

**Official Norwegian Reports NOU 2012: 2**

# Outside and Inside

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*Norway's agreements with the European Union***Introduction**

On 7 January 2010, the Norwegian Government appointed a broad-based independent committee to undertake a thorough, research-based review of the EEA Agreement.

The mandate of the Committee called for a comprehensive and thorough review of the political, legal, administrative, economic and other social consequences of the EEA Agreement. Moreover, the Committee was asked to review Norway's experience of the Schengen Agreement and other cooperation and association arrangements between Norway and the European Union.

The Committee's work was presented in an official report on 17 January 2012. The report will be subject to public consultation and will form part of the basis for a report (white paper) to the Norwegian parliament (Storting).

The 900-page report is extensive, and covers all aspects of Norway's relations with the EU. The complete report is available only in Norwegian. There are plans to translate additional excerpts of the report into English at a later stage.

The EEA Review Committee consisted of the following members:

- Fredrik Sejersted (Chair), Professor of Law, Head of the Centre for European Law, University of Oslo
- Liv Monica Bargem Stubholt (Deputy Chair), Investment Director, Aker ASA, Oslo
- Frank Aarebrot, Professor, Department of Comparative Politics, University of Bergen
- Lise Rye, Associate Professor, Department of History and Classical Studies, Norwegian University of Science and Technology (NTNU), Trondheim
- Dag Seierstad, expert on EU/EEA matters, Lillehammer

- Helene Sjursen, Research Professor, Centre for European Studies (ARENA), University of Oslo
- Fredrik Bøckman Finstad, lawyer at the law firm Thommessen AS, Oslo
- Kate Hansen Bundt, Secretary General of the Norwegian Atlantic Committee, Akershus
- Karen Helene Ulltveit-Moe, Professor, Department of Economics, University of Oslo
- Jonas Tallberg, Professor, Department of Political Science, Stockholm University, Sweden
- Jon Erik Dølvik, head of research at the research foundation Fafo, Oslo
- Peter Arbo, Associate Professor, Norwegian College of Fishery Science, Tromsø

The secretariat of the Committee was chaired by Ulf Sverdrup, Professor at the Norwegian School of Management (BI) and Senior Researcher at ARENA, University of Oslo.

## 27 Outside and Inside – Norway’s European Dilemma

### 27.1 Outside and Inside

Norway is both outside and inside the EU – simultaneously. On the one hand Norway is not a member of the EU. The country does not participate in decision making processes in the EU and is excluded from important aspects of the cooperation, amongst other things the Euro and the common external policy. Formally, Norway is more free than EU States, and has to some extent been able to choose what it does and does not participate in. Norway has adopted roughly  $\frac{3}{4}$  of EU legislation compared to those Member States that participate in everything, and it has implemented this legislation more effectively than many. From the EU’s perspective, Norway is the third-country with which it is most closely associated. As the EU External Action Service writes on its home page: “Norway is as integrated with European policy and economy as any non-member can be”.

The core of the Norwegian “model” of participation in the European integration process is in other words integration without co-determination. This was the solution chosen when opting for the EEA Agreement in 1992, and it has subsequently been applied, with some variation, to the Schengen Agreement and the other agreements that Norway has entered into with the EU. They are association agreements – where Norway commits itself to adopting regulations and policies that are developed and adopted by the EU.

This is a very unusual and special form of international cooperation. It is normal that states are members of the organisations with whose rules they conform. That a state associates itself to an organisation of which it is not a member, commits itself to “dynamic and homogenous” development with it, and continually incorporates large parts of the regulation that it adopts, is an otherwise unknown phenomenon in international politics.

From a principal perspective, this arrangement represents challenges – comprising inherent structural tensions and problems. It is actually an attempt to do the impossible – to simultaneously participate and to not participate. On the one hand Norway is outside of the EU and formally retains its sovereignty, on the other hand Norway participates on a mutually binding basis in large parts of the EU cooperation. On the one side, the agreements between Norway and the EU formally are agreements under international law. On the other side they connect Norway to a supranational and dynamic political union, and demand continuous adaptation to its rules. This raises a range of principle issues – about democratic legitimacy, sovereignty, openness etc.

In practical terms, this form of association has turned out to be less problematic. It has generally functioned as intended, and better than many thought it would. The experience so far is that the principal issues are much greater than the practical ones. The model of association is practical and flexible, and this is how it has been practised by all parties. There are practical problems connected to its daily operation, and through the years there have been a number of concrete conflicts, but not many in light of the comprehensiveness of the agreements. So far, this is a form of association that has functioned according to its purpose – both for the EFTA states and for the EU. There has also been quite broad consensus about this – with no serious attempts to abolish or reform it. On the contrary, the model has expanded to cover more areas.

In this chapter we draw together some threads, and look more closely at this form of association. What is its basic structure and what are the main characteristics? How has it developed over the period from 1992 – 2011, and what are the dynamics and driving forces

underpinning it? What are its structural strengths and weaknesses, and what challenges does it face? Is this construction sustainable and how can one envisage it's develop in the future?

## 27.2 The Main Characteristics of Norway's association with the EU

### 27.2.1 The basic characteristics of the form of association

Norway is connected with the EU through a set of agreements. This is not a cohesive set of agreements that establishes a framework for cooperation that embraces everything. The EEA Agreement is the largest and most important agreement, and can be considered to be a main pillar, which comprises most of the cooperation and influences the entire model of association. But in formal terms there is no connection between the EEA Agreement and the Schengen Agreement, the Dublin Agreement, or the many other agreements between Norway and the EU that concern Justice, Security policy, fisheries, agriculture, etc. Much of the expansion of Norway's agreements with the EU in recent years has developed in areas that fall outside of the EEA. When the EU develops its cooperation in areas, with which Norwegian authorities wish to be associated, this is normally not done through the EEA Agreement, but through additional agreements.

In order to understand Norway's model of association with the EU, one should not only look at the EEA Agreement, but analyse the entire structure of agreements.

This, in its entirety, is very comprehensive. Through these agreements, Norway has not just adopted individual elements of EU legislation, but large sections of it – first and foremost all of the internal market and all of the Schengen cooperation, together with considerable parts of justice and home affairs. The scope is increasing all the time, both with respect to the fact that new legislation is added to the existing agreements and to the fact that additional agreements in new areas are entered into. Cooperation is thus strengthened in breadth and depth. Seen in its entirety it is an extremely comprehensive form of cooperation, probably much greater than most people are aware. It is certainly generally known that Norway through the EEA adopts many of the EU's rules. But the other agreements and structures of cooperation are much less well-known. Those who know about one aspect of the cooperation often do not know much about the others. Because the integration is so fragmented it is difficult to get the complete picture.

As a foreign policy framework the agreements do not just regulate Norway's relationship with the EU as an organisation, but also increasingly to the 27 EU member states, and the two other EFTA/EEA states. Amongst these 29 states, nearly all are countries to which Norway traditionally enjoys its closest political, economic, and cultural ties etc., including to all of the Nordic countries. As EU cooperation has developed in breadth and depth, it covers more and more areas that previously were agreed to bilaterally or in other ways.

This means that an increasing portion of Norway's cooperation with the countries it is closest to is regulated through agreements with the EU. For example, the most important aspects of Nordic cooperation are today managed via the EEA and Schengen agreements, which have in many ways led to much closer cooperation than was achieved by the Nordic countries themselves. Furthermore, the EU has to a considerable extent taken over, or replaced completely or partly other forms and organisations of European cooperation. The EU has during the period developed into a more engaged actor in foreign policy. Norway has associated itself to this development and has through various agreements contributed with

soldiers and materials to the EU's civil and military operations, and joined EU sanctions and foreign policy declarations.

On the other hand, the agreements with the EU increasingly affect large parts of domestic policy. Even though these are agreements governed by international law, which are supposed to regulate cross-border activity, they also have important domestic policy consequences. The rules laid down in the EEA, Schengen etc. are implemented through national laws, administered by national authorities and can be invoked before national courts. Gradually, EU rules have become a natural part of national policy, law and administration, without it on a daily basis being possible or necessary to see where the often obscure border is between EU/EEA requirements and national legislation. In many areas the domestic policy implications are greater than the cross-border implications. This applies not just to the regulation of important social conditions, but also to fundamental questions of democracy and the balance of power in society, as we have seen in Chapter 26.

Norway has no *unified institutional structure* with which to regulate the relationship with the EU. The EEA Agreement is built on the so-called two-pillar structure, where Norway, Iceland and Liechtenstein together comprise the EFTA pillar, which has its own internal supervisory bodies. The EEA Agreement provides, moreover, a certain formal opportunity for co-determination in EU processes in the early phases, but not to a great extent. The Schengen agreement has another solution, which provides for a greater right of participation in the EU's decision processes, but that does not have its own institutional structure for third country participation (Norway, Iceland, Switzerland and Liechtenstein). Some of the other association agreements offer less institutional access and opportunities for co-determination than Schengen and the EEA. The multiplicity of forms of association variation makes the system complicated and difficult to grasp as a whole.

Another fundamental characteristic of the majority of Norway's agreements with the EU is that they *do not have their own material t*. Other than procedurally, specific regulations in Norway's association agreements are generally never established. All of their material content is in effect EU legislation and EU policy, with very few exceptions or adaptations. They are, just as stated, *association agreements* – association to already existing rules, which are adopted by the EU. In reality, all material EEA legislation is actually EU legislation. What the EEA Agreement provides, then, is the procedural framework necessary to secure that it is continually updated in accordance with the underlying EU legislation. It also provides the necessary supervisory bodies to secure that the EFTA States comply with their obligations in the same way as the EU States. Similarly, the Schengen Agreement is no more than an association agreement established to secure Norway's adoption of the EU's Schengen rules.

Norway's association with the EU is dynamic, being constantly updated and developed. Rules are continuously added while others are revised or repealed. The EU is an organisation that since the start of the 1950s has been in continual change, and in the last twenty years this development has proceeded quickly. EU integration has developed in breadth and depth. Norway has integrated itself with this moving target at different times – through the EEA Agreement in 1992, the Schengen Agreement in 1999, the Dublin Agreement in 2001 and so on. Static association to an organisation that is constantly developing is not possible. The preamble of the EEA Agreement states that the Agreement should be “dynamic and homogenous” (with the development of the EU), and the same is also an underlying requirement of the other agreements. As a whole, Norway's relationship with the EU is developing much more quickly than any other international relationship that the country has. We return to this below.

Another fundamental characteristic of this form of association is that it is reactive. It is carried forward by what happens in the EU. Norway has no formal right of initiative in EU processes, and presents only very rarely proposals to the EU concerning the direction to be taken on particular issues. To the extent that Norway takes any initiatives, it is mainly to achieve association to new areas or bodies that the EU has developed. Through its agreements Norway follows developments in the EU in an increasing number of areas, normally several steps behind and with a certain delay. During the 1990s the EEA Agreement was often referred to as a “fax-democracy”. These days it is perhaps more appropriate to say that Norway “downloads” policy and legislation from Brussels. Norway’s European policy first and foremost revolves around following developments in the EU, collecting information about developments and adapting itself to them. Occasionally there are examples where Norway, through various channels, tries to put new issues on the EU’s agenda, especially in areas where Norway has special interests, experience or expertise. But this is more often the exception that proves the rule.

An important characteristic of the EEA, Schengen and the other agreements is that they are indefinite. It is true that they can be terminated by any party with some notice. The EEA Agreement can be terminated by any party with twelve months’ notice. But as long as this does not happen, the agreements run uninterrupted, and neither is there any requirement for periodic assessments or reform. In this respect the agreements are an example of what is referred to in political science as “open ended delegation”. A framework for development is established, which is determined by the (quite flexible) boundaries for what falls under the scope of the agreement – or in other words what is “EEA relevant”, “Schengen relevant” and so on. But within these parameters the delegation is open-ended, and concerns developments in the EU – with the important addition that each new development of substantial importance demands a new consent agreement of the Parliament. During the period from autumn 1992 to autumn 2011 the Parliament has made in total 287 such decisions.<sup>1</sup>

An important consequence of the fact that the agreements are dynamic and indefinite is that for every year that passes there will be a greater distance between the agreement’s content when it was first entered into and the agreement’s new content. In discussions about the EEA it is often suggested that it has developed far beyond the preconditions established in 1992. In a number of important areas this is correct, as the Committee has demonstrated throughout the report. But there is nothing particularly unnatural or illegitimate about that, of itself. On the contrary, this is an integral part of its construction, and the Parliament agreed to this dynamic development willingly and consciously. Twenty years is a long time, and much has happened in Europe in the intervening period. If one reads today the St.prp. no. 100 (1991-1992) about the EEA Agreement, it is easy to find examples of things developing differently than expected. But the main impression is that the White Paper nevertheless was quite realistic when setting out its expectations.

Another characteristic of the relationship between Norway and the EU is that it is *asymmetrical*. This applies at several levels. One thing is the difference in size between a small country and a large organisation with 27 member states. Another and more interesting observation is that the EEA has never been viewed as an agreement between equals. The underlying idea has always been that the one party (EFTA) should associate itself to the other party (EU). EFTA was already in 1989-92 a “demandeur”, to use a foreign policy expression – the one that is asking something of the other. At the same time, the balance as measured in the number of countries on each side was 7:12. In 1995 this changed to 3:15, and today it is 3:27 – and 5:500 million as measured in the ratio of populations. Even if the EEA Agreement

has not formally changed, this shift in the weight of the parties on either side clearly has consequences for how it functions in practise and for the underlying balance of power.

When there is an asymmetrical balance of power and interests it is particularly important for the weaker party to secure commitments from the stronger party through legal agreements. The Parliamentary Report of 2009 on main developments in Norwegian foreign policy emphasises that Norway, as a small and wealthy country, with an open economy and great natural resources, has “a particularly deep dependence, and with that a lasting real-political interest in, a well-functioning and well regulated international community”. This means that the international legal order and multinational governance and regimes should be viewed as “Norway’s primary and prioritised foreign policy interest”.<sup>2</sup> From the perspective of the Norwegian government this also includes the EEA, Schengen and the other agreements with the EU.

Norway’s agreements with the EU are characterized by a *substantial gap between formality and reality*. The agreements are based on Norway not transferring formal authority to the EU – whether legislative, executive or judicial. In reality though there is massive delegation of legislative power to the EU, a considerable delegation of judicial power to the EU Court and the EFTA Court, and some delegation of executive power to the EFTA Surveillance Authority as well as to the Commission and a number of other EU bodies, such as agencies.

A gap between what is formally agreed and what actually happens in practise is not unusual in international relations. However, with respect to the Norway-EU relationship this distance is much greater than usual. This can partially be explained by the fact that the EU is a supranational system, in which the member states have delegated certain competences to common institutions. Norway has through the EEA, Schengen and the other agreements associated itself to this supranational system, and committed itself to follow developments “dynamically and homogeneously”. For political and constitutional reasons one has however done this through agreements that formally are agreements under international law, and so consequently give the impression of conceding less power than is actually the case.<sup>3</sup> Thus, Norway is integrated with a supranational system, but applies traditional international legal instruments to do so. It can be likened to putting on much too tight clothing – that bulges out at the buttons and stretches at the seams.

Even through Norway’s agreements with the EU are governed by international law, they contain elements that are more common under supranational arrangements. Firstly, as established under the EEA Agreement, the supervisory and judicial control structures of the EFTA Surveillance Authority and the EFTA Court are a rather atypical of international law arrangements. Secondly, the range of commitments is much greater than in any other international law arrangement, and there is a general commitment to participate in future developments, even if in principle Norway can opt out of specific initiatives. Thirdly, EU/EEA law enjoys a high degree of precedence over national law within the EFTA States. Consequently, the EEA Agreement could be seen as a hybrid between an international and a supranational agreement.

Norway’s relationship with the EU is characterised by compromise – between being outside and inside the EU. In Norway the EEA Agreement has over the past 20 years served as a compromise between the Yes and No camps over the question of EU membership.<sup>4</sup> Of all political parties in Norway only two of the smallest ones, KrF (Christian Democrats) and Venstre (Liberals) have accepted this form of association as their first choice. For the other parties, this is a second choice that nobody particularly likes but that they can live with. The EEA is an arrangement that represents “the art of the possible”. Through this form of

association the EU issue is taken off the Norwegian political agenda. The compromise has made it possible for parties with diverse views on Norwegian membership to sit together in Government and it has created stability and predictability in Norway's relationship with the EU.

The same is true for the relationship between the EU and Norway. In its time, the EEA Agreement was also a compromise between the EU and the EFTA States, who wanted a solution for participating in the Internal Market without membership. The EU granted this solution, access, on the condition that the EFTA-states commit themselves to adopting EU legislation, without having the right to participate in decision-making. Compromises have costs, and they are seldom elegant. But they can nevertheless be robust – as long as the underlying conflicts of interest can be managed.

Another fundamental characteristic of Norway's association with the EU is that it depoliticizes important matters. Even though the question of EU membership tends to create strong political engagement, there has been little political interest concerning Norway's continuous association with the EU through the EEA etc. Issues that otherwise would have been high on the national political agenda, go unnoticed in the Storting when it comes to conformity with EEA commitments. The relationship with the EU is managed (with a few exceptions) by the civil service, with less involvement at political level than would normally be the case with regard to purely domestic issues. This is not just due to lack of political interest but also a result of structural aspects of the model. Because Norway does not participate in the political decision-making processes in Brussels there is no incentive for Norwegian political engagement. If involvement makes no difference, then why bother getting involved? To the extent that there is political engagement, it is generally limited to a very small number of single issues. Also, the debate in Norway is often held late in the process, long after the EU has adopted its measures.

De-politicization is also a consequence of how the basic Norwegian compromise impacts individual issues. As the parties have already agreed to adopt new legislation from the EU, there is little to be gained from staging a political debate about the issues, which in the worst case would lead to criticism and controversy without the end result being affected. There is little reason therefore to rock the boat. For some the memories of 1994 still live with them, and it is feared that debates about the EEA and Schengen could revive fundamental tensions over EU membership. This is reinforced by the "suicide clauses" which all Norwegian coalition governments since 1994 have had, which involves the coalition's splitting apart if the EU question is put back on the agenda.

Another aspect of de-politicization is that EU legislation adopted through the EEA, Schengen etc., can solve many issues that would otherwise remain unresolved in a purely Norwegian political context. Solutions to domestic issues are often found in Brussels. Sometimes this can be frustrating. Other times it can be a relief, as new opportunities for to resolve matters present themselves that otherwise would remain in dispute. For example, this may have contributed to the Storting in 2010 warmly welcoming the report on "Norwegian asylum and migration policy in a Norwegian perspective", where the main message from the Government was that Norway should align its immigration policy with the EU policy.<sup>5</sup> In other situations it could be opportune to blame the EU or the EEA for reforms that are desirable but controversial. Seen as a whole, the Norwegian model of association with the EU is in many ways opaque – both because it is difficult to get a total overview - because there is so much distance between formality and reality, and because it depoliticises issues and inhibits debate.

As a result few comprehend the real scope and depth of Norwegian integration with the EU – not just among the public but also in political circles, the administration and the media.

Another fundamental aspect of Norway's association with the EU is that it is remarkably pragmatic. Just the idea of being outside and inside simultaneously – of participating without being a member – is in itself pragmatic. An important reason why this has worked over the past 20 years is that all parties have in fact been cautious about raising difficult questions of principle. Moreover, the EEA and the other agreements concern few principal or ideological political issues, such as Union citizenship, human rights, common aid and development policy etc. There is also no requirement to meet democratic standards for being a member of the EEA, as there is for membership of the EU (the Copenhagen criteria). Notably, one of the last European principalities where its monarchy still has considerable political power happens to be an EFTA member of the EEA.

During its twenty-year existence the Norwegian model of integration has also turned out to be very *flexible*. Firstly, the EEA agreement has been flexible enough to remain unchanged through big changes – such as three of the EFTA states entering into the EU in 1995, or ten new EU countries entering in 2004. It has also been flexible enough to keep up with developments of EU law over 20 years, as well as the taking in and development of new policy areas within a rather pliable framework. Veterinary conditions and climate change policy are two of many policy issues that were not part of the agreement in 1992, but that have developed subsequently. The same is true for participation in a range of new EU programmes and agencies, etc. Secondly, the EEA has not prevented additional arrangements between Norway and the EU.

It is difficult to say whether the Norwegian model of integration is *robust or fragile*. On the one hand it has lasted for twenty years, which is longer than most would have expected. This can be attributed to the robustness and durability of its structure. On the other hand, this could also be because it has never really been challenged, but rather that all parties so far have applied sufficient good-will so that it could continue to function. This is considered in more detail in Chapter 28.1.

### 27.2.2 Planned like this or become like this?

A related question when analysing Norway's integration with the EU today is whether this was something that was planned, or whether it has only become this way through a series of events.

The answer is that both are true. On the one hand, each of the agreements that Norway has with the EU are very carefully constructed. They are the result of conscious decisions and long-lasting processes. It took several years to produce the EEA Agreement (1989-92), and with the Schengen agreement two attempts were necessary (1996-99). Many of the other agreements have also required long negotiations, such as association to the Defence Agency (2006) and the Agreement on the European Arrest Warrant (2006).

On the other hand, it was not constructed or planned in advance as the entire entity it is today. It has grown gradually over a period of twenty years, and bears the marks of this. The Committee's analogy for this is the "lappeteppe" [a long carpet common in Norway that expands over time as new bits are added when necessary -]. The EEA Agreement has developed over 20 years, to become something different, more extensive than most people envisaged, and this is a process that has happened in the interplay of conscious political choices and independent legal, economic and other processes. This might be viewed then as a generic development.

More important than the EEA Agreement changing is that the world surrounding it has changed. The clearest example of this occurred already in 1994, shortly after the EEA Agreement entered into force when three of the EFTA States (Austria, Finland and Sweden) entered into the EU with effect from January 1995. Two years earlier Switzerland had also pulled out of the EEA – in the other direction. This meant that an agreement that was constructed for 7 EFTA countries after one year of operation only applied to the three smallest of them, of which two are extremely small. As such the EEA Agreement has since January 1995 operated in a completely different context than the one for which it was conceived.

This development has been reinforced later. EU treaty revisions, expansion of the EU's agenda, and not least enlargements in 2004 and 2007 have gradually changed the EU and consequently also Norway's association to it. It is difficult to speculate on the counter-factual. But it seems clear that the EU in 1990-91 never would have negotiated such an agreement just to accommodate relations with Norway, Iceland and Liechtenstein. And it is even more obvious that a solution would have looked different if the three countries had come to the EU today and asked for association.

Furthermore, those who designed the EEA Agreement had differing ideas about what it was made for. The seven EFTA countries had different objectives for the agreement, and for many the goals also changed between its conceptions in 1989 to its entry into force in 1994. For some the EEA was seen as a permanent solution, for others as a step towards EU membership. For the pro-EU Norwegian government that participated in the EEA negotiations it was both a step towards something more, and a safety net in case EU-membership were to be rejected that was not successful. But for some of the mainstays in the Parliament – especially KrF – it was viewed as a permanent solution. For the EU, the EEA was originally seen as a halfway point for the EFTA countries, where they could wait until the EU had launched the single market and finished the Maastricht process, before they were let in completely. This was how the agreement turned out for Austria, Finland and Sweden. For Norway the EEA Agreement has not been a mid-way point with the EU, but rather an alternative parallel track. The EEA Agreement has also not acted as a spring board to EU membership, but rather as an alternative path that has contributed to keeping Norway outside of the EU.

This development has created some strange constellations along the way. From the Norwegian perspective, it shares its fate with Iceland and Liechtenstein. Since 1995 these countries have been Norway's closest allies on EU/EEA matters – with whom it manages the common EFTA bodies, and with whom all substantial questions must be debated. The requirement for unanimity on the EFTA side creates strong connections and mutual dependence. This was definitely not foreseen. But in relation to the EU these two countries have very diverse interests, and are not necessarily natural allies. The alliance with Liechtenstein is quite simply bizarre – a small principality in the Alps with 35,000 inhabitants, close connections to Switzerland, a tradition of being a tax haven, and a political system of governance that has been criticized by the Council of Europe for not living up to modern democratic standards. This is a state that has other priorities and interests than Norway, and with which Norway otherwise would have had little contact. Nevertheless, the cooperation amongst the EFTA States in the EEA has largely functioned well.

According to a prevailing Norwegian view the EEA Agreement is “our” model. It was conceived by Norway, following discussions between Gro Harlem Brundtland and Jacques Delors. Typical of this sort of notion is a report home to the Ministry of Foreign Affairs from Norway's ambassador to the EU where it states that: “Norway was the architect and master-

builder of the EEA Agreement. It is also, in practise, our responsibility to maintain it and keep it relevant.”<sup>6</sup>

The latter part might be correct, but not the former. By no means was Norway the only architect and master-builder of the EEA. For a start, the EU had a clear idea about the parameters for this form of association. Secondly, all other EFTA States participated, and several of them were just as central as Norway, not least Switzerland and Sweden. Thirdly, the EFTA Secretariat actively participated in the process.<sup>7</sup> Expressed somewhat simply, the process between 1989-91 was such that it was the EFTA side that came up with proposals and creative solutions, which the EU side either accepted or rejected. The solution ended up being what the EU was willing to concede to, and that was access to the Internal Market on the condition that the EFTA States commit themselves to continual and homogenous adaptation of EU-rules, together with the introduction of a system for supervision and judicial control. The result was access without co-determination. This was not a constructing a new system together, but about creating an acceptable arrangement for how the EFTA countries would integrate into the EU’s already existing system. To the extent that the EFTA countries managed to win through on their proposals this was because they were able, to a certain extent, to stand united, even if there were many disagreements also amongst the EFTA States.

Even though the EEA Agreement was originally constructed for 7 EFTA States, in 1995 it ended up applying to only three, of which two are so small that they even make Norway look large. This is the only international organisation in which Norway is a superpower, having a certain effect on Norway’s self-image, extending so far as Norway viewing this as a “Norwegian” model, and not always treating its two fellow EFTA partners as fully equal cohorts in a common endeavor.

The other Norwegian agreements with the EU also have their special pre-histories. The initiative for the agreement that connects Norway and Iceland to Schengen was originally taken in 1996 as a consequence of Denmark, Finland and Sweden wishing to join Schengen, and simultaneously wishing to preserve the Nordic Passport Union. But this followed rapidly in the shadows of an expressed goal to dismantle borders in Europe and simultaneously cooperate on external border control and internal security.<sup>8</sup> Today, no one talks about Schengen as an agreement that for Norway’s part would secure Nordic free movement of persons. Switzerland and Liechtenstein have since joined Schengen, but without an EFTA pillar as in the EEA.

The other Norwegian agreements in the area of justice and home affairs may seem like spin-offs of Schengen but they also exist because the EU have develop new arrangements for police cooperation, immigration etc., in which Norway also wanted to participate.

The arrangements that connect Norway to EU defence and security cooperation came into being in the middle of the 2000s after the Norwegian government concluded that it was in Norway’s interest to be involved in these activities.<sup>9</sup> Norway had previously participated in similar cooperation within the Western European Union, WEU. In this case, we are talking about more free-standing arrangements to participate in EU crisis operations, task forces and the European defence agency, , together with political dialogue and unilateral Norwegian support for the EU’s foreign policy declarations and sanctions. There has not been any ambitions to establish a more comprehensive framework agreement for association with the EU in these areas, One can get the impression that the current model of integration has been established through a series of random events. At one level this is correct. If Norway and the EU had started on scratch today, to construct a suitable form of cooperation, it would most certainly have looked different. Today’s model is characterized by the fact that the Agreement

(EEA) was formed during a special period in time from 1989-92. The other agreements are characterized by their special pre-histories. The fact that the form of association has become just what it is a matter of circumstance.

However, in a broader perspective it is no coincidence that Norway, with its particular geography, history, economy, political traditions etc. is not a member of the EU. Norway has applied for membership four times, and twice this has been rejected in referendums. From a broader perspective the similarities with Switzerland are greater than the differences – it is only that the Norwegian model of integration is more consistent and binding.

### **27.2.3 A Master-Servant relation or a Privileged Partnership?**

Norway's model of integration with the EU is viewed differently according to which eyes are looking. Internally in Norway there are three main opinions. Some view the EEA and the other agreements as an optimal solution for Norway, which provides the benefits of European integration without the consequences which they believe full EU membership would entail. Others are against the current form of association, and would seek to replace it either with a less binding or comprehensive cooperation with the EU. Others, furthermore, believe that the Norwegian model of integration suffers from obvious weaknesses, but nevertheless it is necessary to secure Norwegian interests in an increasingly integrated Europe.

Seen from the outside, Norway's relationship with the EU looks different.<sup>10</sup> In the two other EFTA/EEA States one can find many of the same opinions and evaluations as in Norway, only with variations. In Iceland the debates about the EEA, Schengen etc. to a great extent resembled those in Norway, but in recent years they have been overshadowed by the financial crisis and applications for EU membership. In Liechtenstein, there is great satisfaction with the EEA Agreement where it is viewed as arrangement that has strengthened national independence, and made the country more independent from Switzerland.

The four other EFTA States that participated in formulating the EEA Agreement ended up leaving it – three went in one direction and one went the other way. For various reasons they deemed it not to be a good solution. During the debate in Switzerland in 1992 there were a range of arguments put forward against the agreement, but for many people the decisive issue was that a majority did not want the EU/EEA rules on free movement of workers.<sup>11</sup> In Finland, Sweden and Austria the main reason that they left the EEA was that a majority saw full EU membership as more attractive. But during the EU debates in these countries in 1993-1994 heavy criticism was voiced against the EEA Agreement, which many saw as an unacceptable model for the transfer of authority without co-determination.

From time to time throughout the period from 1994 to 2011 the idea has been voiced, as shown in Chapter 13, that the EEA Agreement could be used as a model for other states that desire association with the EU, but without full membership. At the end of the 1990s there were some who believed that it could be an alternative for the new democracies in East and Central Europe. But it stayed as an idea. The countries themselves did not desire this, as they saw it as a second class form of economic association with the EU without political and democratic participation, and neither did the EU try to pressurize them on this. Other third countries that have looked at the EEA model have so far not been overly enthusiastic.

So the Norwegian model of integration so far has not really worked as a model for other countries. It is not viewed as any ideal model or article for export. There could be several reasons for this, but most importantly is that it is not viewed as being especially appealing. Neither have Norwegian authorities tried to promote it, but have on the contrary been rather aloof when receiving signals regarding enlargement of EFTA and the EEA. Again, there

could be several reasons for this, but most important is that from a realpolitik perspective it has not been viewed to be in Norway's interest.

How this plays out in the future remains to be seen. Lately there has been a certain renewed interest from other third countries in the EEA Agreement, both from "micro-states" (San Marino, Andorra and others) and to some extent other and larger third countries. The EEA model (or something similar) has also turned up again in the Swiss European debate. Perhaps the EEA Agreement could also in the future be relevant for countries that are already members of the EU. However, currently (Autumn 2011) there seems to be little to indicate that an enlargement of the EFTA/EEA pillar is imminent.

Even amongst Norwegians who support the EEA Agreement there is a notion that it is a form of Master-Servant relation, whereby the EU is pushing Norway to adopt more and more of its rules.

Seen from Brussels the relationship looks quite different. Amongst the EU institutions, there can be somewhat diverse assessments of how Norway's model of integration actually turned out, and between the institutions and the member states. But the most widespread opinion seems to be that the EU has been very welcoming towards Norway. As a third country Norway has a "privileged partnership", as described in the Council Conclusions of the EU Foreign Ministers on the relationship to the EEA and EFTA States, December 2010.<sup>12</sup> Compared with other third countries Norway is allowed to participate in more areas of EU cooperation than any other country – the internal market, Schengen, nearly all EU programmes EU agencies, etc.

It is not the EU that has pushed for this, but Norway itself that has pleaded for access – which it also largely has been granted.

The EU is generally pleased with the functioning of EU-EFTA-relations and relations with Norway. There are few conflicts; indeed very few in comparison to other third countries. In the Council Decision of December 2010 on Norway's contribution to economic and social cohesion in Europe (the EEA funds), the EU emphasized Norway's contribution to EU crisis operations and task-forces, cooperation on energy, environment and climate change issues, the Far North, and the Common Fisheries Policy.<sup>13</sup> This list corresponds well with Norway's own understanding of the most important aspects of the relationship with the EU.

If the EU, seen from its own perspective, has given Norway a good agreement, this is because it has been in the EU's interest to do so. It has limited costs to the EU and Norway has been good at following up its end of the bargain. Moreover, it is of course also in the interest of the EU and many of the member states to have a close and positive relationship with Norway. Norway is the EU's fifth largest trading partner<sup>14</sup>, and the large supplies of gas and oil are of great economic and political significance. If Norway has had relatively easy access to the EU's programmes, agencies etc. it is because it pays its share of the bill and consequently brings along new resources. In the last couple of years the Norwegian State Pension Fund is viewed as a source of long term capital, and has received more attention and increased significance as a result of the financial and debt crisis. Norway is also viewed as a likeminded cooperation partner by important countries in the EU. First in line are Germany and the other Nordic countries. They view Norway as part of a group of Northwestern European countries that keep their economic, legal and administrative structures in order and that generally stand for the same political values and interests.

From certain quarters in the EU there is every now and again criticism; for having granted Norway a form of association that enables an “a la carte” approach, or “cherry-picking”. This is neither entirely wrong, nor completely accurate.

On the one hand it is correct that the EEA, Schengen and the other agreements give Norway the possibility to participate in those parts of the EU cooperation that a Norwegian political majority desire, whilst at the same time being able to stay out of the areas that the majority does not want. Central here are the primary industries, where there is a long history in Norwegian EU policy going back to the 1960s, where one seeks access to the markets in the EEC/EU, but simultaneously has wished to protect agriculture and fisheries. Recently there are also many who believe that Norway has benefited from not being part of the Euro project (as there are also 10 EU states that are not).

On the other hand there is little opportunity for Norway to pursue cherry picking in the areas where it has actually entered into agreements. The most important agreements (EEA and Schengen) are *packages*, where the condition prevails that if Norway wishes to participate, then it has to participate in everything, both in what it likes and what it dislikes. There is little room for eternal opt outs. Sure enough, for formal and constitutional reasons Norway must give explicit agreement to all expansion of the EEA and Schengen, but from the EU’s perspective this is not seen as an opportunity to engage in cherry picking by saying no to legislation that it dislikes. This is particularly the case regarding the Schengen agreement where any refusal to adopt new relevant legislation from the Norwegian side will lead to the termination of the entire agreement. In the EEA Agreement there is a possibility for the EFTA states to “opt out of” new legislation that may be EEA relevant. But from the EU perspective this is not viewed as a routine measure. Rather, at best it is considered to be a safety valve to be used in extraordinary circumstances.<sup>15</sup> Furthermore an opt out by the EFTA side following detailed procedures would have the consequence that the section of the agreement to which it applied (“the affected part of the annex”) would be taken out of force. Any ability to select freely from EU/EEA-relevant legal acts on the basis of preference simply is not foreseen in the agreement, even if it is sometimes presented this way in Norwegian debate. Permanent opt-outs or extensive adaptations do not really exist.

One also heard in the EU that Norway was a free-rider that benefited from European integration without paying its share of the bill. This criticism simmered down somewhat after quite tough negotiations with the EU ended in Norway’s contribution to the EEA funds multiplying several-fold.<sup>16</sup> There has been divided opinion in the Committee about the extent to which Norway today pays more or less to social and economic cohesion in the EU/EEA area. Norway pays more than other third countries and more than individual member states, but relatively little when measured as a proportion of BNP. A thank-you for Norway’s “very significant contribution” was expressed in the EU’s Council of Ministers meeting in December 2010.

#### **27.2.4 The patchwork model**

As a whole the structure of agreements between Norway and the EU, as pointed out earlier in this white paper, can be seen as a long patchwork carpet that gets longer as bits are sewn onto it]– that hangs together, but where each patch (agreement) is nevertheless different from the others, with new bits being sewn on as time passes. It is not a *given* that it should be like this. The EEA Agreement entails provisions that enable it to be expanded to new areas, and one could in principle have envisaged that Schengen, Dublin and the others had been incorporated into the EEA framework, instead of through new agreements. But for several reasons it did not happen like that. Instead new agreements were entered into in other areas

where the EU has been open to Norwegian association. The result is that Norway has entered into a large number of agreements with the EU, all somewhat different in nature and effect.

From a Norwegian perspective there can be advantages and disadvantages with the patchwork model. One advantage is that it can promote latitude and flexibility, and it makes it more difficult for the EU to connect interests in one area to another. It is not obvious that Norway always would have benefited from closer EU coordination of the relationship, across sectors. Neither is it a given that one would have benefited from using the EEA procedures and the EFTA/EEA institutions to maintain the relationship in other areas. There can also be areas where Norway would have benefitted from interacting with the EU on its own, without having to consider the interests of Iceland and Liechtenstein (as is also true for them). Politically it can be easier to integrate with the EU in new areas, if one does not have to associate new cooperation with all the cooperation that has preceded it.

However, there are also disadvantages in managing the relationship with the EU along the lines of a patchwork model. Even amongst those who deal with EU/EEA affairs on a daily basis there are few who actually have a complete overview and grasp of its scope. This is democratically suboptimal, as it is difficult for citizens to understand what Norway participates in and what it does not participate in. Secondly the relationship becomes more difficult to manage and coordinate, on both sides. Thirdly, there are no established procedures for entering into new agreements in areas where Norway wishes this, and that means that to a certain extent one has to start each time with a blank sheet each time, instead of having a fixed format. Finally, there is no institutional arena at top-level for political and strategic relations between Norway and the EU that encompasses all aspects of the cooperation. This contrasts with the EU's relations to a number of other third-countries.

The alternative to continuing the patchwork model must be to formulate and negotiate a comprehensive and consistent institutional framework agreement for all of Norway's arrangements with the EU, either in the form of an expanded EEA Agreement, or as a completely new agreement. It is a tempting idea, but at the same time it is not obvious that this is realistic or that it would be in Norway's interest. This is considered in more detail in Chapter 28.3 below.

## **27.3 Developments in the relationship with the EU 1992-2011**

### **27.3.1 Development along several axes**

In the introduction of the report in Chapter 3 five themes were identified for how Norway's association with the EU had developed since the EEA Agreement was signed in May 1992 up until today:

- Geographic enlargement of the EU, and consequently also of Norway's agreements
- New agreements with the EU in new areas
- New legislation from the EU within the parameters of existing agreements
- Development of existing agreements through interpretation and practise
- Inspiration and unilateral Norwegian adaptation with the EU beyond the formal agreements

Throughout this assessment we have looked in closer detail at how each of these processes have developed in practise during the period from 1992-2011, generally and with respect to a long list of individual issues. Along each of the five axes there has been considerable

development. As a whole, they show how Norway has become increasingly integrated with the EU throughout the period.

The development has been one-directional. In the course of nearly 20 years there are no examples of the integration being reversed. Rather it has accelerated along all the axes, and in recent years gone faster and been more comprehensive than ever.

The assessment will also have shown that the development has been relatively even, without any great pauses or leaps. The exceptions to this are the geographic changes of the EU/EEA, which have happened in stages in 1995, 2004 and 2007. The single biggest occurrence during the whole period could be said to be the great Eastern enlargement of the EU/EEA in 2004, which fundamentally changed the EU and consequently also directly and indirectly affected Norway's relationship with the EU at many levels.

[Picture]

Respect for the Referendum

Maastricht

Figure 27.1 No bending of the knees

Along the four other axes Norway's integration with the EU, in contrast, has developed evenly. This applies to the first *new agreements in addition to the EEA*. Already shortly after the EEA Agreement entered into force Norway began to sound out the possibilities for entering into other agreements in areas not covered by the EEA Agreement. The initiative to participate in the EU's regional cooperation through the Interreg programmes were taken quietly just after the referendum of 2004 without it being considered necessary to have any special framework agreement, but with continual and increasing Norwegian participation every year since. The Schengen agreement was negotiated in two rounds from 1996 to 1999 and entered into force in 2000. During the 2000s a range of individual agreements followed on border control, immigration, police cooperation, and foreign, defence and security cooperation. Currently it is particularly cooperation on justice where the dynamic is very strong and here there are several on-going processes with regard to further Norwegian integration.

Furthermore, within the framework of the EEA Agreement there has occurred a gradual development of sub-agreements that Norway has not been bound by but where, in line with its own wishes, Norway has taken the initiative. The most visible and disputed example of this is the Veterinary Agreement of 1998. Over time this has grown quantitatively into the largest component of the EEA, comprising nearly 40 percent of all of its legislation. Today it regulates most of the standards and requirements governing Norwegian agriculture and fisheries.<sup>17</sup> There has also occurred a more unobtrusive proliferation of agreements on Norwegian participation in a growing number of EU-agencies and EU programmes within areas such as research and development, education, innovation, social policy, employment, environment, consumer protection, health, civil preparedness, tourism, culture and more.<sup>18</sup>

Another important development has been the development of the "EEA funds", which Norway maintains it was not obliged to continue beyond 1999. Through tough negotiations every five years these have increased twenty-fold and have fundamentally changed character, eventually becoming a central element in Norway's relationship with the EU.<sup>19</sup>

The content of the EEA and Schengen Agreements, moreover, has gradually developed and expanded with the continuous adoption of all new EU legislation falling within the scope of these two agreements, in line with the principle of dynamic and homogenous development.<sup>20</sup> When the EEA Agreement was signed in May 1992 it contained 1849 legal acts. As of January 2011 a further 6426 pieces of legislation were incorporated, which makes the total 8311. Many of these replaced earlier acts which consequently became void, so that the number of valid legal acts in January 2011 was 4502. If one were to draw a curve of the growth of gross legal acts under the EEA Agreement (which has been done in Chapter 6.5.2) it reveals an almost completely linear development from 1992-2011. Likewise, the number of legal acts under the Schengen Agreement has risen evenly from 147 when it was entered into in 1999 to 305 at the beginning of 2011. Also here the curve is roughly linear.

Furthermore, the EEA Agreement in particular has developed through *interpretation and practise*. It is a common trait of both international agreements and national legislation that law is not static, but that over time it develops through legal interpretation and jurisprudence and through the practises of authorities and private persons. EU law is nevertheless more dynamic than most other legal systems, first and foremost because of the EU courts' judicial approach, but also because the Commission on many issues actively promotes judicial development through supplementary guidelines and the management of individual issues. Through the principle of homogenous interpretation this has also direct consequence for the content in the EEA Agreement. Added to this, the EFTA Court and the EFTA Surveillance Authority have contributed to this development through their interpretations and the same is true of other national courts and administrative authorities. This is one of the main reasons that the EEA Agreement has turned out to have consequences in areas that were not foreseen in 1992. Generally this involves development of EU/EFTA law through interpretation and practise and most often at the fullest extent of the rules. But here there are also examples from 1992-2011 that the courts and the supervisory bodies have been careful, and stopped or even taken a step back, and recognized the national authorities' legitimate need for leeway, as for example in the case of lottery monopolies.

When the EEA Agreement was entered into early in the 1990s there were many who were doubtful as to whether it would manage to develop homogeneously with EU law. The argument was amongst other things that the context was so different that out of necessity it would have to develop differently in practise. This has not turned out to be the case. The EFTA Court and the EFTA Surveillance Authority have been very concerned to follow the principle of homogenous interpretation, as have the Norwegian courts - with the Supreme Court in the lead. Within the parameters of the scope of the EEA it is interpreted and practised in all practical applications in the same way that EU law is interpreted and practised in the member states.

Finally, there is also an element of unilateral Norwegian adaptation with the EU beyond the formal agreements. This was not especially evident the first years after the EEA was entered into, but it has become more extensive along the way. Unilateral adaptation happens in several ways. Most obvious are those times when Norway subscribes to initiatives or principles formulated by the EU, without there being any agreement requiring it. One finds examples of this for example in foreign and security policy, where Norway regularly joins the EU's foreign policy declarations and sanctions on third countries. Another example is in social policy, where Norway is not a part of the EU's social dimension, but to a large extent implements the guidelines that are formulated within it, on for example employment policy and health, environment and safety in the work place. Further, there are examples of Norwegian legislators establishing a basis for EU rules to apply under Norwegian law even if

Norway is not bound to do so – most obviously with regard to key EU directives on non-discrimination. Norwegian courts have used EU rules as a legal source for the interpretation of Norwegian law in areas where Norwegian law is not bound to do so, in for example excise issues. Finally, especially within immigration policy Norwegian authorities have recently declared that they will look to EU rules, and seek to apply Norwegian practise to these where there is no obligation under the agreements to do so.

In addition to the rules-based adaptation there is also a large element of inspiration and influence from the EU. It is not unusual that Norway copies completely or partially the EU's goals, governance models and initiatives. Within for example the climate and environment fields and education and research this has happened extensively. Participation in European networks and forms of cooperation has made this sort of exchange of ideas and experiences easier.

On all five of the axes along which Norway's relationship with the EU has developed during the period 1992 to 2011 this has, as already mentioned, been a *reactive* process. The agreements are not constructed for the development of new rules and coming up with innovations, but for adopting and complying with EU regulations in the most effective way, in as similar way to how it is in the EU. In this way the agreement functions as a one-way street. To the extent that "active European policy" concerns influencing, it more often influencing to adjust minor things in already ongoing processes, or to receive special opt outs or adaptations. Norway has neither a formal nor a de facto possibility to put things on the agenda, or to take things off the agenda.

Generally the development of Norway's integration with the EU has been characterized by a *low level of conflict*. There have been many areas of dispute throughout the years, but this is part of the system, and the number is low considering the scope of the agreement. Many of the conflict issues are moreover resolved in Norway's favour, and none of them have seriously damaged the relationship between Norway and the EU. Politically, the whole agreement is a matter for dispute given that there are two parties (the Center Party and the Socialist Left) in the Parliament that are against the EEA, Schengen and several of the other agreements. But seen as a whole these parties have limited support. Neither is their opposition to these agreements so strong that they were deterred from entering into coalitions that govern on the basis of the agreements with the EU. Furthermore, most of the expansions of Norway's commitments with the EU are decided unanimously. An overview of all 287 consent propositions on EU issues in the Parliament between 1992 and 2011 shows that 265 of them were decided unanimously, with only 22 dissensions. During the period from 1992 to 2011 there were only 17 issues where the parties have taken up the question of using the Right of Reservation in the Parliament's Europe Committee, out of the total 6426 new EU/EEA laws,

There can be several explanations for the low level of conflict. One of them is undoubtedly that the EEA and Schengen, as mentioned, serve as national compromises on Norwegian European policy. But the most important reason appears to be that the actual content of adaptations necessary to comply with EU rules are very seldom politically controversial. The development in general is well within the parameters of the main trends in Norwegian politics. This is illustrated by the fact that all of the Norwegian governments since 1994 have run, as a whole, the same European policy, and it is difficult to see the consequences of changes of government along any of the axes that have been outlined here.

### 27.3.2 Dynamics and Motivation

It is one thing to describe developments. It is something else to understand the actual dynamics and motivations that apply. What is it that drives Norway's continual integration

with the EU forward, and why is it the way that it is? That is a much more difficult question, and the Committee will limit itself to attempting a few hints at the answer.

At a higher level, cooperation between the EU and Norway is motivated by a need to *find common solutions* to cross border challenges - concerning the economy and development, migration, technology, climate and the environment, management of resources, globalisation, peace and interaction amongst people, etc. Most of these challenges demand one or another form of coordination and a binding cooperation.

Association with the EU must be viewed as a means to solve these coordination problems, not as an end in itself. As a basis for cooperation there is a broad commonality of values and interests between Norway and the 27 EU states, binding them by the same geographical, economic, political, cultural values, and in many other ways. Increased economic and political interaction creates the need for common rules and the dismantling of national restrictions. Easier transport and communication breaks down barriers and creates new needs for regulation. New common cross-border problems demand common binding cooperation, whether it is for the environment, crime, trade or other matters. The list is long. The development over the last 20 years show in great clarity that the Norwegian authorities neither can nor wish to isolate Norway from these developments.

If one looks more closely at the dynamics in Norway's special form of association it is clear *that the EU is the most important driving force*. This is where the motor is. The development of the EU is motivated by a long list of conditions, in a complex interplay, and Norway follows along. Norway's adaptation to this is as pointed out reactive, and proceeds as a response to the development of new policy areas and regulations within the EU system.

From the Norwegian side there is clearly an element of *political will* in this outcome. Cooperation with the EU progresses because a political majority in Norway considers this to be necessary. Even if a majority in Norway said "no" twice to EU membership, Norwegian policy is in reality not especially Euro-sceptical, especially when assessing it from a practical and concrete perspective, disregarding the question of membership. There are fewer truly hostile tendencies in Norway than in many EU states, and a broad political majority is actually relatively positive to very many aspects of European cooperation. After the referendums in 1972 and 1994 the governments in power formulated an active European policy which in broad terms revolved around integrating Norway as closely as possible to EU processes. This policy has continued unchanged during the past 20 years, with broad support from the Storting and the public. In recent years important steps toward integration with the EU were initiated politically, and have arisen as a result of conscious choices and priorities, including association with the EU's justice policy and security and defence policy.

One observation as an extension of this is what some political scientists have called the *TINA-Syndrome* in European policy: There Is No Alternative. By that one means that in Europe today there is no alternative to the EU if one wishes to have binding European cooperation. Originally in 1960, EFTA was considered to be an alternative, but it has never functioned as such. There are other important European organisations, including the Council of Europe, but their activity is much less comprehensive and binding than EU cooperation, and it functions as a supplement and not as an alternative to the EU. The development over the last 10 years has been that new EU bodies in practise and to an increasing extent have overtaken functions that previously resided with other European organisations. For EU countries this is often expedient. It can lead to the avoidance of unnecessary duplication and increased opportunities for coordination. But for Norway this creates problems because task of organisations in which

it had participated as a full member have been taken over by the EU, where Norway does not have the same status and rights of participation.

In addition to deliberate political choices Norway's integration with the EU is to a great extent driven by more autonomous and self-reinforcing processes. EU integration is often considered to progress through a form of functional logic. The basic assumption here is that the different parts of the economy and society do not exist independently of each other. Reinforced cooperation in one area, that leads to or spills over into other areas. If for examples tariff duties are removed to establish a single market, this will also create a need to remove trade barriers in order to realise this internal market. If an internal market is established for goods, services, persons and capital, this will also create a need to harmonize regulations, police cooperation and control of external borders etc. Cooperation in one area leads to cooperation in other areas.

Norway's association with the EU can be seen in this light. The EEA Agreement made Norway a part of the Internal Market. Since then this has gradually expanded and there has been a functional pressure to extend the association to other areas. The EEA to some extent led to Schengen. Schengen led in turn to Norway also wishing to participate in other aspects of EU Justice- and home affairs policy. There has also been considerable "spillover" when the EU veterinary rules were adopted in order to secure market access for fish, which later led to great changes in Norwegian agriculture and food policy. There is much to indicate that this will continue in the coming years. Given the increasing tendency of horizontal packages of policies and legislation in the EU of which partly contain EEA relevant rules and partly do not, this will lead to Norway taking them over in their entirety, and the integration will continue to expand in this way.

It is, furthermore, assumed that functional dynamics interact with institutional developments. A common internal market increases cross-border trade, but at the same time increases the need for conflict resolution, through for example the EFTA Court, and the need arises for common institutions that can secure coordination and regulation. With such a perspective it is also assumed that interest-organisations, companies, politicians, and bureaucrats gradually will shift their attention towards, and to an increasing extent emphasize the significance of, the European institutions - to the cost of national or regional ones.

Another view puts emphasis on the notion that Norway's relationship with the EU is "path-dependent". That is to say those decisions taken at one point in time lay the ground for decisions at a later point in time. This can bring about opportunities, but may also render other objectives difficult to achieve. The development of the EEA Agreement can be seen as an example of this. Norway has chosen this special model, and unless one can go through the drastic step of breaking out of it, the path is pursued. The same applies to the Schengen agreement.

"Path-dependence" also implies that development is not linear, but is shaped or formed by historical events. The EEA model is for example a child of the times when it was entered into (1989-92). At that time the internal market was the EU's major project and the EEA Agreement reflects this. Since then other elements of EU cooperation have developed and the treaties have changed, without this leading to any revision or renegotiation of the EEA. A classic analogy is the QWERTY keyboard which is still in use in modern computers. It was designed in the 1870s to avoid the letters most frequently in use being too close together, and thereby avoiding their metal arms being jammed. These days there are many other ways to set up a keyboard so that one could write more effectively and ergonomically. The reason QWERTY is still in use is that there would be great conversion costs. Similarly the EEA

Agreement still functions even though the EU has gone from being an internal market of 12 to a political union of 27. Norway is now deeply woven into this model of integration and changing it would involve both cost and uncertainty to break with it.

As the agreement has existed for so long it is also clear that there is an important dynamic in the daily management of the EEA Agreement. It will soon be 20 years since the agreement was signed. As new generations come that have no experience of Norway without the EEA. EU/EEA rules, rights and opportunities are taken for granted. Eventual adaptations and adjustments occur and citizens and companies operate with respect to the new set of rules. Over time it becomes difficult, and often irrelevant, to know where the rules originally came from. It thus becomes increasingly difficult to imagine how things were before the agreement entered into force.

## **27.4 Challenges for Norway's Association with the EU**

### **27.4.1 The EU's Challenges – and Norway's**

This assessment is concluded at the beginning of 2012 at a time when the EU is in a crisis and confronting its greatest challenges in recent times. Daily news from the EU is characterized by financial turmoil, debt problems and uncertainty about the Euro's future. The economic crisis has also led to a state of social and economic crisis in many EU countries, with high unemployment and mistrust of national politicians. Many of European economies are suffering from low growth, a lack of innovation, and bad public finances. European countries are confronting great challenges at many levels, including increased competition from China and other countries, an aging population and climate change.

There are many reasons for today's problems. One of the most important reasons for the debt crisis is the lack of management of national budgets. Nor have member of the Euro-area managed to overcome integral weaknesses that were in the construction of the EMU. The crisis, furthermore, has shown how integrated European states, societies and economies have become with.

The crisis in the EU also affects Norway. In the short term it is primarily the Norwegian economy that feels the brunt of this. Even if Norway up until now has been sheltered from the worst effects - because of good public finances and substantial income from oil and gas - a continued economic downturn in Europe could have great consequence for the Norway's economy and employment, especially in export industries, but also in the finance industry, tourism and service sectors. In the long term developments in the EU will more generally affect the content of Norway's Europe policy. Over the years, Norway's relationship with the EU has been reactive. When the EU develops its cooperation in new areas Norway usually follows along afterwards. If the European integration process stops or reverses, this will inevitably shape the country's Europe policy in the coming years.

The extent to which Norway's model of integration with the EU will be affected is less clear. So far, it has to a remarkably limited extent been so. During the period 1992 to 2011 the EU has been through several comprehensive treaty revisions, there have been crises and successes, and there have been fundamental debates about the goals, values, principles, effectiveness, democracy, legitimacy and identity. All this has to a limited degree affected the EEA and the development and dynamics of the other Norwegian agreements. Norway's integration with the EU has so far been little affected by the great political and idea-related changes in Europe:

It has instead been characterized by ongoing technical and practical adjustments to the new political realities. 27.4.2 “The only problem with Norway...”

It is not unusual to hear from the EU that “the only problem with Norway is that there is no problem with Norway.” This is said mainly as an explanation (or excuse) for why one in Brussels is so little concerned with thinking about the relationship with Norway.

At one level this is correct. There have been few real problems in the Norway-EU relationship during the period 1994-2011, especially compared with other countries. Everything is fine with Norway, and everything is fine with the relationship between Norway and the EU. That is also what most people in Norway think too. Even if resistance against EU membership has stayed strong, and increased recently, the EEA Agreement has throughout the whole period had strong support both in the Parliament and in the public. There have been no strong political demands for change and there are not many who consider changes to the current form of association a priority. Nevertheless, there are a range of problems, tensions, conflicts and difficulties in Norway’s relationship with the EU, which somewhat loosely could be called “challenges”.

At a higher level the whole model of integration is problematic, and could be seen as an attempt to achieve the impossible – to be outside and inside at the same time. This inconsistency creates a range of more concrete tensions and problems. The most basic problems have been there since the start in 1992 and are a part of the construction. Other challenges have turned up along the way. In a note to the foreign ministry from Norway’s ambassador to the EU in summer 2009 entitled “Fifteen years of the EEA Agreement - five challenges for the EEA” a range of *new* problems are outlined for Norway as a consequence of developments in the EU.

Aside from differentiation between original and new challenges one can also differentiate between those that are structural and those that can be mitigated within the boundaries of today’s form of association. The most serious problems are in general structural, even if they can to some extent be mitigated, whilst other smaller problems will be possible to resolve.

The most important challenges regarding Norway’s current form of association with the EU can be divided into five categories:

- Democratic challenges
- Constitutional challenges
- Other political and administrative challenges in Norway
- Challenges for EFTA relations
- Challenges for the ongoing relationship with the EU

### 27.4.3 Democratic challenges

Every assessment of the challenges regarding Norway’s current form of association with the EU must begin with the democratic deficit which underpins the whole construction, and which has been there since the start, early in the 1990s. This is fundamentally a problem of principle, and is what those on the outside primarily point to.

Most people will be in agreement about the democratic weaknesses of the EEA, Schengen and the other agreements Norway has with the EU.<sup>21</sup> What lies behind this, and how big the problem is, is more open for discussion. The committee has considered this above, and has listed the arguments both for the proposition that the agreements are democratically problematic and for the proposition that they are not (see Chapter 26.4).

The Committee believes that there are clear democratic weaknesses with today's form of association, and has analysed this from the perspective of the five central characteristics of a well-functioning democracy. In three of the five the EEA etc. scores poorly and the fourth is doubtful. Firstly, Norway is not represented in decision making processes that actually determine the development of large and important parts of Norwegian legislation and policy. Secondly, the opportunities for democratic supervision and accountability are weak. Thirdly, there are large deficiencies and weaknesses regarding knowledge and debate about Norwegian European policy which means that this area to a limited extent lives up to the requirement for an open and informed public debate. A fourth criterion addresses the rights and obligations for citizens and businesses. Here the agreements with the EU have led to strengthened rights and more judicial control. However, this limits the room for manoeuvre of democratically elected bodies.

The democratic problems of the EEA have been there since the start. They are not an unintended side-effect of the agreement, but a part of its construction, and were well acknowledged by the Parliament when it the agreement with a majority in 1992. Since then they have remained there constantly, and have even increased rather than diminished, but without this having affected the agreements' practical application or effectiveness.

One reason why Norwegian democracy over 18 years has been able to endure this democratically deficient form of association with the EU is that it represents a compromise between those who are for EU membership and those who are against it. Secondly, the agreement can be viewed as a compromise between democratic values and other important Norwegian national values and interests, which a broad political majority considers that the agreements preserve. Further, there are areas of the EU cooperation that are not covered by the EEA and the other agreements, and where Norway continues to make its own political decisions.

Throughout the period 1992-2011 it has been alleged that the democratic problems of Norwegian association with the EU have become larger rather than smaller. This is blamed on, amongst other things, the fact that the EU has become much more expansive over the period. The EEA has developed, and has acquired significance for many more areas than it had in 1992. Further, Norway has entered into Schengen and a range of other agreements with the EU that have similar democratic weaknesses to those of the EEA. Some of are said to be even more democratically problematic than the EEA, in part because they are less known and debated, and because there is even less democratic supervision and accountability. Furthermore, Norway's opportunities for influencing the EU have diminished during the period, as the EU has enlarged its membership, and as more power has been transferred to bodies where Norway has limited access (The European Parliament and the European Council). To the extent that knowledge, engagement, media coverage and public debate about Norway's actual integration with the EU has decreased throughout the years since 1994, one could also view this as a democratically unfortunate development.

The democratic deficiencies of the model of association with the EU are to some extent compensated for by various initiatives. Most importantly, it is continually legitimised by a parliamentary majority through new decisions requiring further integration and commitment. Between 1992 and 2011 the Parliament, as shown on 287 occasions, voted on new extensions of the relationship with the EU, and all of them were adopted, of which 265 with unanimity. In addition there are several hundred Parliamentary decisions on the transposition of EU/EEA law into Norwegian law. Moreover, there are the continuous attempts to improve procedures and processes regarding Norway's Europe policy. The Parliament's management of European

issues is better today than it was in the 1990s, even if there is still room for improvement. Government information on European policy is considerably improved in recent years. These are positive trends that can contribute some way to mitigating the principal problems. But they in no way remove them.

Living with a problem for twenty years, one can eventually get used to it. This has happened with regard to the relationship with the EU. Even if the democratic problems throughout the period 1992-2011 have increased rather than diminished, they have nevertheless become habitual problems. Most people are rather tired of the issue, which has become “old news”, and the attempts over the years that have been made to raise a broader public debate about have not succeeded. It is difficult to do anything about these problems without starting up the whole EU debate again, and these problems are not so bad that most people can't put up with them. In fact, many are in agreement with the foreign minister who in May 2011 - to the question of whether he believed there were democratic deficiencies with the EEA agreement, answered:

“There are clearly democratic challenges. Of this I am not in doubt. But if I can live at ease with these, it is because there are many other areas characterized by dilemmas and contradictions. But they are nevertheless handled in a way that is democratically and legally acceptable. Perfection does not exist. We must live with half-way solutions. As a whole, one can live with this.”<sup>22</sup>

Amongst the critics of the democratic deficit in the EEA etc. it is quite usual to refer to the agreement as a “crofter agreement”. Another image that is presented, but that is less known, is that Norway is a “free rider”.<sup>23</sup> In the EU new policy and law is formulated by 27 member states according to relatively democratic processes. Norway to a large extent adopts the results of this, but without itself having participated in the process or taking part in the votes. One can live in a democracy without using one's right to vote, especially as long as one is satisfied with how others apply it. As such there is the metaphor of Norway as a “sofa voter”, who voluntarily has chosen to stay at home.

In areas other than European policy, Norwegian democracy is generally deemed to function well, and in 2010 Norway won first place on the democracy index, measured by the Economist, getting 9.8 out of 10 possible points.<sup>24</sup> It can be argued that one reason Norway tolerates the lack of democracy embodied in the EEA arrangement, is that its democracy functions so well otherwise. Via the EEA Agreement, Schengen and the other agreements, Norway has outsourced important decision-processes to the EU. But this in itself is a democratic choice, openly made by a qualified majority in 1992, and subsequently confirmed several hundred times by parliamentary majorities on votes for new agreements with the EU. In this way Norwegian democracy is committed to co-existing in an undemocratic association with the EU, because this is the only solution on which it has democratically managed to agree.

#### **27.4.4 Constitutional challenges**

Aside from the democratic challenges it can also be said that there are constitutional challenges with respect to Norway's association with the EU. Some have gone so far as to call the EEA a “constitutional catastrophe”, but it is a little unclear what this means. On closer inspection it seems this expression may share many of the same elements as are contained in the expression “a democratic catastrophe” – in that one has handed over legislative and judicial authority to an organisation (the EU) in which Norway is not a member. In this case “constitution” is not used as a legal term, but as a broader and more nebulous political expression.

In a legal sense the EEA, Schengen and the other agreements with the EU are safely anchored constitutionally. The EEA Agreement was ratified by qualified majority according to the Constitution's §93 on the transfer of authority, in a completely correct way. When the Schengen Agreement was approved there was a comprehensive constitutional evaluation, which concluded that the Parliament could, in line with applicable constitutional law, give its consent, according to the Constitution §26, second paragraph. Such consent has also been given on 286 other occasions during the period from 1992-2011 when Norway has accepted new EU-related commitments.<sup>25</sup>

Another legal issue is the room for disagreement about the application of the Constitution; whether to apply §26 second paragraph, or §93 – in other words about the threshold governing when the Parliament should use simple majority or qualified majority (3/4) when conferring consent.

An additional difficulty is that constitutional procedures for conferring parliamentary consent to new international agreements are, it could be said, not so well suited to Norway's special form of association with the EU.

A major challenge, according to many, is that it is only formal transfers of authority that activate the requirement for qualified majority according to the Constitution's §93. The decisive issue is whether Norway formally retains the possibility to say no to new EU-originating commitments; irrespective of how difficult it is to say no in practise, and irrespective of how extensive the transfer of power is. Under Norway's current form of association the distance between formal and real transference of authority is much greater than in any other form of international cooperation and much greater than what it is for the member states in the EU (that clearly have delegated their authority). This could be viewed as a constitutional problem.

Another challenge is getting over the political-psychological hurdle of invoking the Constitution's §93, which in practise appears to have been so high that parliamentary majorities avoid this when materially it is considered to be a ¾ majority support for the substantive content of the issue.

A third challenge is that §93 enable the transfer of authority only to international organisations of which Norway is a member. Normally this means that Norway cannot use this provision to transfer authority to an EU agency, even when there is an association agreement with it. This is a problem because these agencies increasingly have authority to take decisions that are binding for member states and private persons. In order for Norway to gain association status, it has to accept this.

To enter into agreements with the EU (and to adopt new legal acts) that a democratically elected majority considers accords with Norwegian interests, the Parliament and the Government have developed a theory that §26 second paragraph does not only open the way for the transfer of real authority, but also the transfer of formal authority, as long as it is "not far-reaching".<sup>26</sup> This can be to both EFTA/EEA bodies and EU bodies. This theory is developed via practical application or precedence, as occurs more generally in the national legal system. It could be viewed as an applied interpretation of §26 second paragraph. But it is a problematic that this practise is not clear and undisputed. Furthermore, there are obvious limits to what could be defined as "not far-reaching". This has led to Norwegian negotiators needing to ask for more creative institutional solutions for Norwegian association to EU agencies. And sometimes this gets completely blocked – as currently with the question of Norwegian association with the EU's new agencies for supervision of the financial sector,

which the Government would very much like to participate in, but where the constitutional problems are substantial.

Some challenges have arisen more often in recent years, and it can be assumed they will arise more frequently in the years to come. They could be resolved relatively simply, by changing the Constitution with a 2/3 parliamentary majority. One would establish a procedure for transference of authority with respect to agreements with the EU that is better adapted and more tailor made to fit today's special form of association, and that will provide a more open and in many ways a tidier process. This will help avoid disputed interpretations and creative constructions.

From a technical/legal perspective such a change could be executed in several ways, either by changing §26, or by changing §93, or both, or by formulating a new paragraph. The reform would need to include both (i) the matter of the threshold and criteria for going from simple majority to qualified majority, (ii) the threshold for qualified majority (still ¾ or another fraction), and (iii) the question of transfer of authority not just to the EFTA/EEA bodies but also to the EU bodies.

In terms of content one could consider either (i) a reform that specifies and codifies constitutional practise as it has actually developed over the past 20 years, including the theory of "not far-reaching" transfer of authority, or (ii) a reform that makes it more difficult than it is today to enter into new agreements without going down the road of securing a qualified majority. Here there would be diverse political opinions, which would make it in practise difficult to gather the necessary 2/3 majority for a definitive solution.

The Committee has not considered it its task to formulate proposals for constitutional change. If this should be done, it should happen as an independent process, with an independent assessment. If the Government and a majority in the Parliament wish to continue with today's model of association with the EU in the foreseeable future, and make it constitutionally more robust and more easily managed, the Committee would however recommend that such a process is set in motion.

#### **27.4.5 Political and administrative challenges in Norway**

Even if Norwegian authorities generally must be considered to have administered the relationship with the EU within the parameters of the agreements in an efficient way, this raises a number of challenges both at the political and the administrative level.<sup>27</sup>

Firstly, there has been weak political leadership on European issues. Even if there are exceptions, the Norwegian model of association with the EU generally futo depoliticize issues. In contrast to the EU states, where cabinet ministers continually participate in the Council, the arenas where Norwegian politicians can involve themselves in EU/EEA affairs are few and far between, and are associated with a limited number of opt-outs. They do not represent the main developments, and often are not even particularly important. Political participation often occurs through informal channels that are vulnerable to reshuffles. There are also national political compromises on European issues, which further inhibit political activity and debate. For many politicians there are more disadvantages than advantages from engaging actively in EU/EEA affairs. This is a structural weakness in the construction, but it can be mitigated to some extent, as demonstrated by the individual ministers that have actually taken a visible and commanding role in European policy within their fields.

Secondly, the lack of political management and attention can take root further down in the civil service and be de-motivating. If the political leadership is not particularly concerned

with EU/EEA affairs, the field becomes less attractive for the civil service. Some thrive, working in peace below the political radar. But for most civil servants especially in the government ministries, it is more challenging to deal with issues where the minister is engaged and active. Generally this is a signal that the civil service requires clear political strategies and signals on European policy – and that its absence created frustration and demotivation.

A third challenge is to coordinate a unified Norwegian policy on EU/EEA matters, where issues often cross boundaries between policy sectors and levels of administration. This is a general challenge that most of the EU States have tackled either by putting European policy under the Prime Minister's office or under a separate Europe minister. In Norway the responsibility for coordination still lies with the Foreign Ministry. A structure has been established for this, but it is relatively weak, and it cannot be said that the Foreign Ministry's European department during the period 1994-2011 has been properly staffed to coordinate a unified Europe policy between the specialized ministries, external bodies and others. The Prime Minister's Office (PMO) has also played a limited role.

The result is that current Norwegian Europe policy appears to be fragmented and "Norwegian" positions are to a great extent formulated by civil servants in individual government agencies often at a low level. The Committee's assessment is that there is a need to strengthen the coordination and the strategic and tactical thinking in the administration about the relationship with the EU. How this can best be done, and whether coordination should still reside in the Foreign Ministry, is a question the Committee does not have the capacity to enter into within the parameters of this assessment.

A fourth challenge is that the Norwegian form of association is very demanding for those who on Norway's behalf should pursue an active European policy. Norwegian representatives must often work hard to gain access to EU processes, and even if Norway achieves this, it does not participate on an equal basis. This is a difficult position to be in, which necessitates being better prepared than other national representatives in order to have any chance of success. Further, with the exception of Schengen, Norway generally only has access to early phases of EU decision making, during the preparatory work of the Commission, but not in the later and more decisive phases of when the Commission's proposals are dealt with the Council and the European Parliament. These are structural challenges and the only remedy is to supply sufficient resources and ensure that Norwegian are at least as competent as their colleagues in the member states.

#### **27.4.6 The Development of the EU as a Challenge for Norway**

Through the EEA, Schengen and the other agreements, Norway has integrated itself with the EU, with a commitment to participate actively in further developments. Norway is integrated into the European project through an ongoing process. Most of this development has been unproblematic, and is considered by the Norwegian authorities to be positive. During this period the EU has developed in ways that diminished the differences in values and policies between Norway and the EU.

But some aspects of the development of the EU create frictions or problems in the relationship with Norway. When Norway's ambassador in the summer of 2009 sent a report home to the Foreign Ministry in the summer of 2009 with the title "Fifteen Years of the EEA Agreement. Five Challenges for the EEA" her summary was that Norway "stands before a more complex, impenetrable and demanding EU", and most of the problems she points to correspond with developments in the EU recently.<sup>28</sup>

A structural challenge is that the EU continually develops its institutions and decision procedures, through treaty revisions and practise, while the framework for Norway's agreements are more static and have not been reformed in the same way. This applies especially to the EEA Agreement's main provisions, which mirror the EC Treaty provisions on the four freedoms prior to the Maastricht treaty early in the 1990s and have not been revised since. Procedures that were important 20 years ago become less so over time, while Norway lacks integration with newer and more important processes and institutions in the EU today. This has been a challenge for some time, but it has been particularly evident after the Lisbon Treaty entered into force in 2009.

One of the most important things that happened in the EU between 1992-2011 was the enlargement of the EU and the EEA. When Norway negotiated the EEA there were 12 EU states. Today there are 27, and the EU has developed from being Western European to a more all-European organisation. Consequently, the EEA Agreement has enlarged correspondingly, and Norway has benefited greatly from this, economically and in other ways. To the extent that EU membership has led to political stabilization in Eastern Europe, this is very much in Norway's interest. Norwegian authorities have therefore also been positive to enlargement of the EU and the EEA. However, the enlargement of the EU from 12 to 27 has led to a marginalization of the EEA Agreement and the EFTA States. Seen from Brussels, Norway is today both less important and further away than in 1992. The focal point internally in the EU has shifted over to the East and the South, and for many of the new Member States Norway is very much on the periphery. Added to this is the fact that the EU's decision processes have become heavier with as many as 27 states having to agree. This means that the opportunity for third country participation in the process has diminished.

Another change in the EU that raises challenges for Norway is the strengthened position of the European Parliament, which has happened gradually during most of the period between 1992 and 2011, and took a large step forward in the Lisbon treaty. In the EU this is viewed by most as an important democratic reform. For Norway it is a challenge because in the agreements with the EU there is very limited provision for contact with the European Parliament. Recently the Foreign Ministry has been eager to improve Norwegian procedures with regard to the European Parliament, on many levels. It has encouraged the Norwegian Parliament [Stortinget], the political parties and other bodies to do the same. In many ways the European Parliament as an institution is open for input and discussion, and it is not a given that it would be more difficult for Norwegian actors to have an impact there than in other institutions, but this will most often happen through informal channels and through lobbying - in competition with many others.

The absence of permanent channels into important EU institutions is nothing new. When the EEA Agreement was formed early in the 1990s it was especially important for the EFTA States to have procedures for contact with the Commission, which at that time was at the height of its power. The Commission is still very important, but already during the 1990s its relative importance in the EU was weakened in relation to the Council, as a consequence of the member states taking back some control. During most of the period from 1992 to 2011 Norwegian diplomats have had a challenge to establish contacts with the Council, the Council Secretariat, and the many important committees in the Council structure. The Schengen agreement provides a certain access to that system, but the EEA Agreement does not, and this has been a recurring challenge; it limits Norway's opportunity for influence and intelligence gathering.

In recent years the European Council has become increasingly important in the EU. This is the body for heads of state and government (in contrast to the Council where the various ministers meet). The European Council was originally an informal body that did not meet very frequently. Along the way it has become more important, and with the Lisbon Treaty of 2007 it was made into a formal institution, with its own permanent President (Van Rompuy). Today the European Council has assumed a unique position at the top of the EU's political system, and it leads much of the high-level policy development, which can be viewed as an expression of the fact that heads of state and government are more engaged than previously. Again this is a challenge for Norway, which has no access to that level, and is first and foremost represented to the EU through the foreign minister and the line ministers, without there being any defined role for the prime minister.

Another institutional development in the EU is the establishment of new supervisory bodies and agencies.<sup>29</sup> The context for this is that there has been political resistance to increasing the administrative capacity in the Commission, at the same time as there being a need to strengthen administration and coordination at the European level. The EU has therefore established a range of more or less independent agencies, of which many are located in the member states. In total there are today (Autumn 2011) 43 agencies and similar institutions and the number is growing steadily.

For Norway this raises two specific challenges. The first is to gain access. Association to and participation in EU Agencies is generally viewed to be in the Norwegian interest, and throughout the whole period this has been a priority for the Norwegian authorities. The EEA gives no automatic right to participation in agencies, so this is something Norway must request and negotiate each time. Sometimes it has been easy and other times very difficult, but in general the EU has given access and today Norway is associated to a total of 26 EU agencies. The arrangement varies - from pure observer status to more extensive cooperation, but not at the same level as the EU states. In the "challenges" memo from Norway's EU ambassador in the summer of 2009 it says about the form of association to EU agencies "this does not give us the influence that would have been natural on the basis of our political weight in the issues that are handled by these sorts of agencies. We cannot have leadership positions, we have no influence on the priorities that are determined through the budget work in such organisations and no agency could be located in Norway".

The other challenge is that the EU to an increasing extent gives the agencies a formal competence to take decisions, in order to make them capable to resolve concrete tasks. This is rational, but it creates formal problems for Norway. If Norway is able to participate it is a normal condition that the agencies' decisions also must apply to Norway and Norwegian legal subjects. As shown in Chapter 11.3, this raises constitutional problems. The Parliament can only consent to such agreements with a simple majority according to the Constitution's §26 second paragraph as long as the formal transfer of authority to EU agencies is "not far-reaching". If there is talk of transfer of more far-reaching authority then one should normally refer to §93 with its requirement of a 2/3 majority. But that is also difficult, partly because the political threshold to achieve such a majority is high, and partly because §93 can only be used to confer authority to international organisations of which Norway is a member. Domestic constitutional requirements have in many cases been as high a hurdle with respect to participation in agencies as has getting the EU to agree to such participation.

The construction of new agencies and supervisory authorities was summarized by the Norwegian Ambassador in 2009 as follows: "it is, seen in isolation, not in Norway's interest because of our association to the internal market through the EEA Agreement itself, even

though there may be many good reasons to support the work toward good solutions at the European level”. The quote illustrates the more general point that what is good for the EU is not necessarily always good for Norwegian interests.

Another institutional challenge for Norway has been the establishment in December 2010 of the EU’s new common Foreign Service (EEAS- the European External Action Service). With the establishment of the EEAS the main responsibility for contact with third countries was moved from the Commission to the EEAS, and here Norway is placed in the unit for “Europe and Central Asia”. Some of the disquiet from the Norwegian side was first associated with a concern that establishment of the EEAS would possibly weaken the interest in and attention to Norway and the EEA. Further, it has been viewed from the Norwegian side as possibly problematic that procedures for contact with the EEAS could be less satisfactory than they were with the Commission. Another challenge is how to develop relations with the EEAS, when most of the contact between Norwegian line ministries is directed with the respective Directorates-general in the Commission. These are primarily transitional problems. Some are also already resolved. The most important long-term challenge for Norway is nevertheless that the EU is in the process of developing a foreign policy apparatus that will contribute to stronger coordination of foreign policy in the EU.

One of Norway’s largest challenges concerning the development of the EU is that the Lisbon Treaty abolished the “pillar structure” that divided EU cooperation into three parts – (i) The internal market etc.), (ii) foreign and security policy, and (iii) justice and home affairs). This is now abolished in the EU, and the three areas are to a great extent integrated, even if there are still some divisions. This change is problematic for Norway because the Norwegian agreements continue to be mainly based on the pillar concept. The EEA is only relevant with respect to issues that were in the first pillar, whilst there are other agreements in the areas that previously were in the second and third pillar.

The EU is now open to policy formulation across the former pillars, mainly through broader and more cross-sectoral “packages” of political and legislative initiatives, such as for example within security and crisis management, which raises significant issues within all of the three former pillars. For Norway this presents challenges. Firstly, Norway has no structures at the right level to manage contacts and exert influence on cross-sectoral policy formulation, and is therefore completely locked out of broader strategic thinking. Secondly, the packages of initiatives will contain legislation and programmes that belong partially in the EEA, partially in Schengen and other agreements, and partially outside the existing agreements – and it is not a given that the boundaries between these three categories is clear.

This makes ongoing Norwegian cooperation with the EU more cumbersome, and it is more difficult to define which new legislative measures are “EEA relevant” or “Schengen relevant”. The problem is reinforced by the fact that the EU to an increasing extent adopts general framework directives with very broad coverage and that are supplemented with a range of complimentary directives. Frequently these framework directives encompass issues that fall both inside and outside the EEA. Sometimes the differentiation between what is EEA relevant and what is not goes right through the middle of a single directive, and this creates both procedural and substantive problems. The challenge of identifying and agreeing on which legal acts/ parts of legal acts are “EEA relevant” is an increasing problem. This is especially evident in the EFTA Secretariat, where legislation has started to clog up, as deliberations are awaited from the EFTA States and the EU. This leads to uncertainty about what parts of EU law will be binding for Norwegian actors. It also leads to problems deriving from legal non-

homogeneity, which in turn arises from delayed transposition and implementation - long after they are adopted and implemented in the EU.

Generally, one can expect increased uncertainty concerning the actual scope of Norway's agreements with the EU, as the EU turns towards more cross-sectoral political and legal initiatives in the coming years. For the EU and its member states, increased coordination between different policy areas will be a benefit, but for Norway it will create difficulties.

Another challenge that was pointed out by the Norwegian Ambassador in 2009 was that the speed of the EU decision making has increased recently, first and foremost as a consequence of the financial crisis, but also to some extent in other areas. In areas where the EU has to adopt new legislation quickly one is increasingly moving away from the traditional processes involving lengthy preparation in expert committees, green papers, hearings and consultations. Today more decisions are taken through fast track procedures at a senior political level between the institutions. For Norway this is challenging, not just because faster legislative procedures also increase the pressure to come with timely input, but more fundamentally because it is precisely in the earlier phases of the decision-making process when Norway, under the EEA Agreement, has some access. When the measures adopted through a fast-track procedure between the key EU institutions or between the key EU member states Norway is left totally out of the loop, even if this concerns legislation that is EEA relevant and that will be implemented in Norway later on.

An additional challenge for Norway is that there are an increasing number of third countries that also would like special agreements with the EU involving privileged access to EU processes. In recent years the EU has substantially developed its relations with neighboring countries in the south and the east through the European Neighborhood Policy (ENP) and a range of different association agreements. This has led to many of these countries also wishing the same sort of access to EU programmes, EU agencies etc. that Norway traditionally has had. In the note from Norway's ambassador to the EU of 2009 she pointed out that Norwegian authorities to an increasing extent had "met the arguments that the EU cannot give preferential treatment to the EFTA/EEA States in relation to other third countries on issues where 'many want more' with respect to the EU." In meetings with the EU, Norwegian demands and requests are increasingly weighed up against those of third countries. This has already created problems regarding Norwegian participation in several programmes and agencies.<sup>30</sup> The challenge will probably grow in the coming years, and consequently represents a threat to Norway's "privileged partnership".

#### **27.4.7 Challenges to the EFTA/EEA Partnership**

Norway's association with the EU through the EEA Agreement is channeled through the organisation EFTA, which today has four member states, of which three are EEA/EFTA states (Norway, Iceland and Liechtenstein), while the fourth (Switzerland) does not participate in the EEA. The whole institutional apparatus for development and supervision of the EEA is organized within EFTA – through the EFTA Secretariat, the EFTA Standing Committee, the EFTA Surveillance Authority, the EFTA Court and the Financial Mechanism Office (EEA Funds). Norway coordinates all its positions with respect to the EU in the Standing Committee, and meets together with the other EFTA States in the EEA Council, the EEA Joint Committee etc. There is also an EFTA Parliamentary Committee and an EFTA Consultative Committee for the Social Partners.

EFTA's role as an organisation has changed several times throughout its history. When EFTA was established in 1960 it was originally meant to be an alternative to the EU. This it has been only to a minimal extent. Back then, it was all about securing free trade between the EFTA

states. Afterwards, EFTAs main task from the 1970s and 80s was to coordinate s relations with the EU. After Switzerland said no to the EEA in 1992 EFTA's role changed again, and today it is two-fold. The main task (for 2/3 of the staff) is to take care of cooperation with the EU for the three EFTA/EEA states. The second task is to negotiate free trade agreements with third countries on behalf of the EFTA States (including Switzerland). In this paper, we are only concerned with the EFTA/EEA function.

Cooperation and coordination with other EFTA States with regard to EU relations has always been a challenge in Norwegian European policy, for as long as EFTA has existed. If one goes back to the EEA negotiations in 1990-91 the relationship between the 7 EFTA countries was far from simple, and there was considerable friction between them on many areas of negotiation. Since the EFTA/EEA pillar was reduced to three small countries from 1995, things have in one sense been easier for Norway, as a relative "Super Power" in the organisation. However, it is a continuous challenge to coordinate all of the important Norwegian positions concerning the EU with Iceland and Liechtenstein.

The EFTA/EEA pillar poses challenges at three levels:

1. Cooperation between Iceland, Liechtenstein and Norway
2. The running of the common EFTA/EEA institutions
3. Possible changes in the number of EFTA/EEA states

#### Cooperation between Iceland, Liechtenstein and Norway

Generally, the cooperation between Norway, Iceland and Liechtenstein has worked well during the period 1994-2011. For being quite different countries it has worked surprisingly well. It has also been practically invisible to the public. Norwegian politicians seldom make a big deal about the fact that their closest partners on European policy are Iceland and Liechtenstein, and the internal tensions in EFTA/EEA seldom see public light.<sup>31</sup>

A first challenge concerning the EFTA/EEA pillar is that it is so small. In a way, this can be comfortable for Norway, which consequently gains more influence. But first and foremost it is a challenge that in meetings with the EU Norway is a member of such a small organisation. Had Norway been part of a larger organisation it would have had more weight in relation to the EU. This is how things were originally conceived. But after four of the seven EFTA states chose to leave the EEA, the EFTA pillar since 1995 has been a very fragile platform for Norway's European policy. This is also evident, concretely, in that it is difficult to get representatives from the political level of the EU institutions to show up at the semi-annual meetings of the EEA Council. This has been an ongoing challenge since 1995, and has changed little over the years.

The next challenge is that Norway, Iceland and Liechtenstein to a limited extent are natural allies in European policy. With respect to the EU the three states have different interests, traditions and goals. This means that on a number of issues it can be time-consuming to find agreement, so that the EEA process is delayed. The requirement for unanimity between the three EFTA States is in practise an important constraint on Norway's European policy and is a potential source of tension in the relationship between Norway and the EU. Iceland and Liechtenstein's will and ability to continue the cooperation are decisive for the EEA's efficient operation.

A third challenge for Norway is that the two other partners have limited administrative capacity and resources to commit to the EFTA/EEA institutions and follow up the work at the

national level. In relation to their size it is in many ways impressive that Iceland, and especially Liechtenstein manage to deal with the expansive and demanding EEA processes. However, capacity and delays are ongoing challenges, and this is in no way diminished by the fact that the EEA cooperation is becoming more comprehensive. Recently this has also been affected by the fact that Iceland is employing some of its capacity on the current negotiations for EU membership (see below).

A fourth underlying challenge, which for understandable reasons is seldom discussed, is whether it is in Norway's interest to be identified with Iceland and Liechtenstein. This is not immediately a club that corresponds with Norwegian foreign policy ambitions, or its self-image. Norway has close ties to Iceland, but to be presented as close allies on European policy is another thing, and added to this is the fact that Iceland in a number of areas has more acute conflicts with the EU than does Norway – especially as concerns financial services and fisheries. The relationship to Liechtenstein is even less comfortable – a tiny principality in the Alps of 160 km<sup>2</sup> and 35000 citizens, with a tradition of being a tax haven, and where the Prince still has formal and substantial political power. Aside from reputational challenges this can also cause more concrete problems. When the EU Court in the Rimbaud-case in 2010 for the first time in a judgment deviated from the principle of homogenous interpretation of EU- and EEA law (to the EFTA States' detriment) it was probably because of a lack of confidence in Liechtenstein's tax regime.

Iceland and Liechtenstein on their side experience challenges with their cooperation with Norway. One challenge is that Norway sometimes acts as a Superpower and big brother internally in EFTA/EEA, and does not show sufficient respect. Another challenge is that Norway on a number of issues goes directly (bilaterally) to the EU, without coordinating with or informing the other two, which to a much greater extent is dependent on the EFTA Secretariat.

#### Challenges with the EFTA/EEA Institutions

There are also challenges with respect to the ongoing management and running of the common EFTA/EEA bodies and institutions. Here we will focus on the four permanent institutions: the EFTA Secretariat, EFTA Surveillance Authority, the EFTA Court, and the Financial Mechanism Office (FMO).

The fundamental challenge is the same for the four organisations. The EFTA/EEA pillar is actually too small for a large institutional superstructure. There is something odd about an international organisation with so many important institutions just to manage cooperation between a small, a very small and a tiny country. It is a safe assumption that the institutional system would never have been constructed this way during the negotiations in 1990 – 91 if one had known that it would only apply for Norway, Iceland and Liechtenstein. It was only by a whisker that it continued in 1995, with staff reductions.

On this background it should be underlined how *well* the institutional EFTA/EEA system has worked throughout the period 1994-2011, according to its objectives. The institutions have to all intents and purposes managed the tasks they were given according the EEA Agreement in an effective way, which has been decisive for the agreement being able to function. Moreover, they have managed to build up a relationship of trust and cooperation with the EU institutions, and so secure the EEA Agreement's legitimacy.

All said and done, there are also challenges for the institutional EEA/EFTA system. These are to some extent different for the individual institutions that have their various functions.

For the EFTA Secretariat there is an inherent challenge involved being a secretariat for the three EFTA/EEA States, whilst at the same time gaining the confidence of the EU side that it is able to handle the day-to-day business of adaptations, evaluation of EEA relevance etc. in a correct and neutral manner. So far this has worked out, but it should not be taken for granted, and it is an underlying challenge. This is made no less difficult when national administrations prolong or delay the process, most typically when new legislation is the subject of political dispute. Another challenge is that the relationship between the three EFTA/EEA states is somewhat unequal, and Liechtenstein and Iceland are more dependent on the Secretariat than Norway, which has a larger State apparatus. For the Secretariat the relationship to the Norwegian authorities can, to say the least, be a challenge, in cases when they chose to go it alone. Furthermore, it is a challenge that EFTA officials have contracts that can be extended beyond six years. This makes it difficult for the Secretariat to retain and develop its expertise.

The EFTA Secretariat has until now been a very obscure institution in Norway's Europe-debate, despite the important function it fulfills. As far as the Committee can tell, it is a long time since there has been a general assessment of how the Secretariat functions, and of whether the management of issues and the organisation can be improved. In the Committee's view it could be time for such an assessment, with an audit having the objective to clarify the Secretariat's function and procedures, and to evaluate whether daily resources are sufficient. As part of this it should also be assessed whether relying on temporary employees, resulting in a high rate of turnover, is optimal.

The Financial Mechanism Office (FMO) is a newer organisation, which has only really developed in recent years, having in total 55 employees today. The greatest challenge for FMO is the onerous task of administering the EEA funds well. But there are also institutional tensions in the relationship with Norway and the two other countries, which are magnified by the fact that these are to a large extent Norwegian funds – both because Norway pays about 95% of the common EEA funds, and because there is an equivalently large individual Norwegian financial mechanism.<sup>32</sup> In total, Norway pays about 97% of the funds. To an increasing extent the Norwegian authorities would like to manage this from home, and to use the funds as a foreign policy tool, and this too puts certain structural stresses on the FMO organisationally.

For the EFTA Surveillance Authority (ESA) and the EFTA Court the fundamental challenge is that they are independent and autonomous bodies, and at the same time they should conduct the same supervision and judicial control as the Commission and the EU Court. They should neither be more strict nor more lenient than the Commission or EU Court, and they should follow ongoing developments within these two institutions, which themselves are not always unified or predictable. If they take a misstep, one way or another, then this would affect the legitimacy of the EEA. On the one hand it is unacceptable if they are stricter towards the national authorities in the EFTA/EEA states, who view the EEA as something less than full EU membership. On the other hand, it is unacceptable if they are less strict than the Commission and the EU Court. This would break with the principle of homogeneity and reciprocity, and would make the EU lose faith in the EEA system. This is a difficult balance to achieve, and how ESA and the EFTA Court manage this has often been the subject of dispute – in the Norwegian debate often formulated as the question of whether they are more or less “catholic than the pope”.

The main story is that ESA and the EFTA Court have managed the balance for eighteen years. The two institutions – each for their part – have been very conscientious on this issue, and have worked hard to respect the requirement for homogeneity and dynamic development. There is no empirical basis to be able to say that ESA is “more catholic than the pope”,<sup>33</sup> and

here it is rather a question of some who think that ESA is more careful than the Commission. What is more likely the case is that one has found an acceptable level. As far as the EFTA Court is concerned there is certain evidence to say that during certain periods it has been stricter with the EFTA States than the EU Court has been.<sup>34</sup> If that is the case, there is challenge to the Court's function and legitimacy. However, both ESA and the EFTA Court have through the years managed to establish and preserve the confidence of the EU System, as is necessary in order for the EEA Agreement to be able to function.

For ESA another challenge is to balance the different roles that the organisation should fulfill, primarily as an advisor, negotiating party and independent advisory body with respect to Norway and the other EFTA/EEA states. Again, this should preferably be done the same way the Commission does it in the EU, bearing in mind the distinction that ESA lacks the Commission's political function.

ESA's credibility depends both on how its role is assessed in the EU and the EFTA States as well as in the marketplace and the population. ESA is formally independent, but Norway nevertheless has desired to exert a certain degree of control. Norway has always had the Presidency of ESA and Norwegian authorities have often appointed prominent Norwegian diplomats to leading roles in ESA. The organisation has at the same time upheld the importance of developing through a broader based recruitment basis, not limiting itself to the EFTA countries. An underlying challenge is to ensure that the EU does not suspect Norway of letting the wolf guard the sheep. This would undermine trust and deprive individuals and companies of their rights. At the same time, it is also important that the organisation has the necessary trust of the EFTA States.

ESA has to only a limited extent been the object of evaluations, even though over the years there has been reform of, among other things, working practises, and recruitment and information policy. It could be time for a broader evaluation, which in such an event must be carried out in a way that does not compromise the institution's independence. Similar to the EFTA Secretariat the question can be posed as to whether temporary employment and high turnover is conducive to securing competence and continuity.

The greatest challenge for the EFTA Court is that it has too few cases. In order to function well a court should have a certain caseload, which secures it enough work to do and it can develop legal precedence, competence and authority. The EFTA Court has generally had too few cases, and for long periods, much too few. This is because, first and foremost, the three small states are much too small to generate enough cases for an international (supranational) court. But in addition to that there is the fact that national courts have been more reserved about sending cases to the EFTA Court than is normal in the EU. There are several reasons for this. But it anyway creates a challenge not just for the EFTA Court, but also for the system as a whole. At the root of there is a discussion about power-sharing and competences between National and European courts, but also about trust and credibility.

Another challenge is that the EFTA Court comes across as very small whenever very large and important national cases come before it. These are cases that would be heard by a larger number of judges in the EU Courts – or for that matter in plenary/the Great Chamber of the Norwegian Supreme Court – but in the EFTA Court they are decided by the three permanent judges there.

Recently, from several quarters, there have been calls for an assessment or audit/reform of procedures in the EFTA Court, and the Court's President has presented several proposals for change - with a view to strengthening its position and function. Without going into the

specifics of these proposals – which will need to be assessed and evaluated more closely – the Committee supports such a process.

As will be clear from this assessment, the Committee believes the time may have come for a study and evaluation of how the institutional apparatus of EFTA/EEA functions. Such an assessment falls outside of the parameters of the Committee's task and capacity, and would anyway have to be carried out in somewhat different ways with respect to the individual institutions. For ESA and the EFTA Court the assessments would have to be performed in a way that preserved their independence. The starting point would be the continuation and reinforcement of Norway's current form of association with the EU.<sup>35</sup> If this is the goal, then there are no obvious alternatives to today's institutional solution. Under the current model, it would not be possible to leave administration and supervision of the EEA up to the EU institutions or to the national authorities in the EFTA/EEA countries themselves. In that case, one accepts the institutional EEA/EFTA system, which despite structural weaknesses and challenges has worked for 18 years. If it is to continue to do this in coming years it could be time for an overhaul, with a view to adjustments and improvements. Such an assessment should also look at the economic management tools, reporting routines, transparency, and the suitability of the arrangement as it is constructed and practised today for the coming years.

#### Possible Changes in the Construction of EFTA/EEA – exit or entry

The EEA Agreement has no formal requirements specifying the number of states that must participate in the EFTA/EEA pillar. As mentioned, it was constructed for seven, but since 1995 it has operated with three. Eventually the parties have gotten used to this. If the number were to change, this would upset the current arrangement and create new challenges. This is true either whether one of the current states leaves or a new state joins.

The question of an exit is currently relevant concerning Iceland,<sup>36</sup> which in 2009 applied for full EU membership and is currently in negotiations, with the goal of concluding them in 2013. The extent to which Iceland actually wants to join the EU is an open question. The Government is divided and in the public there is great skepticism. But the negotiations continue and nothing is finally decided.

Should Iceland join the EU it is obvious that this would influence the EEA Agreement's actual functioning, and most probably its formal function as well. The EFTA/EEA pillar has probably already reached the limits of a minimum critical mass. Formally there are no size requirements, and with some adjustments to the Surveillance and Court Agreement on the configuration of the ESA College and the EFTA Court it is in theory conceivable that the system could continue without Iceland. But the staffing and structure of the EFTA/EEA institutions would need to be reassessed. And then one has to consider how things would turn out in practise. To maintain a comprehensive international institutional apparatus just for Norway and Liechtenstein would for most people transgress into the realm of absurdity, and would in practical terms be difficult to make work in a satisfactory way. If Iceland wants to leave EFTA/EEA, without other countries replacing it, Norway's relationship with the EU would in reality transition from being multinational (to the extent that it is) to bilateral. In which case, institutions and procedures should be adapted to accommodate this.

The entry of new states into the EFTA/EEA pillar would not necessarily be as problematic for the current form of association as an Icelandic exit would be, but would nevertheless pose considerable challenges – depending on the countries in question. To some extent enlargement could strengthen the EFTA pillar, and it could make the whole EEA Agreement more robust and relevant. On the other hand it could make EEA processes more complicated

and cumbersome than they have been up until now. Depending on the countries under consideration for entry, internal differences in the EFTA-pillar could intensify possibly involving countries that Norway does not consider to be natural partners in European policy. Added to this is that any enlargement of EFTA/EEA would diminish Norway's current position as a great power in the structure.

Whether to permit new countries into EFTA/EEA has so far not been a burning issue, even if it has been discussed occasionally over the years.<sup>37</sup> The main reason is that there are no other countries that have found this form of association to be attractive. And neither the EU nor Norway has sought to promote it as a model. Indeed, Norway has been rather dismissive of the prospect when faced with the few signals it has received.

Recently this has arisen again as a possible issue – not on as Norwegian initiative, but as a consequence of changes in the EU and elsewhere. No formal steps have yet been taken, and it is quite possible that there will not. Yet in principle several possible scenarios are conceivable that would be more or less challenging for Norway, irrespective of which country this concerns.

Less contentious, from a Norwegian perspective, would be if the Faroe Islands wished to enter, and there have been some feelers in this regard, but so far without results.

Another possible alternative is if Switzerland wished to enter into EFTA/EEA, in its current or an altered form. It would take a lot for Switzerland to reverse its 1992 'no-decision' to the EEA. On the other hand, the current ongoing negotiations between the EU and Switzerland are strongly reminiscent of the EEA negotiations. Norway would find it difficult to say no if the EU wished to collectivise its relationship with Norway and Switzerland. However, this would create a much more contentious relationship with the EU than the one Norway has today. In many areas Norway and Switzerland have different interests and traditions, and the modest, but far from problem-free cooperation that occurs today on the negotiation of free trade agreements under the auspices of EFTA shows what sorts of tensions and frictions could arise between the countries.

Even more challenging for Norway would be an enlargement of the EEA/EFTA pillar involving several "micro-states" – including Andorra, Monaco and San Marino. This is currently on the agenda, because several of the micro-states have themselves begun to look at the EEA, and because the EU is considering this. Norway, without saying so, quite clearly does not view this as an option. But how such a process would progress remains to be seen.

Most problematic for Norway would be if the EU would insist on using the EEA model (or a jointly re-modeled variant) to also encompass relations with large third countries with which Norway has little in common. Ukraine and Turkey are cases in point. Up until now it has not been a major topic for discussion, but it has been mentioned. If the current enlargement project is put on hold it is not unthinkable that the EEA could emerge as a more natural alternative for some of the candidate countries, for example some of the states in the Western Balkans such as Albania.

A last group of countries are the current EU states or regions that are part of EU states. Regionalization and decentralization in several European countries has led to demands for more regional autonomy. In Scotland the EEA has been discussed as a possible form of association. Management of the debt crisis and possible reform of the EU could also lead to consideration of alternative models of integration for existing member states, and once again the EEA might come under the spotlight; either as an alternative for individual states or in the

longer term as a component of a multi-speed or multi-layered EU area. In Autumn 2011 there was for example a debate on Britain's future roll and position in the EU. The debate on "different speeds" in the EU will also create a backdrop for potential future discussions on developments in and reforms of the EEA.

These last alternatives are perhaps not so probable, so the Committee does not need to devote more space to speculation about them. The general point however is that Norway's current model of integration is not only dependent on what Norway wants, but also on conditions beyond the country's borders over which Norway has little control. And if the EFTA/EEA pillar should change, this would create a new situation and new challenges.

#### 27.4.8 The Challenges Summarized

When one goes through all the "challenges" of Norway's current association with the EU, as is done here, it becomes a long and overwhelming list. It becomes clear that the model has a range of weaknesses, and that many of them are structural that only to a limited extent can be mitigated without more radical measures. On this basis it is difficult to call the EEA etc a durable and perfect form of association for Norway's relationship with the EU, as some have done.

However, it has worked in practise for 18 years, and more effectively than many envisaged it would. This means there are also positive aspects to the current system, and that up until now it has proven to be robust and sustainable – despite its problems. Firstly, the current form of association is flexible and pragmatic. It has been possible to adapt it to all the changes and developments so far, and even though the issues of principle are considerable they have been steadfastly and pragmatically resolved. Secondly, much effort has been put into making the system work, both by the national authorities and the institutions. Thirdly, it seems that all of the key parties – both on the EU side and the EFTA/EEA side – have considered it to be in their interest to make the current model work, and have assessed the alternatives to be even more problematical.

The development of Norway's model of integration with the EU shows that if an arrangement is considered to be in the parties' common interest, then there is almost no limit to the challenges that either can be overcome or endured. The next chapter looks at whether the arrangement will turn out to be robust or vulnerable in the future.

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<sup>1</sup> See Chapter 11.4.

<sup>2</sup> See St.meld no. 15 (2008-2009) *Interesser, ansvar og muligheter*, p. 43.

<sup>3</sup> For an overview of examples of this difference between formality and reality see Chapter 11.3.2.

<sup>4</sup> For more on this see chapters 12 and 26.

<sup>5</sup> See St. Meld. 9 (2009-2010) *Norsk flyknings- og migrasjonspolitik i et europeisk perspektiv*, and Chapter 22. Another example of EU adaptation as depoliticization, that is more specific and particular but illustrative, is the introduction in 2011 of the EU directive on laying hens, which secures better living conditions for caged hens, and consequently solved a longstanding political argument in Norway, without there being any real discussion about this. See Chapter 21.

<sup>6</sup> See the report from EU Ambassador Oda Sletnes to the Foreign Ministry, *EØS-Avtalen etter 15 år, Fem utfordringer i EØS*, published 4. September 2009. Sletnes herself is a trained architect.

<sup>7</sup> To the extent that one can talk about a main architect of the institutional solutions for the EEA, those who were present at the time readily point to the Swede, Sven Norberg, who at the time was Head of the Legal Division in the EFTA Secretariat. Norberg became the Swedish judge in the EFTA Court in 1994, and from 1995 an official in the Commission.

<sup>8</sup> See Chapter 22.

<sup>9</sup> See Chapter 23.

<sup>10</sup> This is considered in more detail in Chapter 13.

<sup>11</sup> Later on Switzerland has anyway adopted EU rules on free movement of workers through bilateral agreements.

<sup>12</sup> See the Council Conclusions on EU relations with EFTA Countries, of 14 December 2010, that were adopted by the Council composed of Foreign Ministers. The Conclusions are more closely assessed in Chapter 13.2.1.

<sup>13</sup> See the Council Conclusions, points 25-33. The only point where the Council expressed dissatisfaction with the relationship with Norway concerned trade in agricultural products (point 31), see chapter 13.2.1.

<sup>14</sup> In 2010 3.1 percent of EU exports went to Norway, and 5.3 percent of EU's imports came from Norway – in total 4.2 percent of the EU foreign trade. This puts Norway in fifth place after USA, China, Russia and Switzerland, but ahead of Japan, Turkey, India, South Korea and Brazil. See Chapter 14.

<sup>15</sup> See Chapter 6.4.6 on use of the Right of Reservation in the EEA Agreement, and Chapter 22.2.3 on the so-called Guillotine Clause in the Schengen Agreement.

<sup>16</sup> See Chapter 24.1.

<sup>17</sup> See Chapter 21 on the entry into of the veterinary agreement in 1998 and the significance of this for Norwegian agriculture and fisheries.

<sup>18</sup> See Chapters 9 and 20. The new agreements in this area are primarily taken into protocol 31 of the EEA Agreement, which through the years have grown to be very comprehensive.

<sup>19</sup> See Chapter 24.

<sup>20</sup> See Chapter 6.

<sup>21</sup> Of course not all. In January 2011 the Committee arranged an open debate in Oslo on the theme “ EEA and People Rule. Clever compromise or democratic catastrophe?”. The five introductory panelists that were asked to comment on the question were divided along a scale. One presented the EEA as a democratic catastrophe (Erik Oddvar Eriksen), another presented the EEA as democratically completely unproblematic (Hallvard Bakke), and the three others took positions somewhere in between. The debate can be viewed on the Committees website ([www.europautredningen.no](http://www.europautredningen.no))

<sup>22</sup> ”Utenfor og innenfor? Norway’s European Dilemma”, Foreign Minister Jonas Gahr Støre in conversation with the leader of the European White Paper Fredrik Sejersted, *Nytt Norsk Tidsskrift*, 04/2011, s. 393.

<sup>23</sup> See Blichner, L.C. (2008) Fem mulige grunner til å akseptere EØS-avtalen, *Nytt Norsk Tidsskrift*, 04/2008, s. 365-66. Blichner’s argument on this point can either be interpreted seriously, as irony, or both.

<sup>24</sup> The Economist Intelligence Unit (2010) *Democracy Index 2010 – Democracy in Retreat*.

<sup>25</sup> See Chapter 11.3 on the transfer of authority according to the Constitution, and Chapter 11.4 on the Parliament’s consent according to Constitution §26 second paragraph on EU issues.

<sup>26</sup> See above, Chapter 11.3 on the development of the criteria “not far-reaching”.

<sup>27</sup> See Chapter 8.

<sup>28</sup> See the memo from Ambassador Oda Sletnes, EØS-avtalen femten år. Fem utfordringer i EØS. The memo was originally internal, but was discussed in *Aftenposten* 04.09.2010, and a few days later the Foreign Ministry published it on its website.

<sup>29</sup> See Chapter 9.3.2.

<sup>30</sup> As an example the Ambassador points to a request from Norway that EFTA citizens should be able to be employed in positions in “executive agencies” in EU programmes where they participate in covering their share of the costs. This was turned down by the Commission in 2009. According to the memo the problem was not Norway, but that Russia wanted to request the same. Another example (that was not mentioned) was that Norway actively sought association to the European Defence Agency (EDA). This turned out to be difficult, and the real reason was a worry that Turkey (as another NATO country) would ask for the same. The process was eventually resolved, and Norway continues to be the only third country that has a formal association agreement to the EDA.

<sup>31</sup> When for example the enlargement of the EEA Agreement to include the 10 new EU states in 2004 was blocked and delayed because of a disagreement between Liechtenstein and the Czech Republic on the Prince-family’s properties that were confiscated after the war (see chapter 13.3.2) there was little attention on this in Norway. Neither is it well known that the three countries have disagreed upon which EU legal acts were EEA relevant, and that Iceland and Liechtenstein have had a more restrictive attitude than Norway.

<sup>32</sup> See Chapter 24.

<sup>33</sup> See Chapter 10.5 and for an older investigation see Graver, H.P. og Sverdrup, U. (2002) ESA mer katolsk enn paven, *Nordisk Administrativt tidsskrift*, vol. 83, nr. 2.

<sup>34</sup> See Chapter 10.7 and Haukeland Fredriksen, H. (2009) Er EFTA-domstolen mer katolsk enn paven? *Tidsskrift for rettsvitenskap*, 04-05/2009, s. 507 flg. Commentators on the continent have on several occasions during the EU/EEA debate been puzzled and somewhat critical to protestant Norwegians’ constant references to the Pope and Catholicism as a measure against how strict or not the EFTA institutions are. Others have pointed out that

the Catholic Church precisely functions such that the Pope has more freedom to determine the direction than common priests, and that therefore it is not so strange that ESA and the EFTA Court sometimes are more strict than the Commission and the EU Court.

<sup>35</sup> Another precondition is that Iceland stays in the EFTA/EEA pillar. If Iceland enters into the EU an institutional assessment and reform would probably anyway be necessary – whether one wants this or not.

<sup>36</sup> Signals from Liechtenstein indicate that it is satisfied with the EEA and does not wish to change its form of association.

<sup>37</sup> See Chapter 13, and especially 13.7 on how and why the EEA has not served as a model for any others.