Sven Norberg, The European Economic Space: Legal and institutional issues (1990)

Caption: In summer 1990, in the monthly publication EFTA Bulletin, Sven Norberg, Director of Legal Affairs at the Secretariat of the European Free Trade Association (EFTA) in Geneva, outlines the importance of the legal and institutional implications, with particular regard to the decision-making process of the negotiations on the European Economic Space (EES), later to become the European Economic Area (EEA).

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The European Economic Space: Legal and institutional issues

by Sven Norberg

Some three years ago, in June 1987, the EFTA Council decided to set up a new standing committee, the EFTA Group of Legal Experts, to examine legal questions arising in particular in the course of co-operation between the EFTA countries and the European Community (EC). The Council especially asked the Group to start its work by studying relevant differences in the application and interpretation of the Free Trade Agreements (FTAs) (e.g. Article 13 stating the prohibition of measures having equivalent effect to quantitative import restrictions) and other agreements between the EFTA countries and the EC. The Group was furthermore asked to study in the framework of the relationship between the EFTA countries and the EC the question of settlement of disputes and the legal aspects of appropriate models for cooperation.

This was the first time in EFTA that such legal issues were to be studied and it shows the new awareness on the EFTA side that the creation of a homogeneous and dynamic European Economic Space (EES), decided upon at the first joint EFTA-EC Ministerial meeting in Luxembourg on 9 April 1984, would – much more than earlier EFTA-EC co-operation – require and depend upon the establishment of viable legal and institutional arrangements.

In June 1989 the Group of Legal Experts presented to the EFTA Ministers its final report dealing with the above questions as well as with other matters later added to its mandate and which are specifically characteristic of EC law, such as the direct applicability and effect of treaty provisions and the Cassis de Dijon principle. With the endorsement of the conclusions of the Group on these matters by the EFTA Council at Ministerial level in Kristiansand on 14 June 1989, a political EFTA platform on these issues was also created in time for the beginning of the fact-finding work of the EFTA-EC High-Level Steering Group set up with the aim of making a comprehensive examination of the possible scope and content of an expanded and a more structured partnership between the Community and the EFTA countries.

When now, on 20 June 1990, the European Community with its twelve Member States, on the one hand, and the six Member States of EFTA and Liechtenstein, on the other, opened formal negotiations on a treaty to achieve the dynamic and homogeneous EES, these negotiations had been preceded by intensive fact-finding and exploratory talks between the two sides during which the scope of and the conditions for this ambitious undertaking were clarified. As to the common objectives, the joint declaration of 19 December 1989 adopted in Brussels by the EC and EFTA Foreign Ministers and the Commission reaffirmed the very special importance of the privileged relations between the Community, its Member States and the EFTA countries, which “are a fundamental factor not only for each of them but also for the entire European continent”. In order to be able to achieve the EES and to give the relations a new dimension as part of a common European outlook, they agreed to seek jointly to define a more structured framework for co-operation between the Community and all of the EFTA countries together. With regard to the substance this framework should achieve the free movement of goods, services, capital and persons on the basis of the relevant “acquis communautaire” as well as ensure equal conditions of competition and also strengthen and broaden co-operation in the context of the Community’s actions in a number of other areas such as research and development, environment and education.

The Ministers further took the view that while this new common framework should respect the full decision-making autonomy of the parties, the negotiations should permit provision for procedures which effectively ensure that both parties’ views are taken into account, so as to facilitate the reaching of a consensus in decisions relating to the European Economic Space. Appropriate formulae should ensure the direct effect of common legislation, surveillance of its implementation as well as judicial monitoring and the proper functioning in general of the agreement. The Ministers furthermore stated that the negotiations between the Community, on the one hand, and the EFTA countries acting as a single interlocutor, on the other hand, should have as their aim the conclusion of a comprehensive agreement covering both the substantive and the legal and institutional aspects.

The Ministerial meeting was followed by exploratory talks by the joint EC-EFTA High-Level Steering

Group (HLSG) with five working groups which were concluded on 20 March 1990. These talks concentrated in particular on five aspects, the first one being a preliminary joint identification of the relevant "acquis communautaire" and other areas of substance to be integrated into the agreement. Secondly, a preliminary identification of problems which the integration of the acquis might present to the EFTA countries was undertaken. Thirdly, an analysis of the functioning of the EC "comitology" relating to the "acquis communautaire" was made, including the horizontal institutional solutions to be found to the question of EFTA participation. During the talks possible techniques and instruments for the integration of the relevant "acquis" into the future EES treaty were furthermore identified. Finally, a further examination was carried out of other legal and institutional questions such as surveillance and enforcement and the process of decision-making in the future EES.

Considerable work was carried out during last year's fact-finding and exploratory talks. Particularly important was the examination of the "acquis communautaire", which in this context consists of the EES relevant part of the Community's total legislation, including case law, which is to be integrated into the agreement as a common legal basis for the EC and EFTA relationship. This concerns, in other words, the result of EC integration work of more than thirty years and amounts to some 1,400 acts (apart from basic parts of the Treaty of Rome, essentially EEC directives and EEC regulations) or some 10,000 pages of legal texts in the EC Official Journal. By integrating this "acquis" into the future EES Treaty the conditions for the equal treatment and non-discrimination of citizens from all nineteen countries will be created throughout the whole of the EES.

Some perspectives with regard to the legal and institutional issues

Obviously, a large number of questions will have to be treated when examining such a wide and far-reaching new relationship as the homogeneous EES aims at being. During the discussions so far, both sides have made it quite clear that the considerable substance of the co-operation cannot be thought of without satisfactory solutions to the legal and institutional questions. It should also be kept in mind that these questions are not only legal but also quite political in nature, since they also concern such fundamental aspects of the legal systems of the Contracting Parties, which can only be addressed if there is sufficient political will to go ahead with this historic joint venture. During the last year they have mainly been dealt with in the fifth working group under the HLSG, in which on the EFTA side a major part of the members of the Group of Legal Experts participated.

The questions that I will address briefly below can mainly be grouped in four categories: *firstly*, questions concerning the kind of agreement the EES treaty will be, *secondly*, questions relating to the structure of the treaty, *thirdly*, questions regarding the procedures for the decision-making as to future EES decisions, and *fourthly*, questions concerning the surveillance and enforcement of the EES treaty obligations. *Finally*, the role of EFTA in the future EES will be briefly addressed.

Kind of agreement

To this category belong questions concerning the parties to an EES treaty, the scope of the agreement, the relationship between the EES treaty and existing agreements and the legal mechanism to be used for the further development of the relationship.

The *parties to the agreement* will be determined by the nature of the agreement and the subjects to be covered by it. On the Community side, it will be the Community as such, with or without the involvement of the Member States of the Community as Contracting Parties. On the EFTA side, it will be all the six Member States: Austria, Finland, Iceland, Norway, Sweden and Switzerland. Liechtenstein is also included as a party to the negotiations. When saying that it is the EFTA States that will conclude the agreement, it should be understood that, although each Member State would sign, they will do so together and will, in the new relationship, also act jointly.

The *scope of the agreement* should be comprehensive and cover the four freedoms of the internal market as well as the flanking and horizontal policies such as education, research and development, environment,

consumer protection and the social dimension. The treaty should not only cover the relationship between the EFTA States and the Community but also the relationship among the EFTA States internally. This latter point is not a new one, but has been practised in other multilateral EFTA-EC agreements, such as the Conventions on the Single Administrative Document and on the European Transit Procedure as well as in the 1988 Lugano Convention on the recognition and enforcement of judgments. Taking into account also the aim of creating a dynamic and homogeneous European Economic Space and the ambition of securing equal conditions for economic cooperation within this area, it is the firm EFTA view that it is neither rational nor realistic also to have to adopt and issue for internal EFTA purposes the same set of rules as those adopted in the EES.

The relationship between the EES treaty and all the earlier agreements should be defined in the EES treaty. Matters covered by both the EES treaty and earlier agreements between the Contracting Parties should presumably, unless otherwise stated therein, be governed by the EES treaty.

Another question to be examined and assessed from a number of different points of view is the kind of legal mechanism that should be used for the *adoption of new EES rules* to be agreed upon by the parties to the EES agreement once it has come into force. This question concerns, inter alia, the possibilities of entrusting a common decision-making body with competence to take law-making decisions which are directly applicable throughout the EES. Since a transfer of such competence to the common decision-making body might raise difficult questions of a constitutional character both on the EFTA side and in the Community, it seems instead that a solution would be to adopt “secondary” EES rules in the form of international agreements. No doubt it will be vital for the EES to be able, as far as possible, to keep pace with further Community developments in relevant areas. From this point of view, special procedures for the preparation, conclusion as well as approval of such “international agreements” will be needed so undue delays in relation to the EC developments can be avoided.

The structure of the EES treaty

The questions concerning the structure of the treaty relate, inter alia, to the disposition and content of the main body of the treaty and the legal technique to be used for integrating the relevant “acquis communautaire” into the treaty. The type of legal rules to be dealt with are, on the one hand, such which generally are referred to as the “primary” rules of EC law, i.e. the rules contained in the Treaty of Rome, in the Accession Treaties and in the Single European Act, and, on the other hand, such “secondary” EC rules, which over the years have been adopted by the EC Council of Ministers or by the Commission, above all in the form of directives, regulations and decisions.

Without entering into any details in this context, it would seem that the main body of the treaty will most likely have a structure similar to that of the Treaty of Rome and rules which are also closely similar to those of the EES relevant parts of the Treaty of Rome. As to the secondary EC rules, different techniques could be considered for their integration into the EES Treaty. The common view seems to be that these rules should be in annexes and protocols of the treaty, which, however, would be integral parts of the treaty. Various techniques could also be used for doing this. Practical reasons speak in favour of, as far as possible, trying to use a reference technique mainly referring to the EC texts as published in the Official Journal of the Communities, thereby considerably reducing the volume of the text of the treaty.

Decision-making

With regard to the decision-making process in the future EES, it should be recalled that, in principle, the EES will to start with be based upon rules that are identical to those of the EC. This is a basic precondition for the realization of a homogeneous area of nineteen countries with more than 350 million inhabitants. The further development of the EC as far as the application and amendment of these rules or the adoption of new rules in these fields will have to be accompanied by corresponding developments of EES rules. If this were not the case, we would get more and more divergence and the whole idea of a dynamic and homogeneous European Economic Space would gradually be lost. Evidently, in a balanced relationship both sides, i.e. the EFTA side as well as the Community side, should have the right to launch initiatives and make proposals in

the EES. Nevertheless, there is little doubt that the weight of the internal Community decision-making will also be considerable at the level of the EES.

The actual *decision-making in the EES* would above all seem to concern the kind of decisions that in the Community are taken by the EC Council of Ministers. Most of the rule-making in the EES will no doubt be technical adaptations, improvements and other modifications of the original EES rules (which as integrated acquis communautaire are identical to the EC rules), and these amendments will result from the joint experience in the EES and the EC of the application of the "common" EES and EC rules. While it will be important that here both EFTA and EC views are taken into account so as to facilitate a consensus in EES decisions, it would seem that the more elaborate decision-making process will rather concern the political decisions on new rules.

The procedure of *decision-making* in the EES could be seen in *three stages*, the *preparatory phase* when a proposal is worked out, the *shaping phase* when a decision on the basis of the proposal is being prepared, and the *phase* when a *decision is* actually *taken*.

As to the *preparatory phase* the EES treaty will presumably contain an obligation for the Contracting Parties to inform and consult each other on ideas or proposals for new legislation which would fall within the scope of the treaty or which would be of interest to include in the EES relationship. Such matters would then be subject to a joint decision-making procedure in the EES. It would thus have to be presumed that proposals formally presented to the EC Council, which concern areas that are also covered by the EES agreement, also will be introduced in the EES decision-making procedure as proposals for new EES rules. Although the Commission has the prerogative of launching initiatives in the Community, it is a fact that the formal presentation of such proposals is very often preceded by a rather lengthy process of preparation and consultation with the Member States and interested circles. It will also be vital that experts from the EFTA States be included on an equal footing in such preparatory consultations as well as that the EC side be consulted in the preparation of possible EFTA initiatives.

Regarding the *actual decision-shaping in the EES*, it should also be recalled that the Community decision-making procedure is a rather lengthy one, during which considerable amendments can be made to the initial proposals tabled by the Commission. It will, in the interest of maintaining the homogeneity of the European Economic Space, be of vital importance that the Community does not go ahead on its own and adopt decisions regarding the further development of the Community without having taken due account of EFTA views in the interest of keeping the EES rules in line with the EC rules in the future. To this end, and without encroaching on the autonomy of the Community regarding its internal decision-making, it will be necessary to establish a procedure through which, at the various stages of the EC decision-making process, an exchange of views can take place and EFTA positions be delivered.

Such a constant process of exchanging views should be designed so as to facilitate the reaching, at the very end of the process, of an EES decision by consensus. The system should thus ensure that the views of the other side would be taken into account before any final decisions on EES relevant matters were taken on either side. Thereby one would also ensure that neither side is presented with a fait accompli. It should, however, be underlined that it would not be a question of delaying or blocking the internal EC procedure. Each side would thus retain its autonomy of action in the event that the decision-making process did not lead to a consensus. It might be foreseen that for this certain time-frames might be set out. In case EES decisions were not reached, the Contracting Parties could thus proceed and adopt new internal rules on the matter. The existing EES rules would, however, still apply to all legal relations between the Contracting Parties.

The main political principles and commitments regarding the development of the future EES should presumably be laid down in the treaty. This will probably also be the case with regard to certain of the procedures, while others might be of a more informal character and have to be worked out through practical experience.

Regarding the *decision-taking stage* where *final decisions* will have to be adopted, it would seem reasonable to foresee a decision-making body where the EC and the EFTA sides are represented on an equal footing

and where decisions are taken by consensus. It should in this context be underlined that there would be a strong political commitment for all Contracting Parties to reach common EES decisions at the end of the decision-making process. In concluding this point it should be underlined that *real and equal participation in the EES decision-making* will, for the EFTA countries, be a matter of vital importance.

Suitable arrangements will also have to be made for *parliamentary participation* of representatives of the European Parliament and of the EFTA parliaments in this process. It might thus be appropriate in addition to strengthening, on the EFTA side, the role of the EFTA parliamentary committee, to establish some kind of joint parliamentary body. Similar arrangements could also be made for the *social partners*.

Surveillance and enforcement

It would here seem appropriate first to recall the particular character of the European Community as a strong legal entity, a Community of law. Particular powers have been given to the Commission as guardian of the Treaty of Rome to supervise the application of EC law in the Member States. The Court of Justice in Luxembourg has been entrusted with the task of interpreting the EC legislation in a binding way. I believe it is also correct to say that the Community legal system offers a high standard of legal protection for the individual and his rights under the provisions of Community law.

Already some years ago the Community side raised questions on the possibility of entering into a more deep and close relationship with EFTA countries in view of the risk of creating an imbalanced situation as to the *surveillance and enforcement of treaty obligations* in such a new relationship.

It should be underlined that, although no one has questioned the observance under the present order, the free trade in terms of abolishment of tariffs and quotas is in this respect an easy area. Evidently, it is a different thing with other less transparent fields such as technical barriers to trade, state aid, anti-trust, public procurement or the whole of the services sector. It thus seems obvious that the parties to the EES must require surveillance and enforcement of treaty obligations which is as efficient on the EFTA side as in the Community. Otherwise Community or EFTA traders would risk not being guaranteed the same treatment throughout the whole of the EES area. This aspect seems to be even more important since the real beneficiaries of the liberalization in the first place are the individual citizens, on behalf of whom their governments have concluded these agreements. The importance of these questions in a future EES was also emphasized by EFTA Heads of Government in the Oslo Declaration on 15 March 1989.

As to the question of *surveillance and enforcement*, in this context essentially *four requirements* will have to be fulfilled:

1. access for the individual and the economic operators to a judicial procedure securing the rights conferred upon him by the EES rules (i.e. direct applicability and direct effect of treaty obligations);

2. a surveillance mechanism;

3. a mechanism to secure the uniform interpretation of treaty provisions; and

4. a dispute settlement mechanism.

The first of these requirements, i.e. *direct applicability and direct effect* of EES rules, means that all Contracting Parties will have to make the EES rules part of their legal systems, so that they can be invoked by individuals and economic operators throughout the whole of the EES as well as directly applied by the courts and authorities, which in their turn must have competence to recognize and enforce such rights. This, which especially in the Nordic EFTA countries has so far not been possible, seems to be an unconditional requirement in order to be able to secure a real functioning homogeneous EES.

With regard to the *surveillance question*, there is a need for an independent and effective surveillance mechanism in order to ensure the proper functioning of the EES. Such a mechanism would have to be able

to supervise the proper implementation and application by all the Contracting Parties of the EES rules, as is done by the EC Commission with regard to the BC rules today. It should be competent to act upon its own initiative but also be accessible for complaints by individuals and economic operators concerning alleged violations of EES rules. As a final recourse a surveillance mechanism should be competent to initiate infringement proceedings before a common judicial body.

In addition to its general competence as surveillance body the Commission has also been given specific powers to exercise in certain fields, such as competition, state aid and public procurement. The exercise of corresponding competences in the EES will also have to be further looked into. While this should mainly be dealt with on the EES level, it might be preferable for the EFTA countries also to utilize existing national surveillance mechanisms for certain aspects. This can, in particular, apply to the execution of certain measures directed against individuals.

One of the questions that will now have to be settled is how to arrange for this surveillance mechanism, i.e. whether to establish one single joint body, or to extend by EFTA participation the EC machinery, or to set up an EFTA surveillance mechanism supplemented by a joint mechanism as a bridge between such an EFTA mechanism and the EC Commission. Whatever the final outcome, it seems to be of vital importance that sufficient guarantees are given for the application of a uniform surveillance policy regarding all Contracting Parties throughout the EES.

With regard to the mechanisms for securing *uniform interpretation* of EES rules and for the *settlement of disputes* between the Contracting Parties, the most reasonable solution for ensuring the legal homogeneity within the EES would seem to be the establishment of a judicial body with comprehensive and exclusive competence in EES matters. Such an “EES court”, which would function in conjunction with the EC Court of Justice, should in particular be competent with regard to litigation between the Contracting Parties and infringement proceedings (cf. Articles 169 and 170 EEC Treaty). Furthermore, it should be able to provide preliminary rulings in questions regarding the interpretation of the EES rules (cf. the procedure under Article 177 EEC Treaty). Certainly, the relation to the EC Court of Justice in this context will have to be further looked at. A solution envisaged is, however, that an EES court should consist of judges from the EC Court of Justice and from the EFTA States. It should here be underlined that, due to the crucial role of such an EES court for the functioning of the whole treaty, a satisfactory solution to this question is of vital importance for the EFTA countries.

EFTA in the future EES

From what has been said so far regarding the institutional set-up in the EES, the question might be raised of the role of EFTA in this scenario for the EES. It should in this context be recalled that, although EFTA was founded in 1960 as a reaction to the creation of the EC, this had two main aims: *firstly* to establish free trade among the EFTA States and thereby avoid a rift between the EC and the EFTA States, and *secondly* to co-operate with the EC. These aims are still valid.

With regard to the question of the readiness of the EFTA countries to strengthen the role of EFTA in the future EES, EFTA Heads of Government in the Oslo Declaration committed themselves to use EFTA as the principal platform for multilateral negotiations with the EC and to take the necessary steps to strengthen EFTA’s decision-making process and collective negotiating capacity. During the EES negotiations, which have now begun, it will become clear *what* will have to be done and *how* this will be done. In their Declaration of 12 December 1989, EFTA Ministers, as regards the role of the Association in the future EES, also agreed that EFTA’s structures will be strengthened as required by the joint solutions developed in the new process. They noted that a considerable increase in the resources of the Secretariat had recently been decided on. Recalling that the EFTA countries had spoken with one voice during the high level talks, they furthermore stated their intention of continuing to do so. It can already now, without preempting the negotiations, be said that EFTA will thus function as the co-ordinating organ and the common platform for the EFTA countries in their EES relationship with the Community, in which common EFTA positions will be established and EFTA proposals or initiatives for the EES will be worked out.

Conclusion

As can be seen from the above rather general and abbreviated presentation of the legal and institutional issues that are now dealt with by Joint Negotiating Group V as well as in the High-Level Negotiating Group, there are quite a number of difficult and important issues that need to be settled in the negotiations before the treaty can be signed. The progress made during the past year on these matters is, however, such that I am fully convinced that it should be possible to solve these matters to the reasonable satisfaction of all the Contracting Parties and as Jean Monnet said; “The answers are to be found by progressing – Europe can only take shape through action”.