

**RAPPORT # 16**

# **Integrating an outsider**

An EU perspective on relations with Norway

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## OM RAPPORTEN

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# Integrating an outsider

## An EU perspective on relations with Norway

Christophe Hillion\*

### Introduction

EU relations with Norway are, in the words of the Council of the European Union, “very good and close”.<sup>1</sup> Agreements to promote cooperation have been signed in most policy areas,<sup>2</sup> and these are conscientiously implemented and enforced. Yet, several factors, not least in view of the entry into force of the Treaty of Lisbon, have led the Union to call for a review of the existing framework of relations. This report analyses the main challenges to the current EU-Norway arrangement from an EU perspective, and discusses how those could be addressed by the Union (2). First, however, it attempts to locate this arrangement in the broader context of the Union’s relations with its European neighbours (1), and addresses the following questions: What is the main driving force of the EU’s policy towards states in its vicinity, and how does Norway fit into the wider process of European integration, as seen from the EU?

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\* Universities of Leiden and Stockholm; and Swedish Institute for European Policy Studies. In writing this report, I greatly benefited from conversations with officials of the European External Action Service, the European Parliament, the Mission of Norway to the EU. I am also immensely indebted to Anne Myrjord, for her insightful suggestions and limitless support. All mistakes are mine only.

1 Council Conclusions on EU relations with EFTA countries. 3060th General Affairs Council meeting, Brussels, 14 December 2010. Hereinafter “the 2010 Council Conclusions”.

2 An exhaustive list of such agreements can be found here: [www.consilium.europa.eu/App/accords/Default.aspx?command=se archResult&cid=297&partyId=NO&doclang=EN&lang=EN](http://www.consilium.europa.eu/App/accords/Default.aspx?command=se archResult&cid=297&partyId=NO&doclang=EN&lang=EN)

### 1. Integrating Norway: What’s in it for the EU?

The conclusions of the December 2010 meeting of the General Affairs Council provide the most recent snapshot of the way in which the EU perceives its relations with EFTA countries in general, and with Norway in particular.<sup>3</sup> Here, the Council portrays Norway as being of particular interest most notably in energy matters, the Arctic, the environment and fisheries.<sup>4</sup> It is not the purpose of this report to go into details on such substantive interests. Rather, it focuses on the underlying driving forces of the Union’s approach towards Norway, in particular its wish to see elements of its own *acquis* incorporated, in a homogenous manner, into Norwegian laws and policies.

Indeed, the main emphasis of the 2010 Council Conclusions appears to lie in the assessment of Norway’s (and the other EEA EFTA countries’) adherence to, and incorporation of EU standards. Thus, the Council “welcomes that the EEA countries have demonstrated an excellent record of proper and regular incorporation of the *acquis* into their own legislation and encourages them to maintain this good record to ensure the continued homogeneity of the internal market.”<sup>5</sup> It further points out that “the EU and the EFTA States should ensure homogeneity in the implementation of the *acquis* and the good functioning of the institutions (...)”<sup>6</sup> welcom[ing] and encourag[ing] the proper and regular incorporation by Norway of EEA relevant EU *acquis*

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3 The previous conclusions of that kind dated back to December 2008. It was then decided that the Council would reassess the state of EU-EFTA relations on a biannual basis. See Draft Council Conclusions on EU relations with EFTA countries. Brussels, 5 December 2008 (16 December 2005; 16651/1/08); hereinafter “the 2008 Council Conclusions”.

4 2010 Council Conclusions, paras. 28, 29, 30, 33; see also paras 16-18 of 2008 Council Conclusions.

5 2010 Council Conclusions, para 3.

6 2010 Council Conclusions, para 7.

in its national legislation”.<sup>7</sup> The Council concludes by recalling that “the continued homogeneity of the applicable legislation throughout the European Economic Area must be ensured, with particular emphasis in avoiding gaps in the *acquis* across the EEA.”<sup>8</sup>

EU standards projected to Norway do not only comprise the hard law of e.g. the EEA. It also includes shared *values*. In this vein, the Council emphasises that “Norway’s views on global matters are based on values similar to those of the EU and its international activities can give additional and valuable support to EU actions.”<sup>9</sup> In addition, the Norwegian contribution to “the reduction of social and economic disparities in the EU”, through the EEA and Norway Grants, is also presented as being based on the “commitment of Norway” to a corpus of values shared with the EU, notably the “founding principle of solidarity”.<sup>10</sup>

The Council’s emphasis on the promotion of EU rules and values is not specific to EU-Norway relations. On the contrary, such norm projection is arguably a key objective of the Union in relation to most outsiders, and even more so with those that neighbour the Union, particularly since the 2004-07 enlargement and the entry into force of the Lisbon Treaty.

### 1.1. The EU as exporter of values and rules

The EU is an entity based on the rule of law.<sup>11</sup> Also, ever since the European Coal and Steel Community, the main *method* of integration has been the establishment and enforcement of common rules, both through legislation and the case law of the European Court of Justice.<sup>12</sup> In addition to being a *law*-based creature, the EU also considers itself to be a *value*-based entity, a Union whose members share, in principle, a common approach to fundamental rights and freedoms. This has become particularly evident through the adoption, and subsequently the constitutionalisation of the EU

Charter of fundamental rights, as well as through the Union’s enlargement policy.<sup>13</sup>

Indeed, Common rules and values are not reserved for intra-EU use only. On the contrary, the EU actively, and arguably increasingly, promotes its standards to third countries.<sup>14</sup> Whether such “externalisation of EU governance”<sup>15</sup> is the expression of the Union acting as a “normative power”<sup>16</sup> or as a “normative hegemon”<sup>17</sup> is the object of an ongoing and interesting discussion among scholars. Suffice to say in the context of this discussion that, notwithstanding its label and rationale, the successful projection of EU standards beyond EU borders reduces the likelihood of the Union developing into an island surrounded by legal, political and economic systems incompatible with its own. The interest in preserving its *acquis* thus partly explains the Union’s active projection of its norms.

Enlargement has undoubtedly been the most prominent vehicle for such norm export, in particular since the fall of the Berlin Wall. Through elaborate – and constantly evolving – accession conditions, articulated in multiple pre-accession instruments, aspirant states have been shaped in the Union’s (Member States’) image.<sup>18</sup> Not only is the decision to accept a new member based on an evaluation of the candidate’s alignment with EU standards, the very acknowledgement of a country’s candidate *status* is also dependent on the

7 2010 Council Conclusions, para. 25.

8 2010 Council Conclusions, para 36.

9 2010 Council Conclusions, para 27.

10 2010 Council Conclusions, para 26.

11 Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para 23; Opinion 1/91 *EEA (I)* [1991] ECR I-6079, para 21; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 281. Further: e.g. Arnulf A, “The Rule of Law in the European Union” in Arnulf A and Wincott D (eds), *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press, 2002) 239.

12 Cappelletti M, Seccombe M and Weiler J H H (eds.) *Integration Through Law* (Berlin-New York: De Gruyter, 1986).

13 Smith K E, “The Evolution and Application of Membership Conditionality” in Cremona M (eds) *The Enlargement of the European Union* (Oxford: Oxford University Press, 2003) 105; C Hillion, ‘The Copenhagen criteria and their progeny’ in C Hillion (ed), *EU Enlargement: A Legal Approach* (Oxford: Hart Publishing, 2004) 1; F Hoffmeister, ‘Earlier enlargements’ in A Ott and K Inglis (eds), *Handbook on European Enlargement* (The Hague: TMC Asser Press, 2002) 90.

14 Further: Petrov R, “Exporting the *acquis communautaire* in the legal systems of third countries” (2008) 13 *European Foreign Affairs Review* 33; Magen A, “The *acquis communautaire* as an instrument of EU external influence” (2007) IX *European Journal of Law Reform* 361.

15 Friis L and Murphy A, “The European Union and Central and Eastern

Europe: Governance and Boundaries” (1999) 37 *Journal of Common Market Studies* 211. For a recent formulation see Lavenex S and Schimmelfennig F (eds), *EU External Governance – Projecting EU rules beyond membership* (London: Routledge, 2010).

16 Manners I, “Normative Power Europe: A Contradiction in Terms?” (2002) 40 *Journal of Common Market Studies* 235.

17 Haukkala H, “A Normative Power or a Normative Hegemon? The EU and its European Neighbourhood Policy” (2007) EUSA 10th Biennial Conference in Montreal, Canada, 17–19 May.

18 Further: e.g. Maresceau M, “Pre-accession” in Cremona M (eds) *The Enlargement of the European Union* (Oxford: Oxford University Press, 2003) 9; Hillion C, “EU Enlargement” in Craig P and de Burca G (eds) *The Evolution of EU law* (Oxford: Oxford University Press, 2011) 187.

aspirant state's compliance with, and promotion of Union's fundamental values. In this sense, the post-Lisbon enlargement procedure enshrined in Article 49 TEU foresees that: "Any European State which respects the [EU] values ... and *is committed to promoting them* may apply to become a member of the Union" (emphasis added).

While the projection of norms through enlargement covers the whole range of EU policies, the Union has also taken intermediate steps to export its standards to aspirant states in a more sectoral manner. This is notably the case in the field of energy, through the Energy Community Treaty signed in 2005 by the European Community and South East European countries (including Bulgaria and Romania which have since become EU members).<sup>19</sup> This Treaty basically extends the internal market *acquis* relating to electricity and natural gas to the non-EU contracting parties.<sup>20</sup> Moreover, there is an express obligation of homogeneous interpretation of the relevant *acquis* (ie. EU legislation on energy, the environment, competition and renewable energy sources).<sup>21</sup> The establishment of a European Common Aviation Area,<sup>22</sup> and the EU plan to conclude a Transport Community Treaty with the Western Balkans,<sup>23</sup> can also be seen in the perspective of sectoral norm export and integration.

19 The Energy Community Treaty, OJ 2006 L 198/18. The Ministerial Council of the Energy Community approved the accession of Ukraine and Moldova to the Energy Community in December 2009. Moldova became effective Member in March 2010: < [www.energy-community.org/portal/page/portal/ENC\\_HOME/ENERGY\\_COMMUNITY/Milestones](http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Milestones) >

20 Article 10 of the Energy Community Treaty stipulates that "Each Contracting Party shall implement the *acquis communautaire* on energy..."

21 The institutions set up by the Energy Community Treaty shall, according to Article 94 "interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or Court of First Instance of the European Communities". Further: Lazowski A, "Enhanced multilateralism and enhanced bilateralism: integration without membership in the European Union" (2008) 45 *Common Market Law Review* 1433 at 1447; Rodin S, "Croatia" Blockmans S and Lazowski A (eds), *The European Union and its Neighbours* (The Hague: TMC Asser Press, 2006) 357 at 382ff.

22 Multilateral agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area; OJ 2006 L285/3.

23 "Commission proposes a Transport Community with the Western Balkans and takes further steps in strengthening cooperation with neighbouring countries in the transport sector" (Press Release IP/08/382; 05/03/2008).

As regards norm projection in relation to countries *not* part of the enlargement process, the European Neighbourhood Policy (ENP), established in parallel with the Union's expansion to central and eastern Europe, is a prominent example. The mechanisms used are, to a considerable extent, similar to, and indeed inspired by those of the enlargement policy.<sup>24</sup> Yet, the incentives offered to adopt and adapt to EU rules are very different, in that the ENP lacks the membership "carrot". While this renders the projection of EU standards less effective, the intention is nonetheless clear: extending Union *acquis* beyond the EU, through the unilateral adoption of EU rules by the neighbour.<sup>25</sup>

Indeed, Article 8 of the post Lisbon TEU, which partly codifies the EU pursuance of a "neighbourhood policy", also reaffirms the latter's normative content. The new provision stipulates that the Union should develop "a special relationship" with its neighbours "aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union." The Union is thus endowed with an explicit external power, if not obligation, to establish the "ring of well governed countries" the 2003 European Security Strategy has called for.<sup>26</sup>

In the same vein, Article 21(1) TEU, that encapsulates the aims of the EU external action, foresees that: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement and which it

24 Kelley J, "New Wine in Old Wineskins: Policy Learning and Adaption in The new European Neighborhood Policy" (2006) 44 *Journal of Common Market Studies* 29; Magen A, "The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?" (2006) 12 *Columbia Journal of European Law* 384; Cremona M and Hillion C, "L'Union fait la force? Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy" (2006) European University Institute Law Working Paper No 39/2006.

25 For instance, the 2005 Action Plan with Ukraine stated that "Implementation of the Action Plan will significantly advance the approximation of Ukrainian legislation, norms and standards to those of the European Union" (p 1). See, in the same vein, the Joint Declaration of the Prague Eastern Partnership Summit, Prague, 7 May 2009; Brussels, 7 May 2009; 8435/09 (Presse 78), esp paras 5 and 10.

26 According to the Strategy: "Our task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations... It is not in our interest that enlargement should create new dividing lines in Europe. We need to extend the benefits of economic and political cooperation to our neighbours in the East while tackling political problems there". *A secure Europe in a better world – European Security Strategy*, Brussels, 12 December 2003.

seeks to advance in the wider world".<sup>27</sup> The same Article goes on to saying that the Union shall attempt to develop relations with third countries that share these principles.

Norway is not defined by the EU as a candidate for accession or as being part of the ENP. EU relations with Norway are nevertheless driven by the same fundamental interest, that of creating an environment as similar as possible to the Union, in legal terms, through the export of its norms. As in the case of the ENP countries, the incentives provided by the Union are not linked to the prospect of membership. However, contrary to the ENP, EU norm projection towards Norway is assured by instruments, covering almost the whole range of the Union's activities, and involving unique bodies endowed with compliance control and enforcement powers.<sup>28</sup>

The successful export of the EU *acquis* to third countries, whether defined as candidate states, ENP states or neither of the two, like Norway, implies that the distinction between *insiders* and *outsiders* is being increasingly blurred. This tendency is accentuated by the differentiated membership in the Union whereby Member States are unequally integrated with various EU policies. Such differentiation stems to a large extent from individual Member States' voluntary opt-outs from specific fields of the *acquis*,<sup>29</sup> though there might also be a possibility, in the future, of "imposed" exclusion from selected policies, Turkey being a case in point.<sup>30</sup>

27 Article 21(1) further defines these values as comprising "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."

28 See section 1.2.2, below.

29 For instance, Ireland and the UK have formal opt-outs from the Schengen *acquis*, as well as from the requirement of quality majority voting in Police and Judicial Cooperation in Criminal Matters (the pre-Lisbon "third pillar"). The UK has also opted out of the euro, and Denmark has opt-outs regarding defence, the euro and parts of the cooperation in the old "third pillar", justice and home affairs (Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community). Poland and the UK have opted out of the EU Charter of Fundamental Rights, and the Czech Republic has received guarantees to the same effect.

30 The Negotiating Framework for Turkey, adopted on 3 October 2005 states in its paragraph 12 that, when negotiating a future Accession Treaty with the country, *permanent* safeguard clauses as regards movement of persons, agricultural and structural policies could be considered. Further, see Hillion C, "Negotiating Turkey's Membership to the European Union. Can the Member States Do As They Please?" (2007) *European Constitutional Law Review* 296.

The differentiated EU membership is further entrenched by the usage of so-called "enhanced cooperation", whereby groups of Member States may proceed to deeper integration in a defined area. Introduced by the Treaty of Amsterdam, the provisions on enhanced cooperation have only recently been used in practice, notably in the case of divorce law<sup>31</sup> and EU patent.<sup>32</sup> Other examples of deepened cooperation among some Member States, albeit not formally cases of enhanced cooperation, may be found *inter alia* in the field of justice and home affairs.

The combination of strong norm projection towards third countries and differentiated EU membership means that in some cases certain outsiders are more integrated with the EU than some of the insiders themselves. Norway is undoubtedly one of them.<sup>33</sup>

## 1.2. The most integrated outsider

Analysed through the prism of norm projection, EU relations with Norway is a successful model. The *acquis* absorption in Norway is high,<sup>34</sup> so much so that, in its 2010 conclusions, the Council limits itself to encouraging Oslo to "maintain the same good record in the coming period".<sup>35</sup> This formulation contrasts to the Council's evaluation of most other third countries, regularly asked to *improve further* their track record in implementing the *acquis*.<sup>36</sup>

31 On 12 July 2010, the Council adopted a Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU; OJ 2010 L189/12). This allowed 14 countries (Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain) to adopt a Regulation containing rules which will apply to international divorces. Such a Regulation (1259/2010; OJ 2010 L 343/10) was consequently adopted in December the same year.

32 At the request of 25 of 27 Member States, the Council authorised the use of enhanced cooperation on creation of unitary patent protection on 10 March 2011.

33 Andersen S, "Norway: Insider AND Outsider" ARENA Working Papers WP 00/4 <[www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2000/wp00\\_4.htm](http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2000/wp00_4.htm)>; Sverdrup U and Kux S, "Fuzzy Borders and Adaptive Outsiders: Norway, Switzerland and the EU" (2000) 22 *Journal of European Integration* 237.

34 EFTA Surveillance Authority, 27th Internal Market Scoreboard of the EEA EFTA States. March 2011. The scoreboard (p 7) concludes *i.a.* that Norway has the second lowest transposition deficit in the whole of the EEA. Only Malta has a better record.

35 2010 Council Conclusions, para 25.

36 Indeed, both countries defined as (potential) candidates for membership or as belonging to the European Neighbourhood Po-

In addition to the successful *acquis* absorption, the Norwegian *contribution* to the EU is significant, through participation in EU programmes<sup>37</sup> and actions,<sup>38</sup> presence of Norwegians in EU institutions,<sup>39</sup> participation in EU agencies,<sup>40</sup> and financial contributions to economic and social cohesion in the Union.<sup>41</sup> These elements considerably add to making Norway the most integrated non-EU Member State, alongside its EFTA partner Iceland. The section below seeks to elaborate further, and in a comparative perspective, on the Union's integration of the outsider Norway.

### 1.2.1. Integration through association

The main legal instrument used by the EU to promote its rules and values to Norway is that of "association". The EEA agreement is an association agreement, as are the agreements linking Norway to the Schengen cooperation. While not as systematically referred to, and if so with a different legal nature, the term *association* may also characterise the relationship that Norway and the EU have developed in the field of Foreign and Security Policy.<sup>42</sup>

Before looking more closely at the web of EU-Norway associations, one may perhaps recall what the notion *association* means in EU external relations. In the old European Community context, former Article 310 EC (previously Article 238 EEC) foresaw that the EC may establish an association with third states and international organisations. It has been interpreted by

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ly are all the subject of "progress reports", outlining the developments in each country as regards the adoption of and approximation to the EU *acquis*.

37 The latest count of the Norwegian mission to the EU states that Norway participated in 19 EU programmes, [www.eu-norge.org/Norges\\_forhold\\_til\\_EU/deltakelse/EU\\_programmer/](http://www.eu-norge.org/Norges_forhold_til_EU/deltakelse/EU_programmer/)

38 Notably in the area of Defence and Security Policy, see section 1.2.3, below.

39 According to the EFTA secretariat, some 40 national experts from Norway work in the European Commission in Brussels, [www.efta.int/eea/list-national-experts.aspx](http://www.efta.int/eea/list-national-experts.aspx). A further two work at Eurostat, and three are seconded to EU agencies (Frontex, European Center for Vocational Training and Office for Harmonisation in the Internal Market).

40 Through the EEA agreement and other, bilateral agreements, Norway participates in 21 EU agencies, [www.eu-norge.org/Norges\\_forhold\\_til\\_EU/deltakelse/eu\\_byraer/](http://www.eu-norge.org/Norges_forhold_til_EU/deltakelse/eu_byraer/)

41 The total annual contribution of Norway through the EEA and Norway Grants amounts to approx. 545 million euro.

42 For instance, according to Article 2 of the Agreement between the European Union and the Kingdom of Norway establishing a framework for the participation of the Kingdom of Norway in the European Union crisis management operations (OJ 2005 L67/8), whereby Norway can associate itself with EU Joint Actions and Decisions establishing crisis-management operations.

the European Court of Justice as "creat[ing] special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system".<sup>43</sup>

Traditionally, the Community has established such "privileged links", through the conclusion of association agreements, with two categories of countries: European states that are unable (as yet), or unwilling to become Member States of the EU; and countries with which Member States previously had close relations (e.g. former colonies of some EU Member).<sup>44</sup>

Most European states that have concluded an association agreement with the EU have later become or applied to become members. This is notably the case of the central and eastern European states, which had concluded so-called "Europe agreements" with the Union, and previously Greece, Cyprus and Turkey. Similarly, former EFTA countries Austria, Finland and Sweden became EU members shortly after having concluded the EEA agreement.<sup>45</sup> More recently, Stabilisation and Association Agreements have been signed with the "Western Balkan" countries, all "(potential) candidates" and/or applicants for membership.

The link between association and accession is however not clear-cut. While both the so-called Ankara agreement with Turkey (1963) and the association agreement with Greece (1961) were conceived as steps towards full membership,<sup>46</sup> neither the Europe Agreements, nor the EEA were initially envisioned as pre-accession instruments.<sup>47</sup> By proposing an advanced form of association to the EFTA countries - "a new,

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43 Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 9.

44 Further on Association Agreements; see e.g. Raux J, "Les Compétences expresses à caractère général – Les Associations", *Juris-Classeur Europe* (2002) 2204; Christophe Tchakaloff M-F (dir), *Le concept d'association dans les accords passés par la Communauté: Essai de clarification*, (Bruxelles: Bruylant, 1999).

45 Indeed, the EEA has been labelled "the best medium-term instrument for transition to the EU". See Peers S, "An ever closer waiting room? The case for Eastern European accession to the European Economic Area" (1995) 32 *Common Market Law Review* 187 at 211.

46 In this vein, Article 28 of the Ankara Agreement states: "... as soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community".

47 Maresceau M and Montaguti E, "The Relations between the European Union and Central and Eastern Europe: A legal Appraisal", (1995) 32 *Common Market Law Review* 1337; Mayhew A, *Recreating Europe. The European Union's Policy towards Central and Eastern Europe* (Cambridge: Cambridge University Press, 1998).

more structured partnership with common decision-making and administrative institutions<sup>48</sup> - the Community would offer full access to the internal market, without taking on the institutional and political burden of enlargement. Indeed, in the late 1980s, enlargement was not a favoured option in a Community preoccupied with the extensive internal reforms linked to the completion of the internal market and the progressive establishment of the economic and monetary union.<sup>49</sup>

Compared to current association arrangements with other European states (eg the web of bilateral agreements with Switzerland, the Ankara agreement with Turkey, the Stabilisation and Association Agreements with the Western Balkans, and the Association agreements envisaged with ENP countries from Eastern Europe), the EU-Norway relationship, in particular through the EEA agreement, entails *deeper integration* and *more participation*. This is both the result of the provisions of the agreement itself, which, in the words of Maresceau constitutes “a real intellectual masterpiece of legal thinking on integration”,<sup>50</sup> and the case-law developed by the EFTA Court.

### 1.2.2. Internal Market Association through the EEA

Substantively, the EU norm projection under the EEA is broader than any other association arrangement concluded by the Union. With the notable exceptions of agriculture, fisheries, tax harmonisation and monetary coordination, the EEA fully extends the application of internal market rules to the EEA EFTA states.<sup>51</sup>

In comparison, the scope of the association arrangement with Switzerland, comprising more than 120 bilateral agreements and related protocols, covers

48 Delors J, “Statement on the broad lines of Commission policy”, Strasbourg, 17 January 1989.

49 It was nonetheless acknowledged that the EEA might turn out to be a stepping-stone towards full membership. Thus, on the occasion of the signature of the agreement in Oporto on 2 May 1992, Jacques Delors expressed the wish that “la création de l’EEE soit une étape vers la réalisation d’une Europe élargie.” ([www.ena.lu](http://www.ena.lu)). On this ambiguity, see Forman J, “The EEA agreement five years on: dynamic homogeneity in practice and its implementation by the two EEA courts” (1999) 36 *Common Market Law Review* 751.

50 Maresceau M, “Integration oriented elements in bilateral agreements concluded by the EU with third States: a few examples” (2010) [www.europarl.cy/ressource/static/files/ADDRESS\\_PROF\\_MARESCEAU\\_20100624.pdf](http://www.europarl.cy/ressource/static/files/ADDRESS_PROF_MARESCEAU_20100624.pdf); in the same vein, Graham Avery speaks of “a unique piece of institutional engineering”; see: “Opinion: The EEA – a view from Brussels” available at: <http://www.sv.uio.no/arena/english/about/news-and-events/news/2010/avery.html>

51 Opinion 1/91 *EEA (I)* [1991] ECR I-6079, para 4.

only partially the EU Four Freedoms. Most notably, the EU-Swiss arrangement does not include the free movement of capital.<sup>52</sup>

The export of EU standards towards Turkey is also less ambitious than the EEA. It is first and foremost linked to the aim of the Ankara agreement to establish, in stages, a customs union which entails Turkey’s incorporation of the EU *acquis* in particular in the field of common commercial policy (which is not the case of the EEA),<sup>53</sup> parts of the free movement of goods *acquis*, and competition law.<sup>54</sup> The agreement otherwise states that the contracting parties shall be “guided” by the EC Treaty for the purpose of “progressively securing freedom of movement for workers”,<sup>55</sup> “abolishing restrictions on freedom of establishment”,<sup>56</sup> and “abolishing restrictions on freedom to provide services”.<sup>57</sup> While the Ankara Agreement has been supplemented by protocols, and decisions of the Association Council, the ensuing regime nevertheless falls short of involving the full extension of the internal market *acquis* to Turkey.<sup>58</sup>

The Stabilisation and Association Agreements (SAAs) concluded with the Western Balkans, envisage, much like the old Europe Agreements, the progressive establishment of a free trade area.<sup>59</sup> While the SAAs call for associated states’ adaptation to EU standards, priority being given to the internal market *acquis*, the involved norm projection differs from that of the EEA: it is

52 For more on the difference between the EEA and the Swiss arrangement, see Tobler C, Hardenbol J and Mellár B, *Internal market beyond the EU: EEA and Switzerland* (2010) Briefing paper commissioned by the European Parliament’s Committee on Internal Market and Consumer Protection.

53 Article 10(2) of the Ankara Agreement stipulates that the Customs Union shall involve “the adoption by Turkey of the Common Customs Tariff of the Community in its trade with third countries, and an approximation to the other Community rules on external trade”. Further, Peers S, “Living in Sin: Legal Integration of the EC-Turkey Customs Union” (1996) 7 *European Journal of International Law* 411.

54 Decision 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, OJ 1996 L35/1.

55 Art 12 of Ankara Agreement.

56 Art 13 of Ankara Agreement.

57 Art 14 of Ankara Agreement.

58 Further: Idriz N, “Free movement of persons between Turkey and the EU: to move or not to move?” (2009) 46 *Common Market Law Review* 1621; Lenski E, “Turkey (including Northern Cyprus)” in Blockmans S and Lazowski A (eds), *The European Union and its Neighbours* (The Hague, TMC Asser Press, 2006) 283.

59 e.g. Article 15 SAA Croatia. Further: Phinnemore D, “Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?” (2003) 8 *European Foreign Affairs Review* 77.

incremental and remains essentially voluntary.<sup>60</sup> The SAAs do not bind the associate states to comply with the internal market acquis. Rather, it applies a system of conditionality whereby the degree of norm absorption determines progress in accession talks.<sup>61</sup>

Lacking such accession perspective, the EU association agreements currently negotiated with ENP countries like Ukraine aim at establishing a “deep and comprehensive free trade area with a view to providing for [their] gradual integration... into the EU’s internal market”,<sup>62</sup> based on their alignment with parts of the EU acquis. What however transpires from the ongoing negotiations is that the EU norm projection towards Ukraine is not going to be as “deep and comprehensive” as the one envisaged in the EEA. In particular, various internal market rules to be promoted through the agreement are likely, as in the case of SAAs, only to be covered by a “best endeavour” clause, the incentive for norm absorption being essentially improved EU market access. Indeed, the initial Communication on the establishment of the ENP only foresees the vague prospect of a “stake in the internal market” for the states concerned,<sup>63</sup> that falls short of full participation.<sup>64</sup> To be sure, while the EEA has occasionally been

60 As pre-accession tools, the Stabilisation and Association Agreements (SAA) with the Western Balkan countries call for gradual approximation to the acquis, and notably the “fundamental elements of the Internal Market acquis as well as on other trade-related areas” (Article 69(2), SAA with Croatia). The same article however envisages “approximation” as ensuring that “existing laws and future legislation will be gradually made *compatible* with the Community acquis” (emphasis added). Indeed, the SAA legal approximation provision merely amounts to a “best endeavour” obligation rather than an obligation of result, like the EEA.

61 Blockmans S, “Western Balkans (Albania, Bosnia-Herzegovia, Croatia, Macedonia, and Serbia and Montenegro, including Kosovo)” in Blockmans S and Lazowski A (eds), *The European Union and its Neighbours* (The Hague: TMC Asser Press, 2006) 315 at 327ff; Blockmans S, *Tough Love: The European Union’s Relations with the Western Balkans* (The Hague: TMC Asser, 2007), esp Ch 5.

62 See e.g. pt 5, Joint Press Statement, 14th EU-Ukraine Summit (Brussels, 22 November 2010) 16691/10, PRESSE 312.

63 See e.g. Communication from the Commission to the Council and the European Parliament *Wider Europe—Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM(2003) 104, p 4.

64 The 2006 Commission Communication *Strengthening the European Neighbourhood Policy* foresees that: “In the light of their complexity and ambitiousness, deep FTAs are medium-term – and for some ENP countries even long-term – objectives. Before engaging in negotiations on deep and comprehensive FTAs, the EU needs to consider partners’ ability to implement and sustain such agreements, as well as their level of ambition. Countries will move in this direction gradually and at different speeds, but it is important to give them all the same perspective. The objective would ultimately be that our partners share a common regulatory basis and similar degree of market access”; COM(2006)726, p 5.

referred to as a model in the conception of the ENP,<sup>65</sup> the economy and administrative structures of the states concerned appear, as of now, unfit to shoulder the obligations of an EEA-like arrangement with the EU.

The scope of the EEA based norm projection is not only broader than other European association agreements. The constant updating of the EEA, through the decisions of the EEA Joint Committee to include new pieces of EU legislation, adds a *dynamism* which ensures continued homogeneity between Norwegian rules and EU rules.<sup>66</sup> Such dynamism is lacking in other association agreements,<sup>67</sup> with the notable exceptions of the Energy Community Treaty, and agreements associating i.a. Norway (as well as Iceland) to the Schengen cooperation and the Dublin Convention.<sup>68</sup> It is precisely this “lack of efficient arrangements for the take-over of new EU acquis including ECJ case-law”, that constitutes the main EU critique regarding most of its bilateral agreements with Switzerland. In the words of the Council, the current approach “does not ensure the necessary homogeneity in the parts of the internal market and of the EU policies in which Switzerland participates. This has resulted in legal uncertainty for authorities, operators and individual citizens.”<sup>69</sup> From an EU perspective, the static nature of the Swiss agreements hampers the successful projection of EU norms.

*Institutionally*, the EEA comprises specific bodies of decision-making, compliance control and enforcement, notably the EEA Joint Committee, the EFTA Surveillance Authority (ESA) and the EFTA Court, a complex set-up with no equivalent in the EU web of external relations.<sup>70</sup>

65 See 2.2.3, below.

66 Further: Sejersted F, “Between Sovereignty and Supranationalism in the EEA Context”, in Müller-Graff PC and Selvig E (eds), *The European Economic Area – Norway’s Basic Status in the Legal Construction of Europe* (Berlin: Berlin Verlag A Spitz, 1997) 43.

67 Admittedly, there is a degree of dynamism in most association agreements, thanks to the decision-making power of the association councils established by these agreements. However, this kind of dynamism fundamentally differs from that of the EEA in that it does not stem from an obligation of homogeneity based on the systematic updating of the agreement in the light of EU legislative developments. Further on e.g. dynamism in the context of the Ankara agreement, see Maresceau M, *Bilateral agreements concluded by the European Community* (Leiden/Boston: Martinus Nijhoff Publishers, 2006).

68 See section 1.2.3, below.

69 2010 Council Conclusions, para 48.

70 M. Cremona, “The ‘dynamic and homogeneous’ EEA: Byzantine structures and various geometry” (1994) 19 *European Law Review* 508.

Admittedly, association agreements establish association councils and committees like the EEA Council and the EEA Joint Committee. However, their functions and decision-making powers differ substantially. First, while both EEA institutions (Council and Joint Committee) have been granted decision-making powers, this is normally limited, under most association agreements with other European states, to association *councils* only. Second, the decision-making power of the EEA Joint Committee is more far-reaching, endowed as it is with the responsibility to amend the agreement itself.<sup>71</sup> In contrast, the decision-making power of bodies established by other association agreements tends essentially to concern the administration of the agreement and dispute settlement.<sup>72</sup> While they may progressively develop the relationship by way of binding decisions where the agreement so provides,<sup>73</sup> they generally do not have the power to update the latter's provisions, in the same systematic fashion as envisaged in the EEA context.<sup>74</sup>

Moreover, contrary to the EEA Joint Committee, the two other key institutions of the EEA machinery, ESA and the EFTA Court, do not find any equivalents in the EU system of external relations. Formally, these two bodies are not part of this system, as they are established by an agreement concluded among the EFTA members themselves.<sup>75</sup> Yet it is the EEA agree-

ment, particularly Article 108, which obliges EFTA states to set up an independent surveillance authority and a Court of Justice to ensure the proper implementation of the EEA agreement.

Formalities aside, suffice to say that no other association agreement is supported by such a mandatory surveillance system. While ESA and the EFTA Court are formally independent, their functions are nevertheless determined by the principle of homogeneity which governs the EEA. Hence, Article 109 EEA stipulates that ESA and the Commission shall cooperate, exchange information and consult each other with a view to ensuring a uniform surveillance throughout the EEA. More generally, Article 6 EEA foresees notably that substantially identical provisions in the EC Treaty and the EEA agreement shall be interpreted in conformity with relevant rulings of the Court of Justice of the EC.<sup>76</sup> In the same vein, the EFTA states have, in the agreement establishing ESA and the EFTA Court,<sup>77</sup> decided that "due account" shall be paid to the principles laid down by the relevant rulings of the ECJ,<sup>78</sup> including those given *after* the date of signature of the EEA agreement.<sup>79</sup>

The requirement for uniform interpretation is further underpinned by Article 34 of that agreement which allows the EFTA Court to give "advisory opinions on the interpretation of the EEA Agreement" to national courts that so wish. In this context, the EFTA Court

71 In this sense, Article 98 EEA states that "The Annexes to this Agreement and Protocols 1 to 7, 9 to 11, 19 to 27, 30 to 32, 37, 39, 41 and 47, as appropriate, may be amended by a decision of the EEA Joint Committee in accordance with Articles 93 (2), 99, 100, 102 and 103."

72 e.g. Article 25 Ankara Agreement; Article 110 SAA Croatia. In the case of Switzerland, some 27 Joint Committees have been established to administer the agreements and perform tasks related to dispute settlement (Tobler C, Hardenbol J and Mellár B, *Internal market beyond the EU: EEA and Switzerland* (2010) Briefing paper commissioned by the European Parliament's Committee on Internal Market and Consumer Protection, p 11). A detailed analysis of their functions is provided by Lazowski A, "Switzerland" in Blockmans S and Lazowski A (eds), *The European Union and Its neighbours* (The Hague: TMC Asser Press, 2006) 147 at 157.

73 e.g. Article 40 Ankara Agreement; Article 112 SAA Croatia.

74 For instance, in the Ankara Agreement, Article 9 stipulates that the Association Council decides on the modalities of the transition to towards a Customs Union. In the same vein, the Stabilisation and Association Agreements with the Western Balkan countries endows the SAA Council with the power e.g. to extend the SAA provisions on establishment to self-employed persons (e.g. Article 49(4) SAA Croatia). Some of the EU-Switzerland Committees have the power to introduce technical adaptation to the agreement; e.g. Article 18 of the Agreement on the Free Movement of Persons (OJ 2002 L114/6).

75 For a fuller account of the functions of these bodies, see Norberg S, Hökborg K, Johansson M, Eliasson D and Dedichen L, *EEA Law: A Commentary on the EEA Agreement* (Stockholm: Fritzes, 1993), Forman J, "The EEA agreement five years on: dynamic

homogeneity in practice and its implementation by the two EEA courts" (1999) *Common Market Law Review* 751 at 760.

76 The Court notably pointed out the limits to homogeneity through Article 6 EEA; Opinion 1/91 *EEA (I)* [1991] ECR I-6079, paras 28-29. See, however, Brandtner B, "The 'Drama' of the EEA – Comments on Opinions 1/91 and 1/92" (1992) *European Journal of International Law* 300 at 322.

77 Agreement between the EFTA states on the establishment of a Surveillance Authority and a Court of Justice, OJ 1994 L 344/3.

78 Mention should also be made of Article 105 EEA which requires the EEA Joint Committee to keep under constant review the development of the case law of the ECJ and EFTA Court and to act so as to preserve the homogeneous interpretation of the agreement (a duty interpreted in the *Procès verbal agréé ad Article 105 EEA*, as meaning that decisions taken by the EEA Joint Committee under Article 105 are not to affect the case law of the European Court of Justice).

79 Article 3 (2) of the Agreement between the EFTA states on the establishment of a Surveillance Authority and a Court of Justice, OJ 1994 L 344/3. The Court of Justice and the EFTA Court have indeed recognised the need to ensure that the rules of the EEA Agreement that are identical in substance to those of the EC Treaty are interpreted uniformly: see e.g. ECJ judgment in Case C-471/04 *Keller Holding* [2006] ECR I-2107, para 48 (and the case-law cited); Case C-345/05 *Commission v Portugal* [2006] ECR I-10633, para 40, and EFTA Court judgment in Case E-1/03 *EFTA Surveillance Authority v Iceland* [2003] EFTA Court Report 143, para 27).

has proven to “play the homogeneity game”,<sup>80</sup> going a long way in introducing key principles of EU law into the EEA legal order,<sup>81</sup> a contribution to homogeneity subsequently acknowledged by the European Court of Justice.<sup>82</sup>

Given the strong legal and institutional tools established to ensure homogeneity, the EEA is, from an EU point of view, a nearly perfect tool of norm projection. The only provision that may hamper the export of EU standards is the right of reservation, contained in article 102 (5) EEA. However, the barrier for using this possibility of the EEA EFTA states to refuse to implement EEA relevant *acquis* is high, and the provisions have thus far never been tested in practice.<sup>83</sup> Indeed, the said provisions have been compared to an atomic bomb, which from an EEA EFTA point of view “might be effective” but “not very beneficial for anyone”.<sup>84</sup>

### 1.2.3. Association beyond the EEA

In view of the substantive and institutional provisions of the EEA agreement, the latter would in itself be sufficient to turn Norway into the most integrated outsider. Yet, alongside the EEA, with its highly sophisticated system for EU standards projection, the Union has ensured an even broader norm export to Norway through the conclusion of a series of other agreements, covering issues not defined as being part of the inter-

80 Further: Graver H P, “Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement” (2002) 7 *European Foreign Affairs Review* 73; Forman J, “The EEA agreement five years on: dynamic homogeneity in practice and its implementation by the two EEA courts” (1999) *Common Market Law Review* 751; Fredriksen H H, “One Market, To Court: Legal Pluralism vs. Homogeneity in the European Economic Area” (2010) 79 *Nordic Journal of International Law* 481; Gallo D, “From Autonomy to Full Deference in the Relationship between the EFTA Court and the ECJ: The Case of the International Exhaustion of the Rights Conferred by a Trademark” (2010) EUI Working Papers – RSCAS 2010/78.

81 See e.g. Baudenbacher C, “The EFTA Court Ten Years On” in Baudenbacher C, Tresselt P and Örlgysson (eds) *The EFTA Court – Ten Years On* (Oxford: Hart Publishing, 2005) 13.

82 Bronckers M, “The relationship of the EC courts with other international tribunals: Non-committal, respectful or submissive?” (2007) 44 *Common Market Law Review* 601 at 605; Fredriksen H H, “The EFTA Court 15 Years on” (2010) 59 *International and Comparative Law Quarterly* 731.

83 The third postal directive (2008/6/EC) may become the first test case, following the decision, on 10 April 2011, of the Norwegian Labour Party’s National Convention not to implement the said directive.

84 Bergmann E, “Iceland and the EEA agreement 1994-2010” (2010) *Report for the Norwegian Review of the EEA*, p 20.

nal market, but related to other areas of competence of the EU. The most integrating of these agreements are those associating Norway to cooperation in the old third pillar, Justice and Home Affairs.

As with the EEA agreement, the EU/C-Norway Schengen agreement purports to establish an “association” which extends the application of EU standards beyond its borders.<sup>85</sup> However, unlike the EEA, there is no joint decision-making body to implement Schengen measures in Norway. Rather, Norway (and Iceland) is “bound to carry out the Council’s decisions and measures in the areas covered by the agreement”.<sup>86</sup> Should Norway refuse to accept and implement the content of the Schengen relevant measures adopted by the Council, the agreement can be terminated.<sup>87</sup> Like the right of reservation in the EEA framework, this clause, by some labelled a “guillotine clause”<sup>88</sup> has thus far deterred Norway from taking steps which would threaten homogeneity in the Schengen area. As noted by Wichmann, “the adaptation pressure which arises from the potential activation of the guillotine clause is very strong”.<sup>89</sup>

The Union’s interest in guaranteeing *continuous* homogeneity also in this area is guaranteed through a specific mechanism to ensure that new developments in the *acquis* are mirrored also in Norway. Indeed, the EU-Norway Schengen agreement promotes such dynamism by stating that “the Mixed Committee shall keep under constant review the development of the case law of the Court of Justice ... , as well as the development of the case law of the competent courts of Iceland and Norway relating to such provisions...”.<sup>90</sup>

85 Article 2 of the Schengen agreement states the Schengen *acquis* “shall be implemented and applied by Iceland and Norway”.

86 Kuijper P J, “Some legal problems associated with the communitarization of policy on visas, asylum and immigration under the Amsterdam Treaty and incorporation of the Schengen *acquis*” (2000) 37 *Common Market Law Review* 345 at 351.

87 See Arts 8(4), 10(2), 11 of the Schengen agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter’s association with the implementation, application and development of the Schengen *acquis* (OJ 1999 L176/36).

88 Wichmann N, “The participation of the Schengen associates: Inside or outside” (2006) 11 *European Foreign Affairs Review* 87 at 102. This clause has also been referred to as the “blackmail clause”, see: Lazowski A, “EEA Countries (Iceland, Liechtenstein and Norway)” in Blockmans S and Lazowski A (eds), *The European Union and Its neighbours* (The Hague: TMC Asser Press, 2006) 142.

89 Wichmann N, “The participation of the Schengen associates: Inside or outside” (2006) 11 *European Foreign Affairs Review* 87 at 102.

90 Article 9 of the Schengen Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter’s association with the

An identical provision is included in the agreement on Norway's implementation of the Dublin Convention, on cooperation in the field of asylum.<sup>91</sup>

Contrary to internal market rules (through the EEA), however, the implementation of Schengen law in Norway is not aided by a system of preliminary reference, nor is there any equivalent of the ESA or the EFTA Court envisioned for surveillance purposes. In institutional terms therefore, the Schengen association bears more resemblance to other association agreements, which in turn illustrates the unique nature of the EEA agreement.

The Schengen and the Dublin arrangements are the two most important instruments of EU norm projection in the field of Justice and Home Affairs. Several additional agreements have also been concluded, some of which extend the application of EU norms and principles to Norway, such as the principle of mutual recognition. Hence, the New Lugano Convention extends the application of Regulation 44/2001 and its principle of free movement of judgments in civil and commercial matters,<sup>92</sup> based on the mutual recognition of national Courts' decisions.<sup>93</sup>

The highly developed EU-Norway relations established by the EEA and various agreements in the field of Justice and Home Affairs, is supplemented by broad

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implementation, application and development of the Schengen acquis.

91 Article 6 of the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway (OJ 2001 L93/40).

92 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2009 L 147/5).

93 The web of EU-Norway cooperation in the area of Justice and Home Affairs also includes the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto (OJ L 2004 L26/3), the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (OJ 2006 L292); the Agreement between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ 2009 L353/3) and agreements with various EU agencies: Frontex (2007) Cepol (2006), Eurojust (2005), Europol (2001).

cooperation in the Common Foreign and Security Policy (CFSP). Norm projection in this area is however not a matter of a transfer of EU standards to Norway. Rather it is geared towards the promotion of a European foreign policy, led by the EU.<sup>94</sup> As pointed out in the 2010 Council Conclusions, the Norwegian contribution to the CFSP and the European Security and Defence Policy (ESDP, renamed Common Security and Defence Policy – CSDP - in the Lisbon Treaty) has been substantial,<sup>95</sup> indeed occasionally more significant than that of some EU Member States.<sup>96</sup>

Indeed, Norway's cooperation in this area is of particular interest for the Union. First, and as recalled in the Council conclusions, "its international activities can give additional and valuable support to EU actions".<sup>97</sup> Norway is thus seen as an important reinforcement of the EU voice on the international scene. Indeed, Oslo has regularly aligned its positions with EU CFSP Statements, as well as with several Council Decisions, notably in the field of sanctions, thereby agreeing that its national policies would conform to those EU Decisions.<sup>98</sup>

Second, Norway constitutes a key partner as non-EU European NATO member, particularly in all ESDP missions that involve NATO assets and capabilities.<sup>99</sup>

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94 It should be recalled that a political dialogue also takes place in the context of the EEA.

95 The Council notably points out Norway's participation in EUPOL Afghanistan, EULEX Kosovo, Atalanta and in the "Nordic Battle Group", as well as its cooperation with the European Defence Agency; 2010 Council Conclusions, para 27. A full list of arrangements between the EU and Norway in the CFSP and CSDP areas can be found at:

[www.consilium.europa.eu/App/accords/Default.aspx?command=searchResult&id=297&partyId=NO&doclang=EN&clang=EN](http://www.consilium.europa.eu/App/accords/Default.aspx?command=searchResult&id=297&partyId=NO&doclang=EN&clang=EN)

96 Törö C, "External State Partners in ESDP: Third Country Participation in EU Crisis Management" (2010) *European Foreign Affairs Review* 325.

97 2010 Council Conclusions, para 27.

98 See for instance: Declaration by the High Representative on behalf of the European Union on the alignment of certain third countries with the Council Decision 2011/221/CFSP amending Decision 2010/656/CFSP renewing the restrictive measures against Côte d'Ivoire and Council Decision 2011/230/CFSP (28 April 2011); Declaration by the High Representative on behalf of the European Union on the alignment of certain third countries with the Council Implementing Decision 2011/236/CFSP implementing Council Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya (28 April 2011); Declaration by the High Representative on behalf of the European Union on the alignment of certain third countries with the Council Decision 2011/235/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Iran (28 April 2011).

99 Helsinki Presidency Conclusions, Annex I of Annex IV, December 1999; Nice Presidency Conclusions, Annex VI, December 2000.

It is in this context that an agreement was concluded, establishing a framework for the participation of Norway in the European Union crisis management operations,<sup>100</sup> the first EU agreement of such kind completed with a non-EU NATO member.<sup>101</sup>

#### 1.2.4. Conclusion

Summing up, the answer to the question in this chapter's headline – What's in it for the EU? – relates principally to the desire to export EU standards notably to the immediate vicinity of the Union. In this, EU-Norway relations clearly fulfil the Union's ambitions encapsulated in the new Article 8 TEU. It also relates to the strengthening of EU policies internally (e.g. through Norway's contribution to solidarity) and externally (Norway's contribution to ESDP and CFSP). These interests, coupled with Norway's wish for close cooperation with the EU, have led to a series of arrangements which, taken together, have turned Norway into the most integrated outsider. Indeed, bearing in mind the highly successful projection of EU acquis to Norway, as outlined above, coupled with one of the highest level of external contributions, one may wonder whether it is at all possible for Norway to become more integrated without actually acceding to the Union.

Still, the 2010 Council Conclusions state that relations with the EFTA countries should be "deepen(ed) in the future", begging the question of what this could mean in practical terms. In relation to Switzerland, the notion of deepening might point towards a more tidy and coherent formula of relationship, as the current bilateral sectoral approach is seen as "creating legal uncertainty", and considered to have "become unwieldy to manage" and to have "clearly reached its limits".<sup>102</sup> For Iceland, the notion of deepening is intertwined with the current accession process, however bumpy it may be in view of an EU-sceptic Icelandic population and the enlargement-weary politicians in many EU Member States. For Norway and Liechtenstein however, the

100 Agreement between the European Union and the Kingdom of Norway establishing a framework for the participation of the Kingdom of Norway in the European Union crisis management operations; OJ 2005 L67/8.

101 Further: Törö C, "External State Partners in ESDP: Third Country Participation in EU Crisis Management" (2010) *European Foreign Affairs Review* 325; Sari A, "the conclusion of international agreements by the EU in the context of ESDP" (2008) 57 *International and Comparative Law Quarterly* 53; Emerson M, Vahl M and Woolcock S, *Navigating by the Stars – Norway, the European Economic Area and the European Union* (Bruxelles: CEPS, 2002) 93. 102 2010 Council Conclusions, para 48.

call for deepening is somewhat less evident to comprehend, particularly in view of "the privileged partnership that [already] exists between the EU and Norway".<sup>103</sup> Does it merely refer to the continuous absorption by Norway of the new EEA relevant acquis? Or does it relate to a possible revision of the current arrangement? Certainly, several factors might push for such reform, as shall be seen below.

## 2. Towards a revised EU-Norway arrangement?

Inspired by the ongoing reviews of the functioning of the EEA agreement in both Norway and Liechtenstein, the 2010 Council Conclusions encourage "a parallel process on the EU side [...] taking into account that EU-EEA EFTA relations have developed over the past 15 years in depth and in scope both within the framework of the EEA Agreement and beyond." The rationale of such a review would be to examine "whether the *EU interest* is properly served by the existing framework of relations" (emphasis added). The key elements of such "EU interest" are spelled out as follows: "... the continued homogeneity of the applicable legislation throughout the European Economic Area must be ensured, with particular emphasis in avoiding gaps in the acquis across the EEA".

Already at this early stage, the Council gives a certain direction to the upcoming review, by asking, rather rhetorically, whether the Union's interest would be better served by "a more comprehensive approach, encompassing all fields of cooperation and ensuring a horizontal coherence". The review is set to deal i.a. with the substantial challenges facing the existing arrangement, notably by "taking into account possible developments in the membership of the EEA".<sup>104</sup>

This section elaborates on the factors which, from an EU perspective, may call for adjustments of current contractual relations. These factors, alluded to in the 2010 Conclusions, may be regrouped under two headings: EU Treaty reforms and their potentially negative impact on EEA homogeneity (2.1), the development of EEA membership and changes in EU relations with other neighbours (2.2). It also examines the legal possibilities that exist, post-Lisbon, for a "comprehensive approach" (2.3).

103 2010 Council Conclusions, para 32.

104 2010 Council Conclusions paras 34-36. The Conclusions also call for a review of "the technical functioning of the Agreement".

## 2.1. EU Treaty reforms

Since the EEA was established, EU treaties have been revised several times, whereas the EEA agreement, as such, has not. The widening legal and teleological *décalage* that has allegedly ensued, between the EU and the EEA,<sup>105</sup> has regularly raised questions about its impact on the latter's functioning.<sup>106</sup> It has indeed been suggested that "the EEA is eroded a little bit every time treaty amendments in the EU take effect in influencing corresponding rules of the Community",<sup>107</sup> and that, as a consequence, the "EEA internal market law is not necessarily quite the same as EU internal market law".<sup>108</sup> This question of the (possibly negative) implications of EU Treaty revisions for the EEA, and notably on the homogeneity of the EU inspired legal area, has again come to the fore in the context of the entry into force of the Lisbon Treaty, particularly in view of the far-reaching reform it introduces to the structure of the Union, and to the way it operates as norm setting entity.

Improving the coherence of the EU's action was, alongside the enhancement of the efficiency and the democratic legitimacy of the Union, the main objective of the Treaty revision leading to the Treaty of Lisbon.<sup>109</sup> The lack of such coherence had for long been regarded as limiting the EU's ability to act forcefully on the international stage. The main impediment was seen to derive from the division of the activities of the Union into "pillars", the European Community with its traditional "méthode communautaire" and the two more intergovernmental (EU) pillars of Justice and Home Affairs ("third pillar", renamed Police and Judicial Cooperation in Criminal Matters after Amsterdam) and the Common Foreign and Security Policy ("second pillar").

This constitutional differentiation segmented the policy-making within the EU, a segmentation scrupu-

105 It should be recalled that the gap was found by the European Court of Justice to be inherent to the EEA arrangement. See Opinion 1/91 *EEA (I)* [1991] ECR I-6079; and Opinion 1/92 *EEA (II)* [1992] ECR I-2821.

106 See for instance, contributions in Müller-Graff PC and Selvig E (eds), *The European Economic Area – Norway's Basic Status in the Legal Construction of Europe* (Berlin: Berlin Verlag A Spitz, 1997); Eliassen K A and Nick Sitter N, "Ever Closer Cooperation? The Limits of the 'Norwegian Method' of European Integration" 26 *Scandinavian Political Studies* 125.

107 Graver H P, "Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement" (2002) 7 *European Foreign Affairs Review* 73 at 86.

108 Bull H, "Mixity Seen from Outside the EU but Inside the Internal Market" (Oxford: Hart Publishing, 2010) 320 at 328.

109 See Preamble of Lisbon Treaty; and the IGC Mandate of 2007 (Doc 11218/07; 26 June 2007), pt 1.

lously guarded by the European Court of Justice.<sup>110</sup> The distinction between the EC and the EU also had direct ramifications as regards the international posture of the Union. Hence, the EC concluded international agreements in the fields covered by the EC Treaty (if needed in tandem with the Member States), while the EU would conclude agreements in the areas relating to the second and/or third pillars, even if some international negotiations would straddle the substantive scope of the respective EU pillars, the Schengen agreement with Norway being a case in point.<sup>111</sup>

The revised TEU merges the hitherto distinct legal personalities of the European Community and the European Union, and triggers a convergence of separate sets of policy-making powers. Thus, post-Lisbon, a single EU legislation might more systematically cover both former EC areas and e.g. former third pillar elements, in a manner which was more difficult, if not unlawful, under the pre-Lisbon dispensation.<sup>112</sup> In the same vein, the combination of market and security objectives, as epitomised by the contentious Data Retention Directive,<sup>113</sup> may well become more common post-Lisbon.

110 Case C-170/96 *Commission v Council* [1998] ECR I-2763; Case C-176/03 *Commission v Council* ('Environmental sanctions') [2005] ECR I-7879; Case C-440/05 *Commission v Council* ('Ship-source pollution') [2007] ECR I-9097; Joined Cases C-317/04 and C-318/04 *Parliament v Council* (PNR) [2006] ECR I-4721; Case C-91/05 *Commission v Council* ('ECOWAS') [2008] ECR-3651.

111 See e.g. Wessel R A, "Cross-pillar Mixity: Combining Competences in the Conclusion of EU International Agreements" in Hillion C and Koutrakos P (eds) *Mixed Agreements Revisited – The EU and its Member States in the World* (Oxford: Hart Publishing, 2010) 30.

112 In the *Ship-source pollution* case (C-440/05), the Court annulled the Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (2005/667/JHA (of 12 July 2005) on the ground that by adopting the measure in the context of the third pillar (PJCCM), the Council encroached upon the EC competence in the area of maritime safety. The Court nevertheless found that some aspects of the decision that related to the type and level of the applicable criminal penalties could not be adopted by the Community; it lacked the relevant competence, which by contrast the EU had in the context of the third pillar. In other words, some aspects of the measure had to be decided by the Community under EC law, whereas others had to be determined by the EU, under the then Title VI TEU. In the post-Lisbon dispensation, such a Framework Decision could be lawfully adopted as a single EU instrument.

113 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC; OJ 2006 L105/54.

While the old pillar structure of the EU has been, to some extent at least, deconstructed,<sup>114</sup> EU-Norway relations remain founded on the old Treaty set-up, based as it is on agreements that were concluded by the EC (sometimes with Member States, like the EEA) or the EU, and covering distinct fields of EU competence. In other words, the structure of EU-Norway relations has been greatly determined by the fragmented external capacity of the EU.

Although the replacement of the Community by the Union does not in itself entail a change in the EEA functioning,<sup>115</sup> the defragmented system within which it is now set to operate entails that the EU is more enabled to pursue several intertwined policy objectives within the same all-encompassing instruments. Hence post-Lisbon, the traditional distinction between the EC and other pillars as de facto indicator of possible “EEA relevance” has vanished. The determination of what pieces of EU legislation should be incorporated into the EEA agreement might thus become less predictable, and more contentions for the EFTA states. For the EU, the main concern is that this uncertainty may hamper the homogenous implementation of new norms within the EEA. First, long discussions about EEA relevance on the EFTA side may lead to additional delays in the implementation of the *acquis*. Second, the EFTA states may be prone to adopt a “pick and choose” approach – a policy of selective incorporation of new EU legislation – whereby they acknowledge the EEA relevance of only parts of a legislative measure,<sup>116</sup> insofar as the latter are severable.

The tension is thus growing, post-Lisbon, between the stronger EU coherence imperative, possibly lead-

114 The new constitutional dispensation maintains the distinction between the CFSP (including the CSDP) on the one hand, and other areas of EU competence on the other; as indicated by Article 2(4) TFEU, and Article 40 TEU. Further on this point, see eg: Dashwood A, “Mixture in the era of the Treaty of Lisbon” in Hillion C and Koutrakos (eds) *Mixed Agreements Revisited – The European Union and its Member States in the World* (Oxford: Hart Publishing, 2010) 351

115 See “The Treaty of Lisbon – Implications for the EEA”, Standing Committee of the EFTA States, Sub-Committee V on Legal and Institutional Questions (24 October 2008); also Trzaskowski R, “EEE-Suisse: obstacles à la pleine mise en oeuvre du marché intérieur”; Rapport de la Commission du marché intérieur et de la protection des consommateurs, A7-0216/2010 Parlement Européen (29 June 2010), pt 4.

116 Note that, beyond the issue of EEA relevance of new EU legislation, homogeneity might also be affected by the discrepancy between the increasing use, by the EU, of alternative regulatory instruments, and the remaining classical law based approach of the EEA. See in this sense: Report on Future Perspectives for the European Economic Area (2008) *EEA Joint Parliamentary Committee*, Brussels (29 October 2008).

ing to more all-encompassing policy making notably with respect to the internal market, and the EEA EFTA States’ interest in a predictable notion of “EEA relevance”, whose (de)limitation is the guarantee of their autonomy. The need for a workable articulation between these two interests is therefore one of the main incentives to revise the current EU-Norway arrangement.

Alongside the desire to render the *substance* of EU external action more coherent, the Lisbon Treaty also translates a willingness on the part of the Member States to *streamline* its *institutional* structure. Thus, the post of High Representative for Foreign Affairs and Security Policy/Vice President of the Commission has been created, merging the former posts of the External Relations Commissioner and the High Representative for the CFSP, heading the newly established European External Action Service, in charge of the management of the Union’s external relations.<sup>117</sup>

In line with the internal institutional streamlining, the establishment of the HR/VP and the EEAS provides an occasion for the EU to have a fresh look at current external arrangements, notably with the aim of rationalising and optimising its participation and representation in institutional frameworks such as the EEA JC and Council.<sup>118</sup> It has indeed been suggested that the current EEA institutional machinery is too formal and cumbersome, notably in view of its actual functions in the administration of the agreement.

117 In administrative terms, the EU policy towards EEA countries in general, and towards Norway in particular, is now primarily dealt with by the “Western Europe” unit under Managing Directorate “Europe and Central Asia” in the EEAS. However, the Commission retains responsibilities in various fields of external relations, particularly as regards the external dimension of EU internal policies. The Council Secretariat General too keeps a role in relation to Norway, notably through its “Directorate 2 – Enlargement, Europe (non-EU), Foreign Affairs, Council Support” and more specifically its “Unit 2A – Enlargement, Europe (non-EU)”.

118 Note that the EU representation in EEA structures has already been downscaled over the years, particularly in the EEA Council.

## 2.2. Changes in EEA membership and EU relations with other neighbours

Particularly in view of the streamlining spirit and the quest for coherence of the EU policies post-Lisbon, the Union's approach to Norway cannot evolve isolated from its relations with other third (European) countries. Three processes are currently susceptible to lead to a call for changes in, or touch upon the EU arrangement with Norway in general, and the EEA in particular, especially if these processes are taken together: The accession process of Iceland to the EU (2.2.1), the call for a revision in the EU relations with Switzerland and with European microstates (2.2.2), and the evolving EU relations with other European neighbours, notably the countries covered by the European Neighbourhood Policy (2.2.3).

### 2.2.1. Iceland's accession process

Iceland has started negotiating with the EU Member States with a view to joining the Union. Should an accession treaty be successfully ratified, Iceland would thereby become the fourth EEA EFTA state to "move across to the Union".<sup>119</sup> While previous shifts from the EFTA pillar to the EU pillar of the EEA have not led to questioning the *raison d'être* of the Agreement,<sup>120</sup> Iceland's accession to the EU might be more challenging. In effect, the number of EEA EFTA states would be reduced to two, one of which is a microstate that partly has to rely on the administrative resources of Switzerland to handle its EEA membership.<sup>121</sup>

Various institutional aspects of the EEA might warrant particular attention should Iceland leave the EFTA pillar. In particular, the composition of ESA and of the EFTA Court would have to be revised. As regards the Court specifically, Article 29 of the EFTA Court Agreement requires a quorum of at least three judges for it to take decisions; the Icelandic judge would thus have to be replaced. As regards the nationality of the "complementary" judge, Article 28 of the same Agreement does not prohibit the appointment of two judges of the same country – it could therefore be another Norwegian national; but it also suggests that the new judge would not necessarily have to be a citizen of an EFTA state.

119 On previous "move[s] across to the Union" and their implications see Forman J, "The EEA agreement five years on: dynamic homogeneity in practice and its implementation by the two EEA courts" (1999) *Common Market Law Review* 751 at 754.

120 Ibid.

121 Including at the EFTA Court.

The EU does not have a formal role in this exercise, given that both ESA and the EFTA Court are established by an agreement concluded by the EFTA states. However, given the umbilical cord between these institutions, the EEA Agreement and the latter's functioning, the Union would undoubtedly have an interest in ensuring that whatever the outcome, it fully preserves the ability of the EEA EFTA institutions to guarantee homogeneity.

To be sure, as the Union already considers that the present institutional framework needs simplification and streamlining, a shrinking EFTA pillar would further accentuate the EU eagerness to rationalise its engagement in EEA structures. Indeed, an ESA and EFTA Court that would be essentially composed of Norwegians might make the whole institutional framework look fairly artificial, if not awkward. In effect, the ESA and EFTA Court agreements would appear to be agreements of Norwegians for Norwegians (and some Liechtensteiner...).

Conversely, an *increase* in EEA EFTA membership could consolidate the agreement's added value for the EU, particularly in the perspective of its post Lisbon neighbourhood policy. In this regard, the EU appears to have an interest in a possible Swiss EEA membership. It also intends to carve out a new formula for its relations with European microstates to ensure their integration in the internal market; while mooted the idea of connecting the ENP neighbourhood with the EEA.

### 2.2.2. Internal market expansion to Switzerland and European microstates

As regards Switzerland, the 2010 Council Conclusions are clear:<sup>122</sup> the Union is unsatisfied with the current arrangement, based on a complex web of sectoral agreements. In "full respect of the Swiss sovereignty and choices," the Council concludes that there is a need to move beyond the current system of bilateral agreements. The remedies hinted at by the Council bears a strong resemblance to the EEA: "... horizontal issues related to the dynamic adaptation of agreements to the evolving *acquis*, the homogeneous interpretation of the agreements, an independent surveillance and judicial enforcement mechanisms and a dispute

122 The 2008 Conclusions were equally clear in this respect, see para 31.

settlement mechanism need to be reflected in EU-Switzerland agreements.”<sup>123</sup>

The accession of Switzerland to the EEA would arguably provide the solution to the deficiencies in EU-Swiss relations, pointed out notably by the Council. Indeed, as of now and as EFTA state, it is the only non-EU country eligible for EEA membership.<sup>124</sup> However desirable for the EU, and logical from an EU law point of view, it nevertheless remains unlikely that Switzerland's accession to the EEA will be supported by the Swiss themselves.<sup>125</sup> It has thus been suggested that one may end up with a “tailored version of the EEA”,<sup>126</sup> the details of which would have to be worked out.

As in the case of relations with Switzerland, the fragmented nature of the EU agreements with European “microstates”, particularly Monaco, San Marino and Andorra is of concern to the Union.<sup>127</sup> Sign of the perceived connection between the EEA and these states, the 2010 Council Conclusions on EU relations with EFTA countries include various paragraphs on the EU links with those “European countries of small territorial dimension”. The Conclusions notably point out that relations with these countries should be geared towards their “progressive integration into the internal market”. Here too, the main EU interest is norm projection, and homogeneity of the EU-inspired legal area, and ultimately the safeguarding of the internal market *acquis*.

Remarkably, the 2010 Council Conclusions are silent on the question of whether this “integration” should – and could – be done through EEA membership.<sup>128</sup> Instead, they merely evoke an “analysis of the possibilities

123 2010 Council Conclusions, para 48.

124 Article 128 EEA.

125 Tobler C, Hardenbol J and Mellár B, *Internal market beyond the EU: EEA and Switzerland* (2010) Briefing paper commissioned by the European Parliament's Committee on Internal Market and Consumer Protection; p 38.

126 See “EU-Switzerland relations”, *Euractiv*, 18 January 2011 : [www.euractiv.com/en/global-europe/eu-switzerland-relations-linksdosier-500466](http://www.euractiv.com/en/global-europe/eu-switzerland-relations-linksdosier-500466)

127 Further: Maresceau M, “The relations between the EU and Andorra, San Marino and Monaco” in Dashwood A & M Maresceau M (eds), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press, 2008) 270; Dozsa D, “EU Relations with European Micro-States. Happily Ever After?” (2008) *European Law Journal* 93.

128 It is all the more remarkable that both San Marino and Andorra have in recent years expressed interest in joining the EEA. See “Vil ha flere ministater i EØS”, [www.dn.no](http://www.dn.no) 25.04.2009 and “Dette kan bli vår nye EØS-partner”, [www.E24.no](http://www.E24.no) 22.07.2009.

and modalities of their possible progressive integration into the internal market”. Given the economic profile of those states, the EEA could in principle be an option as it has been for their fellow microstate Liechtenstein, though in order to join the EEA (without becoming EU members), these states would first have to become members of EFTA.<sup>129</sup>

From an EU perspective, an inclusion of the microstates in the EEA would be logical given the latter's well tested mechanisms to ensure homogeneity. However, it could be argued that this option would be even more interesting if coupled with institutional reforms in the EEA itself, the reason being that under the current regime, an enlargement of the EEA EFTA group might render the decision-making even more cumbersome and time-consuming (notably the establishment of a “single EFTA voice” in the EEA Joint Committee). The result could thus be further delays in the implementation of EU *acquis* in the EFTA states.<sup>130</sup>

### 2.2.3. Economic integration under the European Neighbourhood Policy

In addition to the above possible developments in the EEA membership, it should be noted that the EEA *model* has been regularly evoked in EU policy papers on the European Neighbourhood Policy, since the latter's inception. Hence, then Commission President Prodi's seminal speech on the “EU proximity policy”, considered that: “it is worth seeing what we could learn from the way the EEA was set up and then using this experience as a model for integrated relations with our neighbours.”<sup>131</sup> Subsequent Commission's communications go further in establishing the connection by presenting the EEA model as a long-term *objective* of the neighbourhood policy.<sup>132</sup> The same holds true

129 Art 128 EEA. Some of these states have indeed approached EFTA countries to sound their admissibility.

130 Moreover, EEA membership would be demanding notably in terms of administrative resources which microstates might have difficulties to shoulder, as illustrated by Liechtenstein's experience. See Murray F, “Micro States (Andorra, Monaco, San Marino, and the Vatican City)” in Blockmans S and Lazowski A (eds), *The European Union and its Neighbours* (The Hague: TMC Asser Press, 2006) 185 at 205.

131 Prodi R, “A Wider Europe - A Proximity Policy as the key to stability”. Sixth ECSA-World Conference. Brussels, 5-6 December 2002. SPEECH/02/619.

132 Communication from the Commission to the Council and the European Parliament, *Wider Europe—Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM(2003) 104, p 15. In the context of the current ENP Review undertaken by the Commission, the EEA is again evoked as model for carving out the economic integration envisioned in the context

for the Commission Communication on the “Eastern Partnership”.<sup>133</sup>

Thus in reminiscence of the early 1990’s discourse on EU relations with EFTA countries,<sup>134</sup> the EEA is conceived as a blueprint for the Union’s long-term “proximity” policy towards European states for which the EU does not presently envision any membership perspective.<sup>135</sup> Yet, the EEA reference does not, at this stage, bare a lot of practical implications. The ENP countries are far from having the economic, political and legal profile to be EEA members, let alone the desire to become one.<sup>136</sup> It is nonetheless a noteworthy indication of the EU policy-makers satisfaction with the EEA as an instrument for integration without membership.

### 2.3.A new comprehensive approach?

In view of the above developments, the Council has called for a review of the current arrangement in order to see whether it properly serves “the EU interest”, i.e. the “continued homogeneity” of the EEA. Two types of possible reforms are mentioned, one pertaining to the very substance of the Union’s norm projection (the need for a “more comprehensive approach”), and the other linked to the need for simplified procedures to ensure the “technical functioning of the agreement”.

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of the ENP; see SEC(2011)107.

133 Communication from the Commission to the Council and the European Parliament, *Eastern Partnership*, COM(2008)823, p 10. In an interview of 13 April 2011 to *Euractiv*, Commissioner Füle also refers to the EEA as inspiration to carve out new EU relations towards the South Mediterranean states in the aftermath of the Tunisian and Egyptian revolutions; see Štefan Füle: “EU won’t allow Arab revolutions to be ‘stolen’”; <[www.euractiv.com/en/global-europe/tefan-le-eu-wont-allow-arab-revolutions-stolen-interview-504001](http://www.euractiv.com/en/global-europe/tefan-le-eu-wont-allow-arab-revolutions-stolen-interview-504001)>

134 See e.g. Lucron C-P, “Vers l’Espace Economique Européen, l’Europe du Deuxième Cercle” (1990) 339 *Revue du Marché Commun* 527.

135 Sometimes even in relation to countries engaged in EU accession talks. See in this respect the interview Elmar Brok MEP of 29 September 2010 to *Euractiv*: “Turkey should seek Norway-type EU relationship”: <[www.euractiv.com/en/foreign-affairs/leading-mep-turkey-should-look-norway-type-eu-relationship-interview-498233](http://www.euractiv.com/en/foreign-affairs/leading-mep-turkey-should-look-norway-type-eu-relationship-interview-498233)>

136 Gould T, “The European Economic Area: a Model for the EU’s Neighbourhood Policy?” (2004) 5 *Perspectives on European Politics and Society* 17. As ENP country, Israel may be in a different position; see in this regard: Tovias A, “Exploring the ‘Pros’ and ‘Cons’ of Swiss and Norwegian Models of Relations with the European Union: What Can Israel Learn from the Experiences of these Countries?” (2006) 41 *Cooperation and Conflict* 203.

This section will focus on the possible legal avenues, post-Lisbon, for a new comprehensive approach, leaving aside the more modest technical adjustments that can be made within the current framework.<sup>137</sup>

#### 2.3.1. Towards a new agreement?

In relation to other third countries, the EU have for long strived to achieve better coherence in its norm projection through the adoption of comprehensive frameworks. Thus far however, these have been of a political, not legal, nature. Examples of such an approach include the “Common Space” formula with Russia and the ENP framework.<sup>138</sup>

However, in view of the legally advanced, highly integrating relations existing between the EU and Norway, and given the entry into force of the Lisbon Treaty, one may assume that the notion of a “comprehensive approach encompassing all fields of cooperation and ensuring a horizontal coherence” would entail more than the mere creation of an overarching *political* framework. Indeed, it is tempting to interpret the notion as a *depillarisation* of EU-Norway relations, for the purpose of strengthening homogeneity. Leaving aside its political desirability (both in the EU and Norway), how could such a depillarisation be achieved in legal terms?

It should be recalled that the EEA agreement itself foresees the possibility for the Contracting Parties to

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137 The 2010 Council Conclusions suggest to explore the possibility of “updating and simplifying some of the procedures... taking into account notably the massive technological development which ... could be of benefit in the general functioning of the EEA agreement” (para 36, 2010 Council Conclusions). Such simplification could also include fewer meetings of the EEA bodies, downscaling of EU representation, and increased use of electronic communication. Such simplified procedures have been called for notably to narrow the gap between the adoption of new internal market legislation, and its application throughout the EEA. This gap has been pointed out at several levels (see EFTA Surveillance Authority, 27th Internal Market Scoreboard of the EEA EFTA States, March 2011; EU institutions contributions to Report on Future Perspectives for the European Economic Area (2008) *EEA Joint Parliamentary Committee*, Brussels, 29 October 2008; Forman J, “The EEA agreement five years on: dynamic homogeneity in practice and its implementation by the two EEA courts” (1999) *Common Market Law Review* 751 at 752.) and has indeed been acknowledged by the EFTA Court (e.g. E-3/97 *Jaeger* [1998] EFTA Court Report p 1, para 30).

138 Cf. documents referred to under section 2.2.3. Further, see the respective chapters of Van Elsuwege P and Hillion C in Dashwood A & Marescau M (eds), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press, 2008).

widen its scope, following the procedure foreseen in Article 118 EEA, “by extending [relations]...to fields not covered” by the agreement. Given that the EEA agreement (and its Article 118) was conceived at a time when the Community alone was not in a position to *offer* comprehensive agreements, it seems unlikely that this article was intended to serve as a legal basis for extending the cooperation to other pillars. Therefore, a new agreement would arguably be needed. And, contrary to the pre-Lisbon era, it is now legally *possible* for the Union to conclude single agreements covering the whole range of EU fields of cooperation with third countries. Such an agreement would thus be capable of projecting the EU *acquis* in its entirety towards the outsider, in principle irrespective of the old pillar division.

### 2.3.2. Possible substantive legal basis

There are two potential substantive legal bases for such a comprehensive agreement, namely Article 217 TFEU on association, and Article 8 TEU on agreements with neighbouring countries.

First, the provisions on association (ex Article 310 EC) are now to be found in Article 217 TFEU. The new provision is on the whole the same, save that, as a result of the EU's absorption of the EC, it now refers to the *Union* instead of the Community. In other words, future association agreements will be concluded by the EU, and no longer by the EC. As such, they might cover fields related both to the former EC Treaty (i.e. the EEA) and former second and/or third pillars.

This is particularly true in view of the old *Demirel* jurisprudence, arguably applicable *mutatis mutandi* to the new TFEU provisions on EU association agreements. Thus, “[Article 217 TFEU] must necessarily empower the [Union] to guarantee commitments towards non-member countries in all the fields covered by the Treat[ies]”; “association” being characterised as “creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the [Union] system”.

Article 217 TFEU would thus provide a suitable legal basis for a comprehensive framework agreement, *consolidating existing privileged links, and* capable of catering for the multifaceted EU-Norway arrangement: EEA, Schengen and CFSP/CSDP.

A second possible substantive legal basis is the new Article 8 TEU. As pointed out above, this provision es-

tablishes an explicit Union power to conclude specific agreements with neighbouring countries with a view to developing “a special relationship, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation”. The provisions of this Article also stipulate that such agreements may contain reciprocal rights and obligations, as well as the possibility to undertake activities jointly.

While Article 8 TEU seemingly codifies the ENP, its wording does not exclude other neighbourhood arrangements, outside the confines of the ENP, e.g. EEA and Schengen association. Moreover, it does not include any limitation as to the scope of the relationship. It is thus conceivable that a “neighbourhood agreement” based on Article 8 TEU would cover a wide range of areas, including trade, movement of persons, and CFSP issues, all the more so given the inclusion of this Article in the Common Provisions of the TEU.

As regards its nature, the allusions to “special” and “close”, and to “joint activities” contained in Article 8 TEU are reminiscent of the features of association, as articulated by the Court of Justice. On the other hand, the allusion to “cooperation” as the basis of the relationship could point to links of a lesser intensity than association. One possibility could thus be to combine the two substantive legal bases (Article 217 TFEU and Article 8 TEU), so as to establish a comprehensive EU association agreement with neighbours, with which it intends to establish not only a close relationship based on cooperation, but specific links involving all the privileges of association.

### 2.3.3. The procedural costs

The procedural legal basis for a comprehensive agreement, i.e. the procedure for the negotiation and conclusion, is set out in Article 218 TFEU. The course of action for concluding association agreements has not been affected by the Lisbon Treaty, in that Article 218 (8) TFEU foresees that the Council should act unanimously, while paragraph 6 (a)(i) recalls that the European Parliament has to consent.

Should the EU opt for Article 8 TEU as an alternative substantive legal basis for the new agreement, the procedural arrangement would not differ significantly. Admittedly, “neighbourhood agreements” are, unlike association agreements, not specifically mentioned in the provisions of Article 218 TFEU as agreements

whose conclusion calls for unanimity in the Council. However, unanimity would most probably be applicable, notably in view of the agreement's likely inclusion of fields for which unanimity is required for the adoption of a Union act. Also, the Parliament's consent would most likely be required in view of the "specific institutional framework" that the agreement would probably include.<sup>139</sup>

Beyond the procedural requirements deriving from the EU conclusion of the agreement, the latter's all-inclusive scope would possibly entail the participation of the Member States. In other words, the new comprehensive agreement would be a *mixed agreement* and would as such require the ratification also by the Member States, in accordance with their own constitutional requirements.<sup>140</sup>

So far, no post-Lisbon comprehensive agreement of the type outlined above has been concluded. However, the Union has already started negotiations with a view to concluding comprehensive agreements with countries from the Eastern neighbourhood, e.g. Moldova and Ukraine. These agreements will be "association agreements", aimed at economic integration and political association. They are set to be all-encompassing in scope, in the sense that they will cover both former EC fields (eg trade, environment, transport, etc) and former second and third pillar areas.<sup>141</sup>

A comprehensive agreement with Norway would in principle serve the EU interest in strengthening homogeneity, in the sense that it could more easily handle pieces of legislation comprising elements from more than one of the former pillars. Put differently, it could render the discussions on EEA relevance superfluous and thus facilitate EU norm projection, as such, towards Norway. At the same time, such a reform

139 Article 218(6)(a)(iii) TFEU.

140 While the occurrence of such mixed agreements was deemed to be reduced, if not ended by the Treaty of Lisbon, the early post-Lisbon practice suggests that the Member States' interest in such formula has not decreased, as illustrated by the current negotiations of new EU agreements with e.g. Kazakhstan and Canada. Indeed, the new EU-Norway Cooperation Agreement on Satellite Navigation was concluded, after the entry into of the Lisbon Treaty, "between the European Union and its Member States and the Kingdom of Norway", OJ 2010 L283/11.

141 See "Joint Declaration on the EU-Ukraine Association Agreement"; EU-Ukraine Summit; 9 September 2008 (Press: 247; Nr: 12812/08); e.g. Barroso J M, "On the way to open a new chapter in the EU-Ukraine relationship", Kyiv University, Kyiv, SPEECH/11/284, 18/04/2011; Hillion C, 'Mapping-out the new contractual relations between the European Union and its neighbours – Learning from the EU-Ukraine enhanced agreement' (2007) 12 *European Foreign Affairs Review* 169.

would raise a range of institutional issues, which, if not properly addressed might have the opposite effect, namely that of *threatening* homogeneity.

Hence, the jurisdictions of ESA and of the EFTA Court would have to be considered. In particular: Should these be expanded so as to cover the depillarised EU internal market law and, further, fields of cooperation which have hitherto been governed by other agreements, eg Schengen and other old third pillar related cooperation? Or should their competence be circumscribed and cover only some aspects of the association agreement, so as to meet the autonomy concerns of the EFTA states?

To be sure, a mismatch between the jurisdictions of the surveillance mechanisms of the EEA and the EU, respectively, could be detrimental to homogeneity. The discrepancy between the EU and EEA interpretation and enforcement of the law might well increase, as much of the compliance control would then be left to the EFTA states national authorities, much like in traditional external relations of the EU.

A paradoxical situation would thus ensue. The discussions on EEA relevance would become irrelevant as EU norms would as a rule be projected in their entirety in view of the comprehensive scope of the new arrangement, whereas the crucial functions of surveillance and enforcement (pivotal to ensuring homogeneity) would be fragmented and limited, thus hampering the enhanced homogeneity sought through the conclusion of a new agreement, thus partly defeating the latter's purpose.

## Conclusions

Through a dense network of agreements, covering a wide range of policy areas, the multilayered association between the EU and Norway has engendered a high degree of integration that, at least in substantive terms, brings Norway close to EU membership. Commended by the EU, this formula of integration without membership, with the EEA as its cornerstone, is regularly referred to by the Union as a template for the development of its neighbourhood policy.

Several reasons might explain the EU's satisfaction. Not only has Norway faithfully implemented its obligations, but the legal and factual evolution of the relationship corresponds in many ways to the Union's

aspirations, notably vis-à-vis its vicinity. In particular, the arrangement is an effective tool for EU norm projection, and a vector of generous external support for the Union policies, all at a relatively modest institutional cost.

Unsurprisingly, the EU is eager to preserve the achievements of this relationship, notably in terms of continued homogeneity and support of the EU-inspired legal area. Several elements are nevertheless perceived as potentially upsetting the current harmony, leading the EU Council to call for a review of the existing framework of relations.

From an EU perspective, the ongoing depillarisation of the Union and the latter's quest for more coherent policies push for a new "comprehensive approach", understood as the defragmentation of the EU-Norway arrangement. Also, the Union is eager to reduce even further the institutional costs of the arrangement.

The Lisbon Treaty offers possibilities for such a comprehensive approach in the form of a new all-inclusive agreement. Yet, if it is to fulfil its purpose of ensuring horizontal coherence, a new "intellectual master-piece of legal thinking on integration" might once again be needed, particularly in view of the thorny institutional questions that the exercise would raise, let alone its institutional costs.

Given the procedural hurdles of any renegotiation, and the uncertainty as to its outcome (notably because it might trigger an unwanted debate about sensitive issues of sovereignty, autonomy etc), the question might be raised, from an EU viewpoint, whether any substantial alteration of the current framework is worth the candle. Other ways to address e.g. the "EEA relevance" issue, or the streamlining of procedures, could be explored, based on pragmatism and cooperation.<sup>142</sup> Indeed, stirring up the homogeneity issue might not be in the EU interest, particularly in relation to close partners like Norway.

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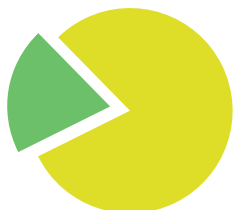
<sup>142</sup> In this respect: see Almestad K, "The duties of Co-operation of National Authorities and the Community Institutions under Article 10 (ex Article 5) of the Treaty of Rome: the EEA variant" (2000) *FIDE XIX Congress* Vol 1, 427.





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# Europautredningen

## Utvalget for utredning av Norges avtaler med EU

Den 7. januar 2010 besluttet Regjeringen å nedsette et forskningsbasert, bredt sammensatt offentlig utvalg som skal foreta en grundig og bredest mulig gjennomgang av EØS-avtalen og konsekvensene av avtalen på alle samfunnsområder.

### Utvalgets mandat er som følger:

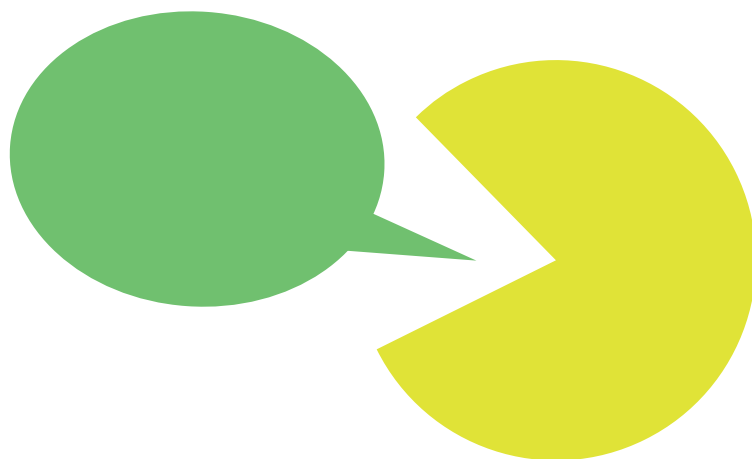
«Utvalget skal foreta en bred og grundig vurdering av politiske, rettslige, forvaltningsmessige, økonomiske og andre samfunnsmessige konsekvenser (herunder velferds- og distriktspolitiske) av EØS-avtalen.

Det skal legges særlig vekt på å vurdere betydningen av utviklingen i EU og EØS etter inngåelsen av EØS-avtalen for avtalens omfang- og virkemåte. Eksempler på områder det kan være naturlig å utrede er bl.a. distriktspolitikk, demokrati på alle styringsnivå, nærings- og arbeidsliv samt forvaltning av naturressurser og miljø. Utvalgets arbeid skal inkludere en gjennomgang av erfaringene med Schengen-avtalen og øvrige samarbeidsordninger med EU.

Utvalget skal ha vekt på beskrivelser og vurderinger av EØS-avtalens og øvrige avtaler/samarbeidsordningers betydning og virkemåte. Arbeidet i organene som ble opprettet for å overvåke EØS-avtalens funksjon, vurderes også.»

### Utvalgsmedlemmer:

Fredrik Sejersted (leder), Liv Monica Bargem Stubholt (nestleder), Frank Aarebrot, Lise Rye, Dag Seierstad, Helene Sjursen, Fredrik Bøckman Finstad, Kate Hansen Bundt, Karen Helene Ulltveit-Moe, Jonas Tallberg, Jon Erik Dølvik, Peter Arbo. Sekretariatet ledes av Ulf Sverdrup, og er lokalisert ved Senter for europarett (UiO). For mer informasjon se: [www.europautredningen.no](http://www.europautredningen.no)



# Europautredningen

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