreement as under the EEA Agreement. The Schengen Agreement contains the possibility for EU to cancel the treaty on short notice, if Iceland and Norway do not fulfil their obligations. Even though the arrangements under the agreement are quite complicated, it seems to function according to its purpose. Naturally this membership impacts Norwegian legislative possibilities in the areas covered by it.

In addition to the Agreement concerning the Schengen aquis Norway has entered into several traditional treaties with EU in the third pillar area.

Concluding remarks

EU law and values have over the last twenty years had an increasingly strong influence in Norway in spite of the fact that it has been and remains to be a strong opponent of the European Union. It is a great paradox that Norway several times have declined membership because that would diminish its sovereignty, while it – partially in parallel decisions – has ratified treaties under which it has virtually no possibility to influence the adoption of the legislative rules that it later will have to transpose to national legislation.

It is questionable to what extent the EU side will be willing to revise the EEA Amendment to bring it in line with a possible new Reform Treaty. If such amendments are not carried out, however, the EEA project may disintegrate very rapidly.

[19]Under the Treaty of Amsterdam the Schengen aquis are an integrated part of EU law, partly based on Articles 61-69 in the Treaty of Rome and partly in the third pillar.
