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The Relationship between the EU and the EFTA States of the European Economic Areal in the Face of Common Crises

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The Relationship between the EU and the EFTA States of the European Economic Area in the Face of Common Crises

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I. Introduction

For more than 30 years now, the 1992 Agreement on the European Economic Area (EEA)[1] has integrated three of the remaining member states of the European Free Trade Association (EFTA), namely Iceland, Liechtenstein and Norway, into the better part of the EU internal market.[2] Defying the discouraging predictions made by leading commentators at the time of its creation,[3] the EEA has proven resilient and very much capable of adapting to developments in the internal market throughout these years.[4] As noted with satisfaction by both the EU and the participating EFTA States on the occasion of the 30th anniversary in 2024, the Agreement has contributed to long-term shared prosperity in the EEA –

[1] Agreement on the European Economic Area [1994] OJ L1/3. For all the details, see Finn Arnesen, Halvard Haukeland Fredriksen, Hans Petter Graver, Ola Mestad and Christoph Vedder (eds.), *Agreement on the European Economic Area – a Commentary*, C.H. Beck, Hart, Nomos 2018.

[2] The fourth remaining EFTA Member State, Switzerland, took part in the EEA negotiations of 1990-91, but Swiss voters rejected the EEA Agreement in a referendum in 1992. The remaining contracting parties nevertheless decided to retain the Agreement's many references to "the EFTA States", giving this term a specific meaning within the context of EEA law that is naturally confusing to outside observers. In the following, Iceland, Liechtenstein and Norway will be referred to jointly as the "EEA EFTA States".

[3] See, e.g., Marise Cremona, 'The "dynamic and homogeneous" EEA: Byzantine structures and various geometry' [1994] *European Law Review* 19 508, 524.

[4] As admitted by Marise Cremona herself in her reassessment of the EEA Agreement 30 years on: "Dynamism, homogeneity and Byzantine structures – a reassessment of integration in the EEA", in: Páll Hreinsson, Ólafur Jóhannes Einarsson and Bryndis Pálmarsdóttir (eds.), *The EFTA Court – Developing the EEA over Three Decades*, Hart 2024.

guaranteeing equal treatment, legal certainty and predictable conditions for its citizens and businesses.[5]

The starting point for the present contribution is the, by now, generally accepted view that the EEA Agreement, within its scope, essentially puts Iceland, Liechtenstein and Norway "on the same footing as Member States of the European Union".[6] In the seminal 2020 Grand Chamber ruling in *I.N.*, the ECJ proceeded to reaffirm "the special relationship" between the EU and the EEA EFTA States, "which is based on proximity, long-standing common values and European identity".[7] Noting that the EEA EFTA States are also associated members of the Schengen area, the ECJ highlighted that the relationship goes beyond economic and commercial cooperation and renders the situation of a citizen of an EEA EFTA State "objectively comparable" with that of a Union citizen to whom, in accordance with Article 3(2) TEU, the Union offers an area of freedom, security and justice without internal frontiers.[8] In 2024, in another Grand Chamber ruling, the ECJ refused to extend this reasoning to include the UK, holding that the arrangements established by the 2020 EU-UK Trade and Cooperation Agreement do not establish a relationship "as special" as that between the EU and the EEA EFTA States.[9] In short, if one is to rank the EU's relationship to its neighbours, the EEA EFTA States are on the top step of the staircase.[10]

Be that as it may, the many crises that have affected the European Union in the last decade have, each in its own distinct way, challenged the EEA, thereby highlighting the shortcomings of the EEA Agreement and raising questions about the need for reform. In the following, this submission will be substantiated by an analysis of the repercussions for the EEA of the EU's responses to the crisis of losing one of its biggest and most powerful member states (Brexit); the rule of law crisis in certain of the EU member states; the Covid-19 pandemic; the climate crisis and, finally, Russia's full-scale invasion of Ukraine in February of 2022. As will become apparent, a recurring and growing challenge is the fact that the EU's understanding of the internal market has evolved considerably over the last decade. As the EU takes a holistic approach to trade policy, industrial policy, economic security and broader political objectives such as those underpinning the green and digital transitions, it has become far more difficult to decide which parts of EU law belong in the EEA Agreement and which parts fall outside its scope. Particularly challenging is the fact that the EEA Agreement does not integrate the

[5] Conclusions of the 59th meeting of the EEA Council (Brussels, 25 November 2024), EEE 1607/1/24, para. 5.
[6] Case C-81/13 *UK v Council,* EU:C:2014:2449, para 59 (differentiating the EEA Agreement from the EEC-Turkey Association Agreement). For a similar differentiation of the EEA from the "route of bilateral arrangements" taken by Switzerland in its relationship to the EU, see Case C-351/08 *Grimme,* EU:C:2009:697, para. 27.
[7] Case C-897/19 PPU *I.N.*, EU:C:2020:262, paras. 44, 50 and 58.
[8] Ibid.
[9] Case C-202/24 *Alchaster*, EU:C:2024:649, paras. 65-70.
[10] Even though some might argue that the yet to be ratified 2023 EU-Andorra and San Marino Agreement will establish an even closer and more 'special' relationship, as it includes the Customs Union and the Common Commercial Policy. See COM(2024) 189 final for the full text of the Agreement.

EEA EFTA States into the Customs Union and the EU's Common Commercial Policy.

II. Brexit

The 2016 decision by UK voters to leave the EU was also a shock to the EEA.[11] For two of the EEA EFTA States, Iceland and Norway, the UK was considered a particularly important EU member state, for geographical, historical and cultural reasons. The UK was Norway's most important market ahead of the Brexit referendum (later replaced by Germany)[12] and several thousand Norwegians worked and studied in the UK (and vice versa). Furthermore, the UK's traditional scepticism towards deepened integration in an 'ever closer Union', as demonstrated by, for example, the view that a free-trade oriented internal market was the essential objective of the EU, facilitated the functioning of the EEA.[13] As did the UK's insistence that any further integration of the euro area should not have a negative impact on the interests of the other EU member states. The EEA EFTA States also shared the UK's scepticism towards free-movement rights for non-economically active Union citizens, as well as any derived rights for third-country family members.[14] Thus, rather differing views as to the size and role of government in society notwithstanding, the EEA EFTA States and the UK generally agreed that the EU should limit its regulations to those strictly necessary for the functioning of a free-trade oriented internal market, and leave the rest to the national level.[15] In short, the EEA EFTA States considered the UK, itself a (if not the) founding member of EFTA back in 1960, as an ally in Brussels.[16]

After the Brexit referendum, the EEA Agreement's status as a mixed agreement caused difficulties. Some argued that the UK's withdrawal from the EU could not automatically entail withdrawal from the EEA, pointing to the status of the UK as an independent contracting party to the EEA Agreement.[17] The EEA Agreement contains no provision mirroring Article 50 TEU, but under Article 127 of the EEA, a Contracting Party's withdrawal from the Agreement requires 12 months' notice.

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[11] For an overview see Hillion's comments on Art 127 EEA in Arnesen et al. (fn 1).
[12] https://oec.world/en/profile/country/nor (last visited 3 January 2025).
[13] As expressed, for example, in the "New Settlement for the United Kingdom within the European Union", conclusions of the European Council of 18-19 February 2016 (2016/C 69 I/01).
[14] The EEA EFTA States have fought hard to limit the rights that non-economically active citizens of the EEA States, as well as any third-country nationals, can derive from the EEA Agreement. For an overview, see for example Christian N.K. Franklin and Halvard Haukeland Fredriksen, 'Differentiated citizenship in the European Economic Area', in: Dora Kostakopoulou and Daniel Thym (eds.), Research Handbook on European Union Citizenship Law and Policy, Elgar, 2022, pp. 297–319.
[15] By way of an example, Norway opposes EU regulation on minimum wages not out of a desire to keep wages down, but rooted in the belief that workers will be better off if the matter is left to collective bargaining in a system with strong trade unions. This is a view shared by Denmark and Sweden, which both voted against the adoption of Directive (EU) 2022/2041 and now ask the ECJ to annul the Directive, see Case C-19/23 *Denmark v European Parliament and Council of the European Union* (pending). Norway, for its part, solved the problem by convincing the EU that the directive is not EEA-relevant(!).
[16] In a remarkable move, the Prime Minister of Norway even intervened in the UK debate by urging the UK to stay in the EU, see e.g. https://www.politico.eu/article/eu-referendum-look-before-you-leap-norways-pm-tells-brexiteers/ (last visited XXX).
[17] See Hillion's comments on Art 127 EEA in Arnesen et al. (fn 1), para. 17.

At the end of the day, the UK, the EU and the EEA EFTA States agreed that the UK's withdrawal from the EU *ipso facto* also entailed withdrawal from the EEA. Article 127 was thus never activated and the diplomatic conference envisaged by this provision to secure an orderly withdrawal from the EEA was never convened. Rather, the EEA EFTA States were essentially asked to await the outcome of the EU-UK withdrawal negotiations, it being understood by all parties concerned that the path chosen would require a separate agreement between the EEA EFTA States and the UK that essentially mirrored any agreement that might be reached between the EU and the UK. Thus, only days after the EU-UK Withdrawal Agreement of 24 January 2020, the Separation Agreement between the EEA EFTA States and the UK was signed.[18] In this way, the need for a multilateral "BrEEAxit" agreement between the EU, the UK and the EEA EFTA States was avoided, with all the complexities such an agreement would entail.[19]

The only formal link between the two agreements is to be found in the provisions on social security rights, where it was necessary in order to protect the rights of those who had exercised their free movement rights under the EEA Agreement in ways that included the UK, one or more of the EEA EFTA States and one or more of the remaining EU member states. To solve this triangular problem, the EU-UK Withdrawal Agreement obliges the UK to protect the social security rights of EEA EFTA State nationals, whereas the Separation Agreement between the EEA EFTA States and the UK obliges the UK to protect the social security rights of Union citizens, both provided that the EU and the EEA EFTA States jointly commit to protecting the social security rights of UK nationals.[20] The latter was achieved by way of a decision by the EEA Joint Committee adding a chapter on the rights of UK nationals to the EEA Agreement's Annex on Social Security.[21] In this rather creative way, it was possible to extend the protection of social security rights agreed between the EU and the UK in the Withdrawal Agreement to include the EFTA pillar of the EEA.

Given that the EEA Agreement does not include the EU Common Commercial Policy, it was clear from the start that the EEA EFTA States would not be parties to any future EU-UK free-trade agreement. Still, given the common starting point (the internal market) and the urgency of the matter, it is hardly surprising that the 2021 Free Trade Agreement between Iceland, Liechtenstein and Norway on the

[18] Agreement on arrangements between Iceland, Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union, 28 January 2020.

[19] To complicate matters further, any amendments to the Main Part of the EEA Agreement would also have to be ratified by all of the EU member states, unless the Commission would be prepared to argue that the Agreement is now covered by the exclusive treaty-making powers of the EU. See on this Christoph Vedder, *The EEA in the Union's Legal Order*, in Arnesen et al, (fn 1), pp. 101-123.

[20] Article 33 of the Withdrawal Agreement and Article 32 of the Separation Agreement.

[21] Decision of the EEA Joint Committee No. 210/2020 of 11 December 2020 amending Annex VI (Social Security) to the EEA Agreement.

one hand and the UK on the other largely mirrors the Trade and Cooperation Agreement which the EU and the UK signed on 30 December 2020.[22]

Unfortunately for the EEA EFTA States, however, the rules on origin for goods are not coordinated between the two agreements, nor has the UK so far opted to rejoin the Regional Convention on pan-Euro-Mediterranean preferential rules of origin (PEM Convention). As a result of this, exports from the EEA EFTA States of goods meant for further work in the EU or in the UK are limited considerably by the rules of origin in the EU-UK Trade and Cooperation Agreement and the EEA Agreement.[23] The fact that the rules on the free movement of goods in the EEA essentially only apply to goods originating in the Contracting Parties[24] has always been a defect of the EEA Agreement, but this problem has grown considerably as a consequence one of the most important trading partners of Iceland and Norway leaving the EU.

Outside the scope of the EEA Agreement, Brexit has had very practical consequences for the negotiations between Iceland, Norway, the Faroe Islands, the EU and now also the UK concerning fishing rights in the North Sea and North-East Atlantic. After long and very difficult negotiations, in particular between Norway and the EU, most of the Brexit-related issues were finally settled by the end of 2024.[25]

III. The rule of law crisis

A crisis of a rather different character is the rule of law crisis which developed gradually within certain EU member states from 2010 onwards. Its implications for the EFTA States of the EEA flow from the fact that the object and purpose of the EEA Agreement is not simply to grant reciprocal access to each other's markets, but *to extend the EU internal market to the participating EFTA States*.[26]

[22] Free Trade Agreement between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, 8 July 2021. It is noteworthy that Switzerland opted for a separate bilateral free-trade agreement with the UK. Usually, the four EFTA States negotiate free-trade agreements together as a bloc, to enhance their leverage. The explanation lies in their different relationships to the UK before Brexit; the Swiss-UK FTA is essentially a copy of the Swiss-EU Agreements as they previously included the UK. Switzerland and the UK are currently negotiating a new, comprehensive FTA.

[23] A practical example is Icelandic and Norwegian exports of aluminium products for further work by EU or UK car manufacturers. The idea of "green" Norwegian production of batteries for EU and UK electric vehicles was also dealt a blow by the lack of coordinated rules on origin (although American and Chinese subsidies have turned out to be an even bigger problem).

[24] Article 8(2) EEA. Note that Article 3 of Protocol 4 introduces so-called diagonal cumulation of origin for products incorporating materials originating in a Contracting Party to the 2011 Regional Convention on pan-Euro-Mediterranean preferential rules of origin (PEM Convention). However, the end product will only be given EEA originating status if the working or processing carried out in the EEA goes beyond certain minimum requirements or, failing that, where the value added within the EEA is greater than the value of the materials used originating from outside of EEA.

[25] For an overview, from the EU perspective, see Frederik Scholaert, EU-Norway fisheries relations – An overview of the northern fisheries agreements, European Parliamentary Research Service, November 2024 (PE 766.225).

[26] See, for example, Case C-452/01 *Ospelt*, EU:C:2003:493, para. 29, where the ECJ stated that the EEA Agreement aims to provide "for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, *so that the internal*

This can only be achieved if the EU law principle of *mutual recognition* is acknowledged as a general principle of EEA law and applied in much the same way within EEA law as within EU law – for the benefit of citizens and economic operators from both the EFTA pillar and the EU pillar of the EEA.[27] This again presupposes *mutual trust* between the national legal orders of all the 30 EEA States, especially as regards the rule of law and the effective judicial protection of fundamental rights.[28] Consequently, the debate within the EU about the reach of the principle of mutual trust in the face of the rule of law crisis within certain EU member states was (and still is) equally relevant for the EFTA States in the EEA.[29]

The most direct consequence for the EEA of the rule of law crisis is related to the conditions for funding from the EEA Financial Mechanism, the EEA Agreement's parallel to the EU cohesion funds.[30] For the period 2014-2021, Protocol 38C to the EEA Agreement conditioned EEA funding on respect for the rule of law by stipulating that "[a]ll programmes and activities funded by the EEA Financial Mechanism … shall be based on the common values of respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights including the rights of persons belonging to minorities".[31] This wording was clearly inspired by Article 2 TEU on founding values of the Union, which the ECJ has stated that a Member State must comply with as "a condition for the enjoyment of all of the rights deriving from the application of the Treaties".[32] To the credit of the EEA EFTA States, the connection which the Financial Mechanism thus establishes between financial support and common values predates the EU conditionality mechanism of 2020, whereby EU financial transfers became subject to the recipient states' observance of various principles, including the rule of law.[33]

The bite of the conditionality of the EEA Financial Mechanism became clear already in 2014, when Hungary wished to take control of payments earmarked for civil society and raided the offices of NGOs that had benefited from EEA funding.[34] The EEA EFTA States reacted by suspending payments to Hungary.[35] After years of negotiations failed to produce an agreement as to how the funding for civil society was to be administered, the entire country allocation for Hungary under

market established within the European Union is extended to the EFTA States" (emphasis added). This statement has later been reiterated in numerous cases, both by the ECJ and by the EFTA Court.

[27] For a recent example from the EFTA Court, see e.g. Case E-15/23 *K v National Office for Health Service Appeals*, para. 70 (mutual recognition of professional qualifications).

[28] For recent examples from the EFTA Court, see Case E-23/13 *Hellenic Capital Market Commission*, para. 76 (mutual trust between financial market authorities) and Case E-15/24 *A v. B*, para. 71 read together with para. 67 (mutual trust with regard to mutual recognition of judicial decisions).

[29] See Halvard Haukeland Fredriksen, Christophe Hillion and Sander Stokke, Mutual trust, mutual recognition and the rule of law – National report for Norway, in: Kornezov et al. (eds.), *Mutual trust, mutual recognition and the rule of law*, Proceedings of the XXX FIDE Congress. Volume I, Ciela Norma, Sofia, pp. 475-491.

[30] Articles 115-117 EEA. For a general introduction, see www.eeagrants.org.

[31] Article 1(2) Protocol 38C.

[32] Case C-896/19 *Repubblika v Il-Prim Ministru*, para. 63.

[33] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[34] https://euobserver.com/eu-political/125537

[35] https://eeagrants.org/news/status-suspension-eea-and-norway-grants-hungary

Protocol 38C (over €200 million) was eventually withdrawn.[36] The Hungarian government considered this a violation of the EEA Agreement and threatened legal action. However, the judicial dispute mechanism of the EEA Agreement cannot be triggered by individual EU member states, but only by the EU as such[37], and Hungary failed to win any support from the European Commission.[38] Thus, Hungary's attempt to upset the functioning of the EEA essentially petered out to preventing the adoption of joint conclusions after the biannual meetings of the EEA Council.[39]

The rule of law condition in the EEA Financial Mechanism was further demonstrated in 2020 when the Norwegian Courts Administration withdrew from its cooperation with its Polish counterpart under the Justice programme financed under the EEA Financial Mechanism.[40] Later, in 2021, EEA financial support was suspended in relation to several Polish municipalities, provinces and country councils after they had declared themselves "LGBT-free zones".[41]

Given the controversies surrounding the EEA Financial Mechanism for 2014-2021, the EEA EFTA States aimed for an even stronger rule of law conditionality mechanism for the 2021-2028 period. Agreement on the new Protocol 38D on the EEA Financial Mechanism (2021-2028) was finally reached in 2024.[42] It largely follows the template of the EEA Financial Mechanism (2014-2021), but Article 1(2) adds that all programmes and activities funded by the EEA Financial Mechanism shall be consistent with respect for common values and principles (including the rule of law) and abstain from supporting operations that may fail to do so. Furthermore, democracy, rule of law and human rights is set out as one of now only three thematic priorities for the country-specific allocations.[43] In addition, 10% of the total financial contribution is set aside for a fund for civil society and another 2% for a fund for capacity building and cooperation with

[36] Press Release of the Norwegian government of 23 July 2021 *No agreement reached on EEA and Norway grants funding for Hungary*.
[37] See Article 111 EEA.
[38] It is to be assumed that the EEA EFTA States had secured the tacit support of the European Commission before suspending the EEA grants to Hungary.
[39] Importantly, under Council Regulation (EC) No. 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area, individual EU member states will generally not be in a position to prevent the EU from agreeing to EEA Joint Committee decisions updating the Agreement with novel EU legal acts of EEA relevance.
[40] See Eirik Holmøyvik, *For Norway it's Official: The Rule of Law is No More in Poland*, Verfassungsblog, 29 February 2020.
[41] https://notesfrompoland.com/2021/02/03/polish-region-loses-millions-in-norway-grants-due-to-anti-lgbt-resolution/
[42] Agreement between the European Union, Iceland, Liechtenstein and Norway on an EEA Financial Mechanism for the period May 2021–April 2028, OJ L, 2024/2603, 8.10.2024. See also the related Agreement between Norway and the European Union on a Norwegian Financial Mechanism for the period May 2021–April 2028, OJ L, 2024/2602, 8.10.2024. Due to long and difficult negotiations on the amount of the financial contributions, the agreements on the financial mechanisms have always lagged behind their official starting and end times – the delayed start of the mechanism for 2021-2028 is thus no exception.
[43] The two others being the green transition and social inclusion and resilience. By contrast, the Financial Mechanism for 2014-2021 set out five thematic priorities, of which the rule of law was only indirectly covered by the priority concerning "culture, civil society, good governance, fundamental rights and freedoms", see Article 3 of Protocol 38C.

international organisations and institutions, among them the Council of Europe, the OECD and the European Union Agency for Fundamental Rights.[44]

It is interesting that the rule of law condition in the EEA Financial Mechanism for 2021-2028 is not formally linked to the EU's devices to safeguard the rule of law, such as the 2020 conditionality mechanism or Article 7 TEU. This does not prevent the EEA EFTA States from relying on EU measures to safeguard the rule of law to justify the suspension of EEA funding to an EU beneficiary state, but it makes it clear that they remain free to decide autonomously to sanction first, as they indeed did under the EEA Financial Mechanism for 2014-2021. This manifestation of the autonomy of the EEA EFTA States must be understood in light of the EU's rather slow reaction to the rule of law backsliding in certain member states in the last decade.

Equally interesting, and perhaps somewhat paradoxical in a rule of law context, is that Protocol 38D does not give the beneficiary states the possibility to trigger the judicial dispute resolution mechanism of Article 111 EEA in case of disagreement with the EEA EFTA States as to whether a suspension of the funding is justified or not.[45] An EU Member State unhappy with a decision by the EEA EFTA States to suspend EEA funding will thus also in future have to convince the EU as such to pursue the matter in the EEA Joint Committee or, alternatively, take legal action in the national courts of the relevant EEA EFTA State(s).[46]

Besides the disputes related to the EEA Financial Mechanism, the rule of law crisis within the EU has also led to cases before the national courts of the EEA EFTA States, where it has been argued that the national courts of certain EU member states cannot be trusted to protect fundamental rights. So far, however, these cases have all concerned the enforcement of arrest warrants, based on the 2006 Agreement between the EU on the one hand and Iceland and Norway on the other on the surrender procedure between EU member states and Iceland and Norway.[47] Although clearly related to the free movement of persons in the EEA, the EU-IS/NO Surrender Procedure Agreement is a separate agreement with no formal links to the EEA Agreement. For present purposes, it will have to suffice to note that the Supreme Court of Norway has adopted the two-step approach taken by the ECJ in cases such as *L.M.* and *Openbaar Ministerie*.[48] In a pilot case concerning arrest warrants from Poland, the Supreme Court held that the Polish

[44] Article 7 of Protocol 38D, as well as Article 7 of the EU-Norway Agreement on a Norwegian Financial Mechanism (2021-2028). The combined total of the financial contribution under the agreements for the entire period is about EUR 3 billion.

[45] Unlike the situation under EU law, where a member state will always be able to bring a case before the ECJ, see Cases C-156/21 *Hungary v Parliament and Council* and C-157/21 *Poland v Parliament and Council*.

[46] The underlying problem is the lack of an effective judicial dispute resolution mechanism for 'cross-pillar' disputes in the EEA, i.e. disputes between one or more EFTA States on the one hand and the EU and/or one or more EU member states on the other. See further on this Fredriksen's comments on Article 111 EEA in Arnesen et al. (fn 1).

[47] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (O.J. 2006, L 292/2).

[48] HR-2020-553-U and HR-2022-863-A, with references to the ECJ judgments in cases C-216/18 *L.M.* and C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie*.

judicial system undoubtedly suffered from systemic and generalised deficiencies that created a real risk of violations of the very core of the fundamental right to a fair trial (the first step), but nevertheless concluded in the case at hand that there were insufficient grounds to believe that the appellant – who was accused by Polish authorities of being involved in drug trafficking – ran a real risk of breach of his right to a fair trial because of these deficiencies (the second step).[49]

The Supreme Court's adoption of the ECJ's two-step test has been met with criticism by scholars who argue that the second step of the test *de facto* erases the first step, thereby undermining the importance of the general and systemic challenges to the rule of law in the assessment.[50] The Supreme Court's ruling in the abovementioned pilot case led to a complaint to the European Court of Human Rights (ECtHR), where the applicant complained of a violation of his right to a fair trial under Article 6 of the European Convention on Human Rights on grounds relating to the risk of a flagrant denial of justice in Poland. The ECtHR has given the case priority as an "impact case", thus setting the stage for an indirect review of the ECJ's approach in *L.M.* and *Openbaar Ministerie*.[51]

At a more general level, it remains to be seen if the ECJ's principled response to the rule of law crisis will have consequences for the EU's trust in the judicial protection of EEA law on offer in the EFTA pillar of the EEA, with potential implications for the recognition in the EU of administrative and judicial decisions from the EEA EFTA States.[52] As highlighted by the ECJ in several of its recent rule-of-law judgments, 'the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure concerning the application to them of an EU act'.[53] In the EFTA pillar of the EEA, however, the EFTA Court lacks jurisdiction to assess the legality of decisions of the EEA Joint Committee, both in direct actions and by way of preliminary references from national courts which might wonder if the EU legal act they are asked to apply is valid as a matter of EU law and, if not, how such invalidity can be transferred to the EEA context, to preserve homogeneity between EU and EEA law.[54] Further questions concerning the judicial protection of individual rights in the EFTA pillar of the EEA arise in cases where decisions taken by the EFTA Surveillance Authority or national authorities

[49] HR-2022-863-A. An unofficial English translation of the order can be found at the home page of the Supreme Court: https://www.domstol.no/en/supremecourt/rulings/rulings-2022/supreme-court-criminal-cases/ HR-2022-863-A/.

[50] See, with further references, Fredriksen, Hillion and Stokke, Mutual trust, mutual recognition and the rule of law – National report for Norway (fn 27), pp. 485-491.

[51] Application no. 36356/22 *Knihinicki v. Norway* (pending). Importantly, the so-called Bosphorus presumption that shields EU member states (and, indirectly, the ECJ) from full review by the ECtHR is unlikely to apply to the EU-IS/NO Surrender Procedure Agreement, due to the lack of supranational control mechanisms. The result might be full (albeit indirect) review in Strasbourg of the ECJ's approach in *L.M.* and *Openbaar Ministerie*.

[52] See on this Halvard Haukeland Fredriksen, "The Rule of Law within the EFTA-Pillar of the European Economic Area – Living Up to the (New) Expectations of the CJEU?", in: Sarmiento et al. (eds.), 4 Yearbook on Procedural Law of the Court of Justice of the European Union 2022, Max Planck Institute Luxembourg for Procedural Law Research Paper Series 2023, pp. 7-24.

[53] See, for example, Case C-619/18 *Commission v Poland*, EU:C:2019:531, para. 46.

[54] See Articles 34 and 36 of the Agreement between the EFTA States on a Surveillance Authority and a Court of Justice (SCA).

are based on drafts prepared by EU agencies, and where it is far from clear how alleged wrongs committed within the EU pillar can be effectively assessed by the EFTA Court or the national courts in the EFTA pillar.[55]

IV. The Covid-19 pandemic

The third crisis on the list is the Covid-19 pandemic which hit Europe in 2020. Due to their participation in the internal market, as well as in the Schengen area without internal frontiers, Covid-19 affected the EEA EFTA States in essentially the same way as it affected the EU member states, with similar social and economic consequences as authorities struggled to control the virus. The EEA EFTA States all have relatively open economies, with a substantial number of workers and economic operators from other EEA countries and considerable reliance upon imported goods and services.

Given the level of integration into the internal market, most of the legal questions brought about by the border closures and other Covid-19 related restrictions on the four freedoms were essentially the same under EEA and EU law. A telling example is provided by the EFTA Court's 2024 judgment in *LDL* on the EEA law compatibility of Norwegian rules obliging persons entering Norway from areas with high infection rates to undergo quarantine at a designated quarantine hotel.[56] The answers given by the EFTA Court to the referring court (the Supreme Court of Norway) closely follow the judgment delivered by the ECJ three months earlier in *Nordic Info*, concerning similar restrictions put in place by Belgian authorities.[57] During most phases of the pandemic, Norwegian authorities opted for a much stricter policy to limit movements to and from the country than the Swedish authorities, for example, leading to dissatisfaction on both sides of the long Norwegian-Swedish border and resulting in quite a few cases before the courts. Following the ECJ's lead in *Nordic Info*, however, the EFTA Court highlighted that the health and life of humans rank foremost among the assets and interests protected by EEA law and that it is for each EEA State to determine the degree of protection it wishes to afford to public health and the way in which that degree of protection is to be achieved. [58] Although the final assessment of the proportionality of the restrictions was left to the referring court (the Supreme Court of Norway), the EFTA Court rather clearly suggested that the quarantine rules in question could be justified under the circumstances.[59]

Homogeneity between EU and EEA law was also preserved in the field of competition law, where the Commission's emergency relaxations of the state aid

[55] See further the comments on Article 111 EEA in Arnesen et al. (fn1), paras. 3-6.
[56] Case E-5/23 *LDL*.
[57] Case C-128/22 *Nordic Info*, EU:C:2023:951.
[58] Case E-5/23 LDL, para. 83.
[59] Following the EFTA Court's lead, the Supreme Court upheld the fine imposed upon LDL for violating the quarantine rules, see HR-2024-1107-A.

rules were swiftly implemented into the EEA Agreement and then applied by the EFTA Surveillance Authority in close cooperation with the Commission.[60]

Still, the fact that the EEA Agreement does not integrate the EEA EFTA States into the Customs Union caused considerable problems as the EU sought to limit the export of personal protective equipment and, later on, vaccines.[61]

The limitation on the export of personal protective equipment was already introduced by the European Commission on 14 March of 2020, by way of an Implementing Regulation that failed to exempt the EEA EFTA States.[62] This led to several shipments of such equipment being stopped in customs between the EU and EEA EFTA States. The EEA EFTA States considered this a clear violation of the EEA Agreement's rules on free movement of goods and called an emergency meeting of the EEA Joint Committee. Within just five days, the Commission amended the regulation to exempt the EEA EFTA States (as well as Switzerland and certain other countries and territories with special relations to the EU).[63] The Commission did not comment on whether the exemption of the EEA EFTA States was required by the EEA Agreement, but asked for and received guarantees that all of the exempted countries would control their own exports of the products concerned, so as to avoid undermining the export ban. With this guarantee in place, it is hard to see how an export ban without an exemption for the EEA EFTA States could be reconciled with the EU's obligations under the EEA Agreement.[64] Still, the fact that the guarantee as such did not flow from the EEA Agreement made the legal assessment less straightforward than it would have been if the EEA EFTA States were in the customs union.

The later export authorisation requirement for Covid-19 vaccines, introduced by the Commission in 2021, proved more difficult for the EEA EFTA States. True enough, the Commission did initially exempt all of the EFTA States, as well as certain other countries and territories with special relations to the EU, when introducing the authorisation requirement in January of 2021, but this was later reversed when the scheme was tightened on 24 March that year.[65] As in the case of personal protective equipment, the Commission feared that the exempted countries could undermine the export ban by allowing further export to third

[60] See, for example, EEA Joint Committee Decision No. 115/2020 of 6 August 2020, implementing into the EEA Agreement a Commission Regulation of 2 July 2020 (No. 2020/972) that amended the State aid rules in light of the economic and financial consequences of the Covid-19 outbreak.

[61] For a more detailed presentation than space allows for here, see Johanna Jonsdottir, The European Economic Area: Decision-Shaping during the COVID-19 Pandemic, 61 *Journal of Common Market Studies* (2023) pp. 1547-1562.

[62] Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation.

[63] Commission Implementing Regulation (EU) 2020/426 of 19 March 2020 amending Implementing Regulation (EU) 2020/402 making the exportation of certain products subject to the production of an export authorisation.

[64] The only possible legal basis would be Article 13 EEA on restrictions on the free movement of goods, but restrictions that constitute a means of arbitrary discrimination of the different EEA States can never be justified.

[65] Commission Implementing Regulation (EU) 2021/521 of 24 March 2021 making specific arrangements to the mechanism making the exportation of certain products subject to the production of an export authorisation.

countries.[66] Again, the EEA EFTA States considered this a clear violation of the EEA Agreement's rules on free movement of goods and called an emergency meeting of the EEA Joint Committee. This time, however, it took much longer for the EEA EFTA States to persuade the Commission to exempt them – the regulation was only amended on 5 May, after weeks of intense diplomacy at the highest level.[67] Importantly, Switzerland's parallel attempt to be treated on an equal footing with the EFTA States in the EEA proved unsuccessful, thus rather clearly suggesting that legal arguments concerning the free movement of goods under the EEA Agreement played a role. Still, as in the case of personal protective equipment, the Commission refused to acknowledge that the export ban violated the EEA Agreement. In a letter to the Prime Ministers of the EEA EFTA States, Commission President von der Leyen stated that she considered the restrictions lawful under Article 13 of EEA, which allows for restrictions on the free movement of goods for, for example, the protection of health and life of humans.[68] However, as the EEA EFTA States guaranteed that vaccines would not be further exported to third countries, it is hard to see how a ban on the export of vaccines to the EFTA pillar of the EEA could be reconciled with the prohibition in Article 13 EEA on restrictions that constitute arbitrary discrimination.

The Commission proved more cooperative with regard to the joint purchase of vaccines, where Iceland and Norway were given permission to take part in the Union's purchase agreements on an equal footing with the EU member states.[69] Importantly, neither the EEA Agreement nor any other agreements between the EU and the EEA EFTA States guaranteed this, a fact of which Norwegian authorities were acutely aware. The EEA EFTA States were wholly dependent on goodwill from the EU and individual EU member states.[70] To be better prepared for any future pandemic, the EEA EFTA States have since pushed for closer cooperation with the EU on health preparedness and response, essentially asking for participation on as full terms as possible in the European Health Union. The EU has responded that some elements of the Health Union can be achieved through the incorporation of relevant EU legislation into the EEA Agreement, but that other elements will have to take the form of separate bilateral agreements between the EU and the EEA EFTA States, thereby indirectly accentuating the limits inherent in the EEA EFTA States' sectorial relationship to the EU.

[66] As noted by Jonsdottir (fn 61, pp. 1555 f.), it seems clear that the primary target of the tightened rules was the UK.
[67] Commission Implementing Regulation EU 2021/734 of 5 May 2021. The diplomatic campaign from the EEA EFTA States is described in detail by Jonsdottir (fn 61), pp. 1556 ff.
[68] Referred by Jonsdottir (fn 61), p. 1557 f. Article 13 EEA mirrors Article 36 TFEU.
[69] See, for example, the final report of the Norwegian Coronavirus Review Committee in NOU 2022: 5 *The Norwegian Government's Management of the Coronavirus Pandemic*, chapter 5. The report is in Norwegian only, but the purchase of vaccines through the EU is highlighted in the summary that has been translated into English and can be found at https://www.regjeringen.no/en/dokumenter/nou-2022-5/id2910055/. Liechtenstein chose to purchase vaccines together with Switzerland, outside the EU purchasing programme.
[70] Sweden in particular.

V. The climate crisis

Fourth on the list is the climate crisis, to which the EU has reacted with several initiatives now placed under the umbrella of the *European Green Deal*.[71] A lot of the EU legislation concretising the Green Deal is of clear relevance to the EEA Agreement and as such continuously implemented into the relevant annexes by decisions of the EEA Joint Committee.[72] It is telling that in 2024 the EEA Council set aside two full pages of its Joint Conclusions to address "climate change and the green transition", agreeing that "continued high ambition, collective effort and urgent action are needed to ensure the transition to a sustainable, socially fair, climate-neutral and environmentally friendly future".[73]

One prominent example of such collective efforts is the Union's Emission Trading Scheme (EU ETS), which was incorporated into the EEA Agreement back in 2007.[74] The EEA relevance of the EU ETS was not obvious and its adaptation by the EEA Joint Committee might arguably be considered a widening of the Agreement's substantive scope.[75] In 2023, the revised ETS from the EU Fit-for-55 Package was incorporated into the Agreement, thus ensuring homogeneity between EU and EEA law in this field.[76]

In the so far only case concerning the ETS to reach the EFTA Court, the EFTA Court was asked whether the obligation to surrender emission allowances under the ETS Directive may be settled by dividend in connection with restructuring of an insolvent company.[77] The EFTA Court highlighted that combating climate change is "an objective of fundamental importance given its adverse effects and the severity of its consequences, including the grave risk of their irreversibility and its impact on fundamental rights" and seized the opportunity to refer to the ECtHR's seminal 2024 judgment in *Verein Klimaseniorinnen Schweiz and Others v Switzerland*.[78] This objective informed the EFTA Court's interpretation of the Directive, leading to the conclusion that EEA law precludes national insolvency law that treats the obligation to surrender emission allowances as an obligation which can be settled by dividend if an insolvent company is to be rescued through compulsory debt settlement.[79]

A further example of the flexibility of the EEA Agreement in the face of the climate crisis is the EEA Joint Committee's decision in 2019 to extend the cooperation to

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[71] See https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en (last visited 3 January 2025).
[72] For an overview, see Chapter 8 of the report of the 2022-2024 Norwegian EEA Review Committee (NOU 2024: 9 *Norge og EØS: Utvikling og erfaringer*) (in Norwegian only).
[73] Conclusions of the 59th meeting of the EEA Council (Brussels, 25 November 2024), EEE 1607/1/24, para. 21.
[74] EEA Joint Committee Decision No. 146/2007.
[75] The discussions leading up to the decision to incorporate the ETS into the EEA Agreement are documented and analysed by Johanna Jonsdottir, *Europeanization and the European Economic Area – Iceland's participation in the EU's policy process*, Routledge 2013, Chapter 6.
[76] EEA Joint Committee Decision No. 335/2023.
[77] Case E-12/23 *Norwegian Air Shuttle* (9 August 2024).
[78] Para. 35.
[79] Before the EFTA Court, Norwegian Air Shuttle argued in vain that the Directive should not be interpreted to affect the substantive insolvency law of the EEA States.

reduce greenhouse gas emissions to include emissions from land use, land use change and forestry, and to integrate two of the EEA EFTA States, Iceland and Norway, into the EU's system of binding annual greenhouse gas emission reductions by member states from 2021 to 2030, to meet commitments under the Paris Agreement. [80] The initiative came from Norway, but the Norwegian government was concerned about possible knock-on effects of what it considered to be an extension of the scope of the EEA Agreement and therefore pushed for a bilateral agreement outside the EEA framework. The EU, on the other hand, considered the link with the ETS to be so close that any such extension of the cooperation ought to be considered "EEA relevant" and incorporated into the Agreement's annex on environmental law (Annex XX). By way of a compromise, it was agreed to make use of the EEA Agreement's particular framework for cooperation "in specific fields outside of the four freedoms" (Protocol 31), which indeed includes extended cooperation on the environment. [81] Importantly, however, it was also agreed that the otherwise not applicable institutional provisions in the Main Part of the EEA Agreement should apply, thereby securing supranational control through the EFTA Surveillance Authority and the EFTA Court.[82] The practical effect of the compromise is therefore limited to Iceland and Norway avoiding any obligation to extend this part of the cooperation to reduce greenhouse gas emissions beyond the 2021-2030 so far agreed.[83] However, as it is difficult to see how Iceland and Norway will be able to comply with their obligations under the Paris Agreement without an extension of the cooperation with the EU, such an extension seems likely.[84]

More of a challenge to the EEA Agreement, however, is climate-related EU legislation that regulates access to the internal market for economic operators from third countries. The leading example of this is the EU's Carbon Border Adjustment Mechanism (EU CBAM).[85] The aim of the EU CBAM is to ensure equal treatment of carbon-intensive goods produced within the EU under the EU ETS and of such goods from third countries which have been produced without an equivalent cost related to the carbon emitted during production.

As the EU ETS is incorporated into the EEA Agreement, it is clear enough that the EU cannot apply the EU CBAM to goods originating in the EEA EFTA States without violating the Agreement's provisions on the free movement of goods. This does not mean, however, that CBAM as such necessarily belongs in the EEA Agreement. Indeed, the view of Norway is that the EU CBAM is so closely linked to the Customs

[80] Decision No 269/2019. Liechtenstein is not included, thus again demonstrating the pragmatic flexibility of the EEA Agreement.
[81] The legal basis in the Main Part of the Agreement is Article 78, where the environment is listed as one of ten fields of extended cooperation "in so far as these matters are not regulated under the provisions of other Parts of this Agreement".
[82] The institutional provisions found in Part VII of the Main Part solely apply to cooperation outside of the four freedoms if this is specifically provided for, see Article 79(3) EEA.
[83] Article 102 EEA on the continuous updating of the EEA Agreement with novel EU legal acts of EEA relevance is limited to legal acts covered by the Agreement's annexes, thereby excluding the protocols.
[84] As recommended by the 2022-2024 EEA Review Committee, see NOU 2024: 7, p. 151.
[85] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism.

Union and the Common Commercial Policy that it should not be considered EEA-relevant. Participation in the EU CBAM will inevitably draw the EEA EFTA States closer to the EU common commercial policy, for example in cases where the EU negotiates with third countries on the applicability of the EU CBAM. Conversely, participation in the EU CBAM will limit the EEA EFTA States' ability to negotiate free-trade agreements with third countries that include preferential trade in 'CBAM goods'.[86] Still, a 'no' to the EU CBAM would leave the EEA EFTA States exposed to the 'carbon leakage' that the EU legislator seeks to prevent. It could also lead to attempts by economic operators from third countries to use the EEA EFTA States as a backdoor into the internal market, to circumvent the EU CBAM.[87] An independent 'EEA EFTA CBAM' might be a theoretical possibility, but the additional costs would be considerable and very difficult to justify. It is therefore hardly surprising that the Norwegian government in 2024 opened up the possibility of the incorporation of the EU CBAM into Protocol 31 of the EEA Agreement, as another example of "voluntary cooperation" on climate-related issues outside the scope of the four freedoms (as the Norwegian government sees it).[88] It remains to be seen whether the other EEA EFTA States and the EU will accept this solution.[89]

The debate on the 'EEA relevance' of the CBAM Regulation is a very clear example of the difficulties in delimiting the scope of the EEA Agreement in the face of the EU's holistic approach to the climate crisis. Thus, while it is true that joint efforts to address climate change have deepened the relationship between the EEA EFTA States and the EU, it is also true that the climate crisis has accentuated the problems inherent in the attempt to isolate the internal market from the Customs Union and the EU Common Commercial Policy.

VI. The Russian invasion of Ukraine

The fifth and final crisis on the list is Russia's full-scale invasion of Ukraine on 24 February 2022 and the related energy crisis in the EU brought about by Russia withholding gas supplies to Europe.

For the EU, the Russian aggression against Ukraine has contributed to a considerable strengthening of the Common Foreign and Security Policy, with a long list of economic sanctions, targeted restrictive measures (individual sanctions), diplomatic measures and visa measures against not only Russia, but also Belarus, Iran and North Korea, as one very concrete result.[90]

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[86] The relationship between the EU CBAM, EU Free Trade Agreements and WTO law is in itself a complex issue well beyond the scope of this contribution. The argument advanced here is simply that diverging EFTA Free Trade Agreements will add further complexities.

[87] The fact that the EEA Agreement's provisions on the free movement of goods generally only apply to products originating in the Contracting Parties (Article 8 EEA) is not in itself sufficient to prevent this, as the rules of origin in Protocol 4 allow for originating status to be obtained through "sufficient working or processing" of non-originating materials.

[88] Press Release from the Ministry of Finance, *Regjeringen går inn for å innføre CBAM-forordningen*, 7 October 2024 (in Norwegian only). The wording "voluntary cooperation" ("frivillig samarbeid") comes across as a Freudian slip as regards Norway's affiliation to the EU in other cases.

[89] The EU has marked the CBAM Regulation as "Text with EEA relevance" and presumably believes that it belongs in Annex XX as a "proper" part of the EEA Agreement.

[90] See https://www.consilium.europa.eu/en/policies/sanctions-against-russia/.

Furthermore, and of greater significance for the EEA, the reemergence of war in Europe has contributed considerably to a rethinking of the internal market, as the EU seeks to achieve 'strategic autonomy' in a challenging geopolitical environment. The long list of EU legislation that flows from this rethink includes the EU framework for the screening of foreign direct investments into the Union[91], the Foreign Subsidies Regulation [92], the Anti-coercion Instrument [93], the International Procurement Instrument[94], the EU semiconductor ecosystem ('the Chips Act')[95] and the framework for ensuring a secure and sustainable supply of critical raw materials.[96]

As the EU's Common Foreign and Security Policy is not covered by the EEA Agreement, it is primarily the repercussions for the understanding of the internal market that will be addressed in the following. Still, EU sanctions against individuals and countries as such do have consequences for the internal market that should not be overlooked. It would hardly be acceptable to the EU if the EEA EFTA States allowed the EFTA pillar of the EEA to serve as a backdoor into the internal market for sanctioned individuals or companies, or as a vehicle to circumvent the EU's ban on exports to Russia. Fortunately, however, this has never been an issue, as the EFTA States all agree with the EU on the need to sanction Russia for its illegal invasion of Ukraine. Consequently, all of the EFTA States (Switzerland included) have chosen to align themselves with the EU sanctions regime.[97]

For the two EEA EFTA States connected to the electricity grid of continental Europe, Liechtenstein and Norway, the most immediate consequence of the Russian invasion of Ukraine was the very substantial increase in electricity prices in the winter of 2022 that followed from Russia's use of gas as a means of exerting pressure on individual EU member states and thus on the EU as such. In Norway, consumers and industry long accustomed to very cheap electricity, primarily

[91] Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union as well as the 2024 Commission proposal for a new FDI Screening Regulation (COM(2024) 23 final).
[92] Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market.
[93] Regulation (EU) 2023/2675 on the protection of the Union and its Member States from economic coercion by third countries.
[94] Regulation (EU) 2022/1031 on the International Procurement Instrument (IPI) promoting reciprocity in access to international public procurement markets.
[95] Regulation (EU) 2023/1781 establishing a framework of measures for strengthening Europe's semiconductor ecosystem.
[96] Regulation (EU) 2024/1252 establishing a framework for ensuring a secure and sustainable supply of critical raw materials.
[97] Whereas Iceland has aligned itself completely with the EU's sanctions regime, the other three EFTA States have made some exceptions, but none that appear likely to threaten the integrity of the internal market. Norway has for example made an exception for the landing of fish from Russian vessels in certain ports in the northern part of Norway, in an attempt to preserve the joint Norwegian-Russian management of fish stocks in the Arctic. Admittedly, the fish landed can be processed in Norway and then exported to the EU as Norwegian fish products, but only within the quotas agreed by the EU and Norway, which would alternatively be filled with fish products made from Norwegian fish. The EU has banned the landing of Russian fish in EU ports and introduced a 12% customs duty on any imports through other channels, but has nevertheless so far not reacted to this Norwegian 'loophole'.

hydropower, were shocked to learn that the high-capacity subsea interconnectors that had been built to Denmark, Germany, the Netherlands and the UK in the last two decades had led to the 'importation' of unprecedented price levels.[98] Attempts to limit this 'price contagion' ran into EEA law difficulties, as electricity is covered by the EEA Agreement's provisions on the free movement of goods, including the prohibition in Article 12 of EEA of quantitative restrictions on exports and on all measures having equivalent effect.[99] For reasons that are not easily understood, much of the ire was directed at the EU's Agency for the Cooperation of Energy Regulators (ACER), which was established through the 2011 Third Energy Package.[100] ACER's (rather limited) competences over national authorities gave rise to a heated debate in Norway concerning the constitutional limits for any 'transfer of sovereignty' to independent EU agencies, as the Third Energy Package was finally incorporated into the EEA Agreement in 2017[101] and this debate apparently left a considerable part of the public with the misapprehension that ACER was to blame for the high prices.[102] This caused the incorporation of the 2019 Fourth Energy Package ('the Clean Energy Package') to derail completely and it is now one of the most prominent listings in the infamous 'backlog' of novel EU legislation that is stuck in the EEA Joint Committee.[103] Even though there is no basis to claim that incorporation of the Fourth Energy Package as such will influence electricity prices in Norway, the role of the EEA Agreement as a legal hindrance to a 'Norway first' energy policy has made it politically very difficult to proceed with any EU legal acts related to the energy union.

Still, as Norway is a major producer of green electricity, the price increase in 2022 greatly benefited the mostly publicly owned producers, filling the coffers of the government, as well as many (but far from all) municipalities. This enabled the

[98] For a thorough description and analysis, see Chapter 9 of the report by the 2022-2024 EEA Review Committee (NOU 2024: 7, in Norwegian only).

[99] Cf. the ECJ's interpretation of the corresponding Article 35 TFEU in Case C-648/*18 Hidroelectrica*, EU:C:2020:723, paras. 42 and 43.

[100] More specifically by Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

[101] EEA Joint Committee Decision No. 93/2017.

[102] The constitutional question concerned whether Parliament had to give its consent by a supermajority of three fourths of all of the representatives. or whether a simple majority of those present at the voting sufficed. It was brought before the courts as a "representative action" by the political organisation *Nei til EU* (literally: *No to the EU*) and drew a lot of media attention. The litigation was drawn out by the government opposing the courts' jurisdiction to hear the case, arguing that it was an inadmissible *actio popularis*. In a plenary ruling in 2021, the Supreme Court decided by 12 to 5 votes to let the case proceed (HR-2021-417-P). It took another two and a half years for the case to make its way back to the Supreme Court, where the Court ruled unanimously (17-0) that the transfer of sovereignty inherent in the EEA adaptation of the Third Energy Package was indeed "of limited significance" and that Parliament therefore was correct to give its consent with only a simple majority of the representatives present (HR-2023-2030-P). The Supreme Court was clearly aware of the public misapprehensions as to ACER's powers and took pains to explain in detail that the Third Energy Package "does *not* provide a legal basis to set electricity prices or make decisions to build new foreign cables or power stations, to lay down ownership rules or to grant licences." (para. 186 of the ruling, unofficial translation by the Supreme Court, italics in original(!)).

[103] As of 2 October 2024, there were 561(!) EEA-relevant legal acts outstanding for which the compliance date in the EU had passed, see the latest 'Progress Report' by the EEA Joint Committee, 12 November 2024 (EEE 1606/24).

government to establish a rather generous aid scheme for consumers, which took some of the heat out of the debate.[104] Due to the State aid rule of the EEA Agreement, however, the scheme could not be extended to economic operators, which has led to considerable discontent in parts of the business community and caused leading politicians to promise not to build any new subsea interconnectors to EU member states. This will clearly be contrary to the object and purpose of the Energy Union, but as EEA law currently stands it is a decision that rests solely with national authorities.

In contrast to the rise in the price of electricity, the underlying and equivalent rise in the price of gas did not affect Norwegian consumers and industry, as gas is not used domestically as a source of energy. Norway's very substantial production of natural gas is thus exported in its entirety, primarily through subsea pipelines to several EU member states (Belgium, France, Germany, the Netherlands and Poland) and to the UK. In response to Russia's withholding of gas supplies to Europe, Norway increased its gas supplies to EU member states to an absolute maximum and has since been the largest exporter of gas to the EU. In 2023, Norway exported a gas volume equivalent to more than 30% of the total gas consumption in the EU.[105] However, despite calls from various quarters, both domestically and within the EU, for solidarity with the EU member states hit by the high prices, the gas was exported at market price. Estimates of the 'super profit' made by Norway as a direct result of Russia withholding gas supplies to Europe vary considerably, but a conservative assessment is about EUR 35 billion in 2022 alone.[106] The EU's dependence on Norwegian gas, and Norwegian authorities' preparedness to increase gas production at the expense of future production of oil from combined fields[107], appear to have silenced the calls for Norway to channel parts of the 'super profit' into a kind of Norwegian 'Marshall programme' for the green transition of Europe.[108]

With regard to the EEA's long-term prospects, the biggest challenge accentuated by Russia's invasion of Ukraine stems from the already mentioned rethink of the internal market, as the EU seeks to achieve 'strategic autonomy' in a challenging geopolitical environment. Again, the fact that the Customs Union and the Common Commercial Policy fall outside the scope of the EEA Agreement creates difficulties. Of the six EU legal acts mentioned in the introductory part of this section, three have been categorised as 'Text with EEA relevance' by the EU legislature – notably;

[104] At the time of writing (January 2025) the government covers 90% of the price above a threshold of NOK 0.9375 /kWh (approximately EUR 0.08/kWh).
[105] https://www.consilium.europa.eu/en/infographics/eu-gas-supply/
[106] Eirik Hjalte and Ida Elisabeth Uberg Gaasland, *Norway: A War Profiteer or Equitable Market Participant? How much of Norway's 2022 natural gas export revenues to the EU can be explained by the influence of the Russia-Ukraine conflict on natural gas prices using Russian supply shortfall of pipeline gas as a proxy*, NHH 2023.
[107] In fields with both oil and gas, extraction of gas will reduce the pressure and therefore the amount of oil that can be extracted later.
[108] Arguably, some of the 'super profit' is, indirectly, channelled back to certain EU member states through the EEA and Norwegian Financial Mechanisms for 2021-2028 mentioned above in Section III. However, the increase in funding from the previous period by no means reflects the Norwegian profit due to the unprecedented gas price in 2022 and 2023. The combined total of the financial contribution under the agreements for 2021-2028 is EUR 3.085 billion, up from EUR 2.8 billion from 2014-2021.

Regulation (EU) 2022/1031 on the International Procurement Instrument (IPI); Regulation (EU) 2023/1781 establishing a framework of measures for strengthening Europe's semiconductor ecosystem ('the Chips Act') and Regulation (EU) 2024/1252 establishing a framework for ensuring a secure and sustainable supply of critical raw materials. However, all of these three regulations contain provisions regulating the Union's relations to third countries which will impact the EEA EFTA States' own free-trade agreements if incorporated into the EEA Agreement. As far as the International Procurement Instrument is concerned, this has led the EEA EFTA States to conclude that it should not be considered EEA-relevant.[109] The other two regulations are still under consideration by the EEA EFTA States.

Of the other three regulations mentioned, both the FDI Screening Regulation and the Foreign Subsidies Regulation illustrate the challenges for the EEA brought about by EU initiatives that regulate access to the internal market for economic operators from third countries. As neither regulation is considered to be of EEA relevance, the starting point is that the EEA EFTA States are also viewed as third countries in this context. Nevertheless, from an EEA law perspective it is clear that EU legislation that subjects economic operators from the EEA EFTA States to administrative burdens that are not applicable to economic operators from EU member states risks violating Article 31 EEA on the right to establishment and/or Article 40 EEA on the free movement of capital. As far as the Foreign Subsidies Regulation is concerned, the existence of EEA rules on State aid mirroring those found in EU law removes any possibility for the EU to justify restrictions to Articles 31 and 40 of the EEA. As far as investment screening is concerned, the legal assessment is rather more complicated, as the EU might argue that it is needed to prevent investors from countries outside the EEA from using companies established in the EEA EFTA States as a stepping stone to circumvent the screening. In order to avoid this, however, Norway is about to align its own direct investment screening regime to that of the EU, whilst also exploring the possibilities for coordination of the two.[110] If this is to work, however, the Norwegian regime will have to develop in line with any changes to the EU regime. This demonstrates how the EEA EFTA States' integration into the internal market 'spills over' and results in more or less voluntary alignment of national law with EU law, also outside the scope of the EEA Agreement.

Be that as it may, it is a matter of concern for the EEA EFTA States that the EU legislature appears to have ignored the EEA Agreement completely in the process leading up to both the Regulation on the framework for investment screening and the Foreign Subsidies Regulation.[111] As far as the latter is concerned, the European

[109] See https://www.efta.int/eea-lex/32022r1031. Whether the EU agrees with this assessment is not known.
[110] See the proposals from the Investment Control Committee in NOU 2023: 28.
[111] See, as regards the FDI Screening Regulation, COM(2017)487 final and, as regards the Foreign Subsidies Regulation, COM(2021)223 final. The proposal for a new FDI Screening Regulation is no different, see COM(2024) 23 final.

Commission is still of the opinion that financial contributions granted by EEA EFTA States are covered by the regulation.[112]

More generally, the EU's response to Russia's invasion of Ukraine has resulted in much closer cooperation between Norway and the EU in the fields covered by the Union's Common Foreign and Security Policy. Outside the scope of the EEA Agreement, Norway contributes to the EU's programmes for military and civilian assistance to Ukraine, has participated in several EU operations, contributes to crisis management under the EU umbrella, supports most of the EU's sanctions policy and takes part in the new EU initiatives for capacity building and innovation.[113] Although the EEA Agreement is also an important framework for cooperation with the EU as regards foreign and security policy, strengthened cooperation in these fields will primarily have to be pursued outside the EEA framework.[114]

VII. Conclusions

If one is to attempt to summarise the impact on the relationship between the EEA EFTA States and the EU of the many crises that have affected them in the last decade, the conclusion must be that their 'special relationship' has prevailed and indeed seems stronger than ever. At the same time, however, the EU's holistic approach to trade policy, industrial policy, economic security and broader political objectives such as those underpinning the green and digital transitions poses a very real challenge to the EEA Agreement.

The EEA EFTA States have expressed their concerns to the EU through various channels, including an 'EEA EFTA Comment' from their Standing Committee on the occasion of the 30th anniversary of the EEA Agreement in 2024. In it, the EEA EFTA States stressed that a strategic rethink of the internal market has to take into account "the special relationship rooted in the mutual obligations of the EEA Agreement and any potential implication of the EEA", in order to ensure that new initiatives do not inadvertently result in the fragmentation of the internal market.[115] Highlighting the support for this concern found in Enrico Letta's 2024 report to the EU Council on the future of the internal market[116], the EEA EFTA States warn against loss of competitiveness and reduced economic security, and stress the need for close dialogue with the EU institutions on how to address shared challenges within the framework of the EEA Agreement.

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[112] See https://competition-policy.ec.europa.eu/foreign-subsidies-regulation/questions-and-answers_en, question No. 18 (visited 3 January 2025).

[113] For a thorough description and analysis, see Chapter 14 of the report by the 2022-2024 EEA Review Committee (NOU 2024: 7, in Norwegian only).

[114] Two independent committees, the 2021-2023 Defence Committee (NOU 2023: 14) and the 2022-2024 EEA Review Committee (NOU 2024: 7), have argued for Norway to seek closer and more formalised cooperation with the EU on foreign policy, security and defence.

[115] EEA EFTA Comment from the Standing Committee of the EFTA States, *30 Years, 30 States: Together for a Competitive and Resilient Europe*, 22 May 2024, para. 8.

[116] Enrico Letta, *Much more than a market – Speed, Security, Solidarity: Empowering the Single Market to deliver a sustainable future and prosperity for all EU citizens*, 18 April 2024, p. 141.

The EU's limited willingness to let the concerns of three small neighbours with a total population of only around 6 million guide the future of the internal market became quite clear, however, in the conclusions from the meeting of the EEA Council in November 2024. The EEA Council did acknowledge "the challenges posed by Internal Market-related initiatives that also address issues that fall outside the scope of the EEA Agreement", but all the EEA EFTA States got was a promise of further discussions "while fully preserving the autonomy of the EU and of its decision-making process".[117] True enough, the EEA Council added that the future development of the EEA had to respect the choices made by the EEA EFTA States in areas that did not fall within the scope of the Agreement[118], but this is rather cold comfort if the underlying development in the EU continues to defy the traditional boundaries between the internal market and other areas of EU law, which seems very likely. The EEA EFTA States are clearly not obliged to accept any extension of the scope of the EEA Agreement, but they may find themselves in a situation where the alternative will be the gradual undermining of the homogeneity between EU and EEA law that has so far ensured that they do not just have access to the EU internal market, but actually form an integrated part of it.

These challenges to the continued success of the EEA have recently been highlighted by both the 2022-2024 Norwegian EEA Review Committee[119] and a 2023-2024 'Task Force' set up by the EEA EFTA States.[120] However, neither report provides more than a call on the EEA EFTA States to pay more attention to this development, presumably because neither committee was entrusted to consider the need for fundamental changes to the legal framework for the 'special relationship' between the EEA EFTA States and the EU.[121]

After a decade of common crises and a strategic rethink within the EU of the role of the internal market, the need for a rethink of the scope of the EEA Agreement is growing.

[117] Conclusions of the 59th meeting of the EEA Council (Brussels, 25 November 2024), EEE 1607/1/24, para. 19.
[118] Ibid.
[119] NOU 2024: 7 *Norge og EØS: Utvikling og erfaringer*, e.g. on p. 74.
[120] *Cross-sectoral EU initiatives: The way ahead for the EEA*, Report to the Standing Committee of the EFTA States by the Task Force on Files with Distinctive Horizontal Dimensions, 4 July 2024.
[121] The author was a member of the 2022-2024 Norwegian EEA Review Committee and carries his share of the responsibility for the Committee's inability to challenge its mandate and think freely about the institutional framework required to maintain the special relationship between the EEA EFTA States and the EU.