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THE EVOLUTION OF THE AGREEMENT ON EUROPEAN ECONOMIC AREA AND THE DECISION MAKING PROCEDURE CONTAINED THEREIN

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I. RELATIONS BETWEEN THE EUROPEAN COMMUNITY AND THE EFTA STATES

The relations between the European Community (EC) and the EFTA States are already twenty three years old, regarding the bilateral free trade agreements signed between the EC on the one hand and EFTA States individually on the other. Those agreements are derived from the accession agreements concluded with the United Kingdom, Ireland and Denmark, which are the former members of EFTA. During their accession negotiations, a question mark about the positions of the other EFTA States had arisen. Some of them didn't want to accede to EC because of their neutrality and one -Portugal could not be accepted by EC because of not having democracy in the country (2). Then a solution was

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* (1) Anadolu Üniv. İkt. Fak., İkt. Bölümü, Uluslararası İlişkiler Anabilim Dalı
(2) Nicolas MOUSSIS, Access To Europe, 1991, EDIT-EUR, p. 24.

ultimately found on 22 July 1972, with the conclusion of free trade agreements between EC and Austria, Iceland, Sweden and Switzerland bilaterally. Two other agreements, one with Norway on 14 May 1973 and the other with Finland on 5 October 1973 followed the formers.

EC has made those bilateral trade agreements depending upon the Treaty of Rome provisions namely Article 113 (3). EC has an exclusive competence in matters dealing with Common Commercial Policy. So the Commission of EC had represented the Community in those negotiations before the Council of the EC concluded the agreements. But bearing in mind that EFTA States created only a free trade area among EC and themselves without establishing common institutions, the contracting parties had been the EFTA States themselves.

Although the Luxemburg Declaration of EC and EFTA ministers was a cornerstone in the relations as the decision of initiating the European Economic Area (EEA), the implementations were unsatisfactory. Realizing the weakness of EEA attempts, Mr Jaques Delors, the precedent President of the EC Commission mentioned the need to strengthen the relations (3). Then the Council of Ministers have agreed on 1 January 1993 to create the EEA (4). But according to Art. 228 (I) second paragraph of the Treaty of Rome, the EC Commission asked to European Court of Justice (ECJ) for an Opinion as to whether the agreement on the EEA was compatible with the treaties establishing the EC. The EEA agreement had been foreseeing an EEA Court within the context of dispute settlement procedure (5). In its Opinion (6), ECJ ruled that; the planned judicial system constituted a threat to the autonomy of the Community legal order in the pursuit of its own objectives (7). So it was incompatible with the treaties establishing the EC.

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(3) Armando Toledano LAREDO, The EEA Agreement: An Overall View, COMMON MARKET LAW REVIEW, 29, 1992, p. 1200.
(4) Bull. EC-10/1991, point 1.3.1.
(5) See also; Opinion 1/76, Re European Laying Up Fund For Inland Waterway Vessels (1977), ECR 741.
(6) Opinion 1/91, 14.12.1992, O.J.1992, C:110.
(7) Bull. EC-12/1991, point 1.7.8.

After the ECJ had given its second Opinion (8) on the amended draft, the EEA agreement was signed on 2 May 1992 in Porto. But it was tackled on the ratification step by the **no** answer arised from the Swiss referendum. Then the contracting parties agreed on an adjustment protocol on 17 March 1993 (9), which would enable the agreement to be implemented without Switzerland, which may nevertheless participate in the EEA at a later date if it so wishes (*).

II. LEGAL STATUS OF EEA IN EUROPEAN COMMUNITY LAW

The EEA is to be established on the basis of an international treaty which essentially merely creates rights and obligations as between the contracting parties and provides for no transfer of sovereign rights to the intergovernmental institutions which it sets up (10). Agreement creates obligations only between the contracting states (11).

The EEA was established with a mixed agreement. That's because some matters such as political dialogue which are dealt with the agreement are not within the exclusive Community competence (12).

As regards the status of the agreement in European Community law, as the ECJ held in its opinion 1/91, relying on some cases (13), international agreements concluded by means of the procedure set out in Art. 228 of the Treaty of Rome are binding on the institutions of the Community and the Member States. Moreover, the provisions

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(8) Opinion 1/1992, 10.4.1992, O.J. 1992, C:136/I.

(9) Bull. EC– 3/1993, point 1.3.2.

(*) This article had been written before the accession of Sweden, Austria and Finland to EC. Necessary amendments to the article couldn't be made because of the uncertainty concerning the implementation of the EEA agreement.

(10) Opinion 1/91, supra, paragr.20.

(11) ibid. paragr.49.

(12) David O'KEEFFE, The Agreement on the EEA, LEGAL ISSUES OF EUROPEAN INTEGRATION, 1992/I, p. 12.

(13) 181/73: Haegeman (1974), ECR 449 ; 104/81 : Kupferberg (1982), ECR 3641.

of such agreements and measures adopted by institutions set up by such agreements become an integral part of European Community legal order when they enter into force.

The ECJ ruled in Kupferberg case (14) that; unconditional and specific provisions of a free trade agreement may have direct effect within the EC in that they are to be applied by the national courts of the Member States and are capable of conferring rights which the courts must protect. However in another case (15), the ECJ held that the question of whether specific provisions of such an agreement have direct effect depends upon an analysis of the provisions in the light of both the object and purpose of the agreement and its wording. It's therefore probable that, some provisions of the agreement might not have direct effect (16). Instead, they might have indirect effect as it is so in Ankara agreement between Turkey and EC.

III. DECISION MAKING PROCEDURE IN EEA

The EEA agreement is a composition of a main agreement which has 129 articles, 47 protocols and 22 annexes attached to it. Protocols explain and develop several dispositions of the agreement. Annexes contain about 1400 Community acts up to the introduction of the EEA agreement. Those annexes provide for the integration of the secondary EC legislation into the agreement. Regulations, directives and decisions constitute secondary EC legislation which have been identified as relevant so called **acquis communautaire** (17).

The EEA has been characterized as both dynamic and homogeneous during the negotiations as well as in the preamble of the agreement. The aim of the EEA is to create a homogeneous area. That basic object could only be realized if the same legal rules would be applied through all the 19 countries concerned (18):

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(14) ibid.
(15) 270/80 : Polydor (1982) ECR 329.
(16) David O'KEEFFE, p. 24.
(17) Sven NORBERG, The Agreement On A European Economic Area COMMON MARKET LAW REVIEW, Volume 29, p. 1174.
(18) Sven NORBERG, The Institutional Solutions Ensuring a Dynamic and Homogeneous EEA, EFTA BULLETIN, 1/1992, p. 2.

so that non-discrimination principle (Art. 4 of the EEA Agreement) could have been achieved among the contracting States.

EFTA States have taken the responsibility of **acquis communautaire** up to the EEA Agreement as to conform homogeneity of the EC legislation and EEA rules. But as regards the dynamism of the EEA, it is also necessary to maintain a homogeneous EEA in the future. So it's essential for the contracting parties to achieve a joint parallel development of the legal orders of the Community and the EEA in areas which are to be covered by the agreement. A change of EC legislation in a field which is also governed by the agreement implies that the EEA rules should be amended as well. Keeping in mind this idea, one can easily come to the conclusion that; EFTA States should take place in the decision making procedure in the areas concerning the EEA. In fact, they had tried to insert themselves in the decision making procedure of the EEA during the negotiations. In other words, EFTA States had demanded a co-decision procedure in the shaping of the Community decisions which would influence the future development of the EEA. They also sought equal participation at all stages up to the point at which the Council of EC Ministers take a final decision. Moreover they have argued to have the right to launch initiatives like the EC Commission has. But unfortunately, they were unable to win that battle against EC. That's because of a statement in the preamble of the agreement which indicates that, the decision making autonomy of the Community must not be jeopardized.

During the negotiations of the EEA agreement, EC didn't want to share its decision making autonomy with the EFTA States and as a consequence, EFTA States had to have respected EC's decision making primacy over EEA rules. They hardly accepted that principle struggling at the negotiations. Finally a compromise had been reached which was convenient to the EC law. The abstract of the compromise was that during the entire phase of legislative elaboration within the EC, EFTA States would only play second fiddle and it is only after the decision has been taken by the Council of EC Ministers that it comes into the sphere of EEA (19).

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(19) Chistophe REYMOND, Institutions, Decision Making Procedure and Settlement of Disputes in the European Economic Area, COMMON MARKET LAW REVIEW, V. 30, 1993, p. 453.

Thus, the decision making procedure in the EEA can be best illustrated when it is studied into three different categories:

III. 1. Decision Making Within The European Community

It is stated in Art. 99 (I) of the EEA agreement that; as soon as new legislation is being drawn up by the EC Commission in a field which is governed by this agreement, the EC Commission shall seek advice from experts of the EFTA States in the same way as it seeks advice from experts of the EC Member States for the elaboration of its proposals.

As it is known; in preparing its proposals to be submitted to the Council of EC Ministers, the Commission usually consults informally with experts from the Member States (20). That informal consultation was taken into consideration into the EEA agreement. Art. 100 (I) of the EEA agreement explains that consultation broadly stating that; the EC Commission shall ensure experts of the EFTA States as wide a participation as possible according to the areas concerned in the preparatory stage of the draft measures to be submitted subsequently to the committees which assist the EC Commission in the exercise of its executive powers. In this regard, when drawing up draft measures, the EC Commission shall refer to experts of the EFTA States on the same basis as it refers to experts of the EC Member States.

But the consequences of the EC experts' advises and the EFTA States' experts' advises in the EEA legislative procedure might be different. Although the advice of the experts are informal within the EC, Commission usually takes into account those ideas, because national interests finally come to the Council of EC Ministers sphere. But that's not the case in the EEA. EFTA States have no power of control on the decision shaping and making. So advises of the EFTA States experts might be taken into account with less keenless (21).

After this first consultation, when the proposal is sent to the Council of EC Ministers, it's also transmitted to each of the EFTA

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(20) See Luxemburg Agreement, Bull. EC- 3/1966.
(21) Christophe REYMOND, p. 464.

States. Furthermore at the request of one of the contracting parties, a preliminary exchange of views taken place in the EEA Joint Committee (22).

III. 2. Decision Making Within the EEA

It is possible that; there could be times an agreement or a compromise could not have been reached easily. That kind of a situation would create serious gambles on the dynamism of the EEA. There are ways to combat with those conflicts and disagreements. For example: the Joint Committee must take any decision necessary to maintain the good functioning of the EEA. But it has to consider that the decision should be equivalent to the new legislation (23). One can easily be confused with that statement. It means that; even though the laws of the contracting parties are different, it's not necessary for them to agree on the new EC legislation which effects to EEA, because the EEA Joint Committee can take a reasonable decision which is parallel to the new EC legislation. If that's the case, there is no need to conclude on an agreement or a compromise, because any decision can be taken considering the two different laws equivalent. The same article adds that; such a decision must be taken at the latest, at the expiring of a period of six months from the date of referral to the Joint Committee, or if that date is later, on the date of entry into force of the new EC legislation.

If no decision on an amendment of an annex to the EEA agreement has been taken at the end of the time limit, the part of the agreement which is affected by the new EC legislation is regarded as provisionally suspended, unless the Joint Committee decides the contrary (24). But the contracting parties shall try to reach on an agreement in an additional six months time, because such a suspension takes effect six months after an agreement or a decision could not be reached by the Joint Committee. So, suspension of a part of the agreement would come into effect only a year after the new EC legislation was made. Nevertheless, the

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(22) Art. 99 (2) of the EEA agreement.
(23) Art. 102 (4) of the EEA agreement.
(24) Art. 102 (5) of the EEA agreement.

Joint Committee shall try to find a mutually acceptable solution for to shorten the suspension period. The rights and obligations acquired by the individuals and economic operators under the agreement remain despite the suspension (25).

It's understood from that article that; EFTA States have the option not to agree on the new EC legislation if they don't like, and as a consequence not to admit it as an EEA rule. That would lead the suspension of the related part of the agreement. That might be a way of showing their independence and sovereignty against EC. They may argue, as they did during the EEA negotiations, that they have been loosing their sovereignty and decision making power by the EEA procedures. In fact, it might be so. But a point must be clarified in that sense: EEA is an international agreement composed of bilateral agreements between EC and EFTA Member States. They have been negotiated, signed and ratified, except Switzerland, by all the contracting parties. By that, all the contracting parties have accepted what EEA imposes on or gives rights to them. If one of the EFTA States had not liked the ingredients of the EEA, it should have done the same, like the Switzerland did. So it's no use to opting out and struggling the dynamism of EEA itself.

III. 3. Effects of the New Legislation of the Joint Committee

The EEA agreement does not transfer legislative competence to EEA bodies. It has been taken into account that; EC's decision making autonomy concerning the development of the internal Community law mustn't be jeopardized, as well as the ambitions of the EFTA States in participating within the EEA decision making process (26). As a consequence, the EFTA States maintain their sovereignty and decision making power. So, a decision of the Joint Committee to amend the corresponding part of the agreement which derives from a new EC legislation, still requires an approval of the States. In other words; the decision of the Joint Committee can be binding on a contracting party only after the fulfilment of constitutional requirements (27). Those constitutional

(25) Art. 102 (6) of the EEA agreement.
(26) Sven NORBERG, The Institutional..., p. 3.
(27) Art. 103 (1) of the EEA agreement.

requirements may vary from one country to another. Decisions can either be approved by the Parliament or by the people following referendum (28). The contracting party should notify that its constitutional musts have been fulfilled by the agreed date. In the absence of such a notification by that date, the decision shall enter into force on the first day of the second month following the last notification of one of the contracting parties.

If the Joint Committee didn't agree on a date and six months have passed after the decision of the Committee without such a notification, the decision shall be applied provisionally pending the fulfilment of the constitutional requirements. But one of the contracting parties may either refuse such a provisional application or notify the non ratification of the decision (29). In both cases, the suspension procedure as provided in Art 102 (5) shall be applied.

Decisions taken by the EEA Joint Committee shall be binding on the contracting parties when they could enter into force with the procedures explained above. Then the contracting parties should take the necessary steps to implement and apply the decisions (30).

Then the question about the characteristics and forms of the decisions arises. The nature of the EEA Joint Committee's decisions as well as the acts within the annexes are specified in the agreement as such:

a) an act corresponding to an EC regulation shall as such be made part of the integral legal order of the contracting parties,

b) an act corresponding to an EC directive shall leave to the authorities of the contracting parties the choice of form and method of implementation (31).

Those statements simultaneously lead the requirement of the direct applicability and effect of the decisions. This will imply for all the contracting parties that the rules must be part of their

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(28) Chistophe REYMOND, p. 466.
(29) Art. 103 (2) of the EEA agreement.
(30) Art. 104 of the EEA agreement.
(31) Art.7 of the EEA agreement.

integral legal order. That's very important for the homogeneity of the EEA rules. Because it's only possible for the individuals or the economic operators to invoke the rules throughout the EEA, if the rules are placed into the legal orders. Nevertheless, the direct applicability and effect of EEA rules are different in the EFTA States than those of the European Community. The procedures which the EFTA States will follow vary by their constitutional and traditional requirements. For example; in monistic EFTA States, an international agreement has direct effect only after its ratification. Besides, in dualistic States, like the Nordic countries belong, a special act is needed to place the agreement into the national legal order, so that it may have direct applicability and effect (32).

IV. CONCLUSION

As it is clearly stated, the decision making procedure has a vital interest for the homogeneity and dynamism of the EEA. By accepting an important part of the **acquis communautaire** and not involving in the shaping of the Community decisions which will modify the EEA rules, EFTA States allowed the EC to maintain its decision making autonomy. They did it by excluding themselves in the EEA decision making process. Even though they had insisted on participation during the negotiations, they had to gave it up and accepted the EC's main objective.

Of course, the EEA agreement provides for the possibility to opt out but such a way will only tackle the system, will not influence the decision shaping procedure and will not enable EFTA States to block EC decisions concerning the EEA legislation. It seems only a dupery to the EFTA States giving the impression that they have obtained a veto power. In fact, by choosing the opting out way, they might face successive reprisals of EC in related areas.

Bearing in mind that, the EEA agreement has initiated a fresh impetus for the economic relations, the contracting parties have to admit its requirements and restraints in order to keep it alive and functional.

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(32) Sven NORBERG, Institutional..., p. 5.