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COMMISSION STAFF WORKING DOCUMENT

A review of the functioning of the European Economic Area

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1. GENERAL BACKGROUND AND OBJECTIVES OF THE REVIEW

This staff working document, drafted by the EEAS in close co-operation with the Commission services, presents an overview of the functioning of the European Economic Area (EEA) over the past two decades. It aims to contribute to a debate with EU Member States at the competent Council group on the future approach of the EU in this area through, among others, some specific questions.

The EEA Agreement was negotiated some 20 years ago under circumstances very different from those that exist today. On the -then- European Economic Community (EEC) side, the core of European co-operation was constituted by the common market, based on the four freedoms and completed by the measures provided for in the Single European Act aiming at the establishment of a real internal market. At that time, the EEA Agreement covered almost the entire scope of Community co-operation, besides agriculture, fisheries and external trade. It was only after the signature of the EEA Agreement that the Treaty of Maastricht entered into force, which created the European Union and widened and deepened the scope of the European integration considerably beyond the internal market, as did the subsequent Treaties of Amsterdam, Nice and Lisbon.

The EEA Agreement was negotiated between the EEC and its 12 Member States and the 7 countries of the European Free Trade Area (EFTA)[1]. It was then meant to represent the best possible alternative to accession to the EEC for those EFTA countries, which were not intending to join the Community. However, the composition of the EFTA side was to evolve shortly after the signing of the EEA Agreement: three of those countries (Sweden, Finland and Austria) joined the EU [2], while a fourth one (Switzerland) eventually opted not to join the EEA[3]. Three rounds of EU enlargement later, the EEA comprises 27 Member States with over 500 million citizens on the EU side and 3 countries with around 5.5 million citizens on the EFTA side [4].

The EEA Agreement is the most far-reaching and comprehensive instrument to extend the EU's internal market to third countries. Its two-pillar structure ensures the integrity of the internal market through institutions (the EFTA Surveillance Authority and the EFTA Court) independent from the EU, but where the EEA EFTA states are represented. Overall, the EEA Agreement can be considered to have functioned well; it has provided the bedrock for very good and close EU relations with the EEA EFTA countries over the past two decades.

The impact of the EEA Agreement is relatively more measurable for the EEA EFTA states, which are able to access a market of 500 million people, than for the EU Member States, which gain market access to 5.5 million inhabitants.

Over time, there have been calls to up-date the EEA Agreement in light of the internal developments of the EU, but these have not been followed through. On the whole, it has widely been considered that if the scope of the EEA Agreement was allowed to develop

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[1] Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland.

[2] In Norway, the 1994 Treaty of accession to the EU was rejected by referendum.

[3] The rejection of the EEA Agreement by Switzerland in a referendum in December 1992 created practical difficulties for Liechtenstein but a special arrangement was negotiated, allowing Liechtenstein to join the EEA as of 1 January 1995, while remaining in its customs union with Switzerland.

[4] Norway, Iceland and Liechtenstein.

alongside with the development of the EU and to be extended in a pragmatic manner to policy areas that had not been considered when the EEA Agreement was negotiated, being a party to the EEA Agreement would offer EEA EFTA countries a convenient "alternative EU Membership-status on an *à la carte basis*", suitable to the political and institutional sensitivities of one of the two sides.

In 2009, the Norwegian Government set up an "EEA Review Committee" to report on the past experiences of the EEA Agreement. In January 2012, this committee released its report. On this basis, the Norwegian government published a white paper in October 2012, which was under discussion in the Norwegian parliament at the time of writing. The white paper confirms that the EEA Agreement is and will continue to be the basis of the Government's European policy and is central to the Norwegian economy. The paper focuses in part on Norway's "room for manoeuvre" in the EEA Agreement, including i.a. on how Norwegian interests can be best served and how to avoid unwanted EU legislation.

In December 2010, the Council adopted a set of conclusions on EU relations with EFTA countries, which gave a positive assessment of EU relations with the EFTA countries and encouraged the EU to conduct its own EEA review with the following objectives:

1. Review the functioning of the EEA Agreement;
2. Examine whether the EU interest is properly served by the existing framework of relations or alternatively by a more comprehensive approach, encompassing all fields of cooperation and ensuring a horizontal coherence;
3. Take into account possible developments in the participation in the EEA;
4. Explore the possibility of up-dating and simplifying some of the procedures with regard to the "technical" functioning of the Agreement.

2. HORIZONTAL ISSUES

2.1. The scope of the EEA Agreement

To date, the EEA Agreement has been sufficiently flexible in adapting to all the various changes of circumstance. The question arises, however, whether this flexibility will be able to provide the necessary responses to some of the current and future developments in the EU. For example, the grey zone between what is internal market legislation *stricto sensu* and what would fall under other policies is growing. Also, the EU adopts more and more packages of legislation with many dimensions, rather than individual acts, which strictly correspond to the internal market concept as understood in 1994. The EU's institutional set-up has also changed radically in some respects since the coming into force of the EEA Agreement.

The Treaty of Lisbon has contributed to the process of rapprochement between the EEA relevant internal market and other EU policies. Of particular relevance are the implications of the *acquis* falling under what is termed as the 'third pillar' (cooperation in the area of justice and home affairs).

One should therefore reflect on how to address heightened interest by EEA EFTA states in judicial cooperation and their wish to intensify further their dialogue on home affairs matters including terrorism, serious crime and police cooperation. It would be important as well to include the policy on trafficking in human beings in the EEA Agreement. Indeed, following the adoption in April 2011 of Directive 2011/36/EU on preventing and combating trafficking

in human beings and protecting its victims, and the adoption on 19 June 2012 by the Commission of the EU Strategy working towards the Eradication of Trafficking in Human Beings 2012-2016, there is a need for a coherent and coordinated approach.

2.2. The relevance of new EU acquis to the EEA Agreement

The "EEA-relevance" of a future EU legal act (i.e. the anticipated need to incorporate an EU act into the EEA Agreement) is proposed by the Commission at the legislative drafting stage, before being confirmed – by the legislator - upon adoption of that act. The EFTA side carries out its own screening exercise of all newly adopted acts and submits draft Joint Committee Decisions (JCD) for those acts which it considers EEA-relevant (the list of acts which it has considered EEA-relevant is published on the EFTA website).

While in practice both sides generally agree on the EEA-relevance of newly adopted acts, disagreements have occurred in some rare instances without a solution proving attainable through dialogue in the EEA institutional framework (for example, Regulation No 1007/2009 on trade in seal products, which Norway resolutely considers non-EEA relevant).

Article 102(1) of the EEA Agreement refers to the incorporation into the Agreement of new EU acts covering issues, which are governed by the Agreement. If the EU considers that a new act is "EEA relevant", it should make sure that the procedure under Article 102 is followed. Moreover, on the basis of Article 111 of the EEA Agreement the EU can bring a matter under dispute which concerns the interpretation or application of the Agreement before the EEA Joint Committee. This provision refers, ultimately, to the possibility to apply Article 102 mutatis mutandis. So far, the recourse to this (heavy) procedure has never been considered by the EU side (see *2.4 Procedure in case of disagreements on the incorporation of the new EU acquis*).

The scope of the "EEA-relevance" has considerably evolved over the past 20 years and can be expected to develop further in the future. In particular, the EFTA side has regularly decided to incorporate a number of acts not identified as EEA-relevant by the EU during the legislative drafting phase. Moreover, the division between the four freedoms of the internal market and the flanking sectors[5] has tended over the past 20 years to become more permeable and the inter-linkage between the two has substantially increased (see *above*). It is to be noted in this context that no analysis has been undertaken so far by the EU side to verify to what extent the acquis in the flanking sectors has been incorporated. Consideration should be given to whether the EU should carry out a systematic scrutiny of the assessment of "EEA-relevance" of EU acts by the EFTA side in general and whether it should assess the current scope of incorporation of EU acquis outside the internal market into the EEA Agreement, resources permitting.

2.3. Delays in the incorporation of legal acts

The homogeneity of the single market

When the EEA Agreement was negotiated, it was considered essential that the application of internal market legislation takes place simultaneously on both sides of the EEA, in order to ensure homogeneity of the ensemble. According to Article 102 of the EEA Agreement, the incorporation of the EU acquis into the EEA Agreement should take place "as closely as

[5] Part V of the EEA Agreement ("Horizontal provisions relevant to the four freedoms") refers to social policy, consumer protection, environment, statistics and company law.

possible to the adoption by the Community of the corresponding new Community legislation with the view to permitting a simultaneous application of the latter".

Since the entry into force of the EEA Agreement, there has been a steady rhythm of incorporation of EU legal acts, which has led to incorporating more than seven thousand of them into the Agreement. In some limited cases however, the incorporation process has not always been seamless and has required firm and persistent pressure from the Commission.

Even in such situations, it has not always led to a conclusive result.

A growing number of outstanding legal acts

Over the last years, there have been increasing delays in the incorporation of legal acts, notably due to:

a) Prolonged internal negotiations among EEA EFTA states

Under the EEA Agreement (Article 93.2), the EEA EFTA states are to "speak with one voice" in the EEA decision-making process. In principle, this rule should serve to apply some pressure among the EEA EFTA states for ensuring the rapid entry into force of legal acts. In practice however, it has been increasingly observed that the incorporation of part of the acquis is being withheld due to the objection of a single EEA EFTA state in relation to the opportunity or the timing of the incorporation of EU acts.

The uneven willingness among the EEA EFTA countries to incorporate new EU legislation into the EEA Agreement has led some of the EEA EFTA states to introduce legislative changes autonomously in their national legal order. Under the current legal system, this does not appear to represent an acceptable option for the EU. Indeed, although, at that moment, the national legislation of an EEA EFTA state would correspond to the EU acquis in that area, the citizens and businesses of the EEA EFTA states and the products originating in those countries (and vice-versa for EU citizens, businesses and products) would not be able to benefit from the effects of the internal market in that area (such as, mutual recognition), as long as the EU acquis is not incorporated formally into the EEA Agreement. Without such an incorporation, the general provisions of the EEA Agreement, and in particular the mechanisms for surveillance and for ensuring homogeneity as applied by the EFTA Surveillance Authority (ESA) and the EFTA Court, would not apply.

b) The late submission of EEA Joint Committee decisions

The longstanding practice according to which the EFTA side is responsible for drafting the JCDs, which introduce EU acts into the EEA Agreement (i.e. the initial phase of the EEA incorporation process), provides a notable advantage to EEA EFTA countries over the EU with regards the scope and pace of the incorporation process. Indeed, this gives the EFTA side a de facto delaying power, with limited recourse for the EU.

In addition, delays linked to translation into the Norwegian language have most recently been an additional cause of hindrance in the submission of acts to the EEA Joint Committee.

c) Protracted negotiations of adaptations

More than 33% of all legal acts (in the field of services nearly 40 % of the directives) have required adaptations. The request for adaptations by the EEA EFTA states and, in particular, institutional adaptations in terms of rights of participation in committees and agencies and the

allocation of competences between the EFTA Surveillance Authority and the authorities of the EEA EFTA states, constitutes a significant source of delay in the incorporation process.

In the absence of a horizontal approach, these matters are discussed on an ad hoc basis, with the effect that the outcome of negotiations varies from one act to another (see also *2.5 Participation in EU Agencies*).

Evidently, the negotiation of new legislation within the EU with 27 Member States has, in some cases, become more challenging. Consequently, the request of substantial modification/adaptation of such legislation in the course of its incorporation into the EEA Agreement has become increasingly difficult to address (and some would say unacceptable), in view of the finely balanced compromise reached during the EU decision-making process.

d) Delays in internal procedures at national level at the final stages of the incorporation process

The entry into force of a JCD (and thus the application of the related EU acts) may be delayed because one or several EEA EFTA State(s) fail to notify the fulfilment of their constitutional requirements within the six months period foreseen by Article 103(2) of the EEA Agreement and indicate that provisional application of the JCD concerned cannot take place. The EEA EFTA state concerned is thus in clear breach of its obligations under the EEA Agreement.

It would appear that this situation in some cases stems from the aim to avoid the initiation of infringement procedures by the EFTA Surveillance Authority (ESA).

By early October 2012, the entry into force of 16 JCDs was still pending, due to the non-fulfilment of the constitutional requirements by Norway; some of them since January 2007 (corresponding to the expiry of the period of six months after their adoption by the Joint Committee).

Overall, the incorporation record varies according to the sector concerned. For example, in the field of services, it takes on average two years from the date the EU adopts a legal act to the date the respective JCD enters into force; the corresponding period is slightly over two years in the field of environmental acts[6].

e) Delays in application of EU legislation incorporated into the EEA Agreement

The difference in the dates of application (for Regulations) or for transposition (of Directives) as decided by JCD between the EU Member States and the EEA EFTA countries will hardly be reduced to zero due to the time gap between the adoption by the EU and the incorporation into the EEA Agreement. Having said that, this difference is still significant in a certain number of cases. On average, a directive is to be transposed by the EEA EFTA states 257 days later than in the EU where it concerns services, and 341 days where it relates to the environment. In other words, instead of tending towards simultaneous application as stipulated in the EEA Agreement, the application of the acquis differs by almost one year between the EU and the EFTA side.

There are some exceptional cases where it took five years formally to apply the legislation (e.g. the Hygiene package). Such a significant delay creates inter alia difficulties in monitoring the implementation records of both parties on the basis of consistent criteria.

[6] According to a research project at the Liechtenstein Institute, prepared as a background document for Norway's EEA review.

In other cases such as REACH, delays in incorporating amendments and implementing acts with respect to acquis already incorporated into the EEA Agreement create legal inconsistency in what is meant to constitute an internal chemicals market, and in some cases, legal uncertainty. This situation is further aggravated by the fact that the functioning of REACH requires it to be continuously amended and implemented.

The EU response to the backlog

According to the independent review of the EEA functioning carried out by Norwegian academics, the delays have been an important safety valve for Norway and the other EEA EFTA countries: "The possibility to delay is in practice a tool that consecutive Norwegian governments have not seldom used in cases regarding more controversial directives, and which in these cases works as a safety valve to ease the political pressure".

At the end of 2011, the above-mentioned delays had led to a backlog of more than 500 legal acts, whose date of application in the EU had already expired. As a practical consequence of this backlog, the stakeholders of the single market potentially face different legal requirements when operating in the EU and the EFTA sides.

This situation might thus lead to competitive advantages for operators based in the EEA EFTA countries, and more fundamentally risks undermining the legal certainty and homogeneity of the single market. This problem is of great concern for the EU side and should be solved as a matter of urgency.

Despite the existence of a procedure in case of disagreements on the incorporation of the new EU acquis within the EEA Agreement (see below), the EU has so far sought to address the situation through discussions (principally at technical level) to convince EEA EFTA countries to take corrective action in relation to the above-mentioned situations. More recently, the EU has repeatedly urged the EFTA side to address the backlog issue and it was agreed at the end of 2011 to clear substantially the backlog by spring 2012.

While 427 acts, whose compliance date in the EU has expired, remain to be incorporated as of October 2012, efforts have been made by the EFTA side to process outstanding acts (2012 has seen the incorporation of the largest number of EU acts in a decade). The EFTA side has started putting in place internal mechanisms to deal with the backlog and accelerate the process of submission of draft Joint Committee decisions.

While the initial results of these efforts are promising, the objective of reducing the backlog to a reasonable level is far from being achieved. Moreover, limited if any progress has been made regarding the more contentious acts (as can be witnessed from the lack of evolution of the language thereon in the EEA Annual Reports).

In light of the above, the EU should continue to aim for a simultaneous entry into force in the EU and the EEA EFTA countries for a large majority of acts. In line with the provisions of the EEA Agreement, the EU should continue to urge the EFTA side to address the backlog of outstanding EU acts.

The EU has the power to initiate the formal procedure provided under Article 103 of the EEA Agreement in cases of failure by the EEA EFTA side to notify the fulfilment of constitutional requirements within the required deadline. It also has the power to initiate the formal procedure provided under Article 102 of the EEA Agreement in cases of protracted non-incorporation of EEA-relevant EU acquis.

All in all, the EU should consider developing a response strategy to the possible growing recourse to a selective approach to the incorporation of EEA-relevant acquis by the EEA EFTA states.

2.4. Procedure in case of disagreements on the incorporation of the new EU acquis

In a limited number of cases, the EEA EFTA side has been reluctant or even, outright opposed, to incorporate EU acts, which the EU legislator has indicated as EEA-relevant upon adoption of the latter (for example, the Norwegian government has publicly stated its refusal to incorporate the Third Postal Directive).

The procedure in case of disagreements on the incorporation of new EU acquis into the EEA Agreement is governed by its Article 102. Under this provision, contracting parties are to make every effort to find a mutually acceptable solution when such a problem arises. If an agreement cannot be reached, the EEA Joint Committee may, within a period of six months following the referral of the problem, take any decision necessary to maintain the good functioning of the EEA Agreement, including the possibility to take notice of the equivalence of legislation. If within an additional period of six months, no decision on an amendment of an Annex to the EEA Agreement has been taken by the Joint Committee, the part of the Annex to the Agreement which would be directly affected by the new legislation would be regarded as provisionally suspended.

In order to effectively oppose any attempt by an EEA EFTA partner to incorporate EEA-relevant EU legislation in a selective manner, the EU side should, evidently, ensure that the part of the Annex to be ultimately suspended would impact negatively on the partner's interests, rather than merely suspend parts of the Agreement that the contravening partner wishes to ignore.

The procedure under Article 102 has never been invoked, let alone followed to its point of conclusion, since the EEA Agreement entered into force. On the one hand, this might be considered a success because the potential consequences of its possible use have acted as a deterrent. On the other hand, it has caused lengthy negotiations and unproductive situations of public political controversy, which have often seen media reports in the EEA EFTA countries concluding to an alleged imposition from Brussels.

Moreover, despite the provisions in the EEA Agreement related to the resolution of disagreements on the incorporation of new EU acquis, there are a number of unresolved cases.

Question

- Should the EU launch the procedure foreseen under Article 102 and/or Article 103 of the EEA Agreement in some specific unresolved cases?

2.5. Participation in and coordination with EU agencies and other bodies

The attribution of powers to Agencies on the EU side, if not matched on the EFTA side, might potentially lead to a situation where there is a risk of unbalanced levels of enforcement. For instance, acquis in the area of financial services is particularly challenging for the EEA EFTA states in relation to the powers granted to the European Supervisory Authorities for financial markets. As such, this challenge needs to be addressed.

Moreover, experience has shown that lengthy negotiations between the EU and the EEA EFTA states take place before incorporating new legal acts, whenever the status or level of participation of these states in EU agencies needs to be addressed.

Consideration could be given whether to seek for an agreement on a horizontal approach to the participation of EEA EFTA States in agencies and other bodies, in line with the principle of institutional autonomy. This agreement should ensure consistency and avoid negotiations on an ad hoc basis

2.6. The role of the EFTA Surveillance Authority

Under the two-pillar structure of the EEA Agreement, the EFTA Surveillance Authority (ESA) was designed to mirror the Commission with regards to the monitoring of compliance of EEA rules by the EEA EFTA countries. However, ESA was hardly provided with the same extensive responsibilities, which the Commission enjoys under Article 17 of the TEU as regards the application of the Treaties.

The strengthening of the responsibilities of ESA and of the level of control by ESA over the implementation of the EEA Agreement by the EEA EFTA states would strengthen the legitimacy of this institution and would increase the Commission/ESA parallelism. Nevertheless, it should be observed that the Commission is politically responsible towards the European Parliament and controlled by the Court of Auditors, while there is no comparable form of monitoring of ESA's performance, as there is only a financial control exercised by the EFTA Board of Auditors.

The ESA regularly produces a scoreboard on the state of transposition of internal market legislation into national law, parallel to the one produced by the Commission. The results for the EU Member States and the EEA EFTA states are included in the same tables. However, a recent internal analysis by Commission services has concluded that the bases used for the two scoreboards differ to such an extent that the figures cannot be compared.

The Commission would encourage a discussion on the responsibilities of ESA, in particular in relation to the possibility of strengthening the control of the application of the EEA Agreement, and of enhancing the monitoring system of ESA, in accordance with Commission practices.

In addition, it would seem that the scoreboards of the EU and of the EEA EFTA States should not be aggregated in official publications since their bases are different and the results are not comparable.

3. SECTORIAL ISSUES

3.1. Agriculture, Processed Agricultural Products and Fisheries

Agriculture

The EEA Agreement provisions regarding the free circulation of goods do not apply to agricultural products (Article 8(3) EEA Agreement), with the exception of the veterinary and phyto-sanitary measures, which have been included as part of internal market considerations. The stated goal of Article 19 of the EEA Agreement, however, was to progressively liberalise trade in agricultural products.

The acquis relating to the Common Agricultural Policy is not part of the EEA Agreement, with the main exceptions being the acquis on standards for organic products (Annex II), and the parts of the acquis related to standards, imports and marketing of wine (Protocol 47) and spirit drinks (Annex II), including the corresponding intellectual property rights (geographical indications).

Regarding trade in agricultural products with Norway and Iceland, some bilateral concessions were progressively agreed, as envisaged in Article 19, essentially by liberalising trade in less sensitive products.

Even though Article 19 foresees progressive trade liberalisation in agriculture with a biennial review clause, Norway has resisted EU efforts for ambitious liberalisation.

At the same time, the negotiations between the EU and Iceland on more ambitious liberalisation of agricultural trade have been launched.

The gradual development of new areas of co-operation, such as the protection of geographical indications (GI) or a dialogue on agricultural policies, is a realistic objective worth considering. Regarding geographical indications, mutual recognition of the respective GIs under bilateral agreements between the EU and Norway and the EU and Iceland respectively is desirable and the negotiations of such agreements should be considered.

Processed Agricultural Products

Trade in processed agricultural products (PAPs) between the EU and EEA partners is regulated by the tariff schedules in Protocol 3 to the EEA Agreement[7]. PAPs are not fully covered by the free movement of goods within the EEA (even if the 'industrial element' tariffs have been eliminated, but partners still maintain an 'agricultural' tariff protection for PAPs).

The Protocol was initially based on the concept of creating a 'level playing field' for the food processing industry within the EEA, hence the import duties and export refunds payable on PAPs are linked to the differences in prices of agricultural raw materials (comparing Norwegian, EU and world prices). Price developments taking place since the mid nineties may justify a review of the 1994 price differences on which tariffs are based. The EU has an interest in undertaking such a review with a view to reducing tariff protection for PAPs, especially in Norway. A review of the Protocol 3 resulting in reduced duties for PAPs would also contribute to further integration among EEA partners in the agri-food area.

The EU has repeatedly raised the request for a review of the Protocol at technical and political level since 2006. A Protocol 3 review process has until now been rejected by Norway, on the grounds that: a) it may result in the need for increasing Norwegian import duties which would be politically unacceptable; b) Norway considers that the Protocol is functioning well and favouring EU exports to Norway; c) with the current political perspective in Norway and no change in Norwegian agricultural policy, a move towards opening of trade negotiations with the EU to review market access conditions for PAPs is not foreseen.

Negotiations with Iceland have been initiated in 2012 and are expected to be concluded in a timely manner and in line with the enlargement process.

Fisheries

[7] The Protocol applies to the EU, Norway and Iceland (Liechtenstein is covered by Protocol 2 to the EU–Switzerland bilateral FTA).

Apart from certain concessions negotiated at the time, the fisheries sector is excluded from the EEA Agreement as regards free movement of goods. Protocol 9 on trade in fish and other marine products nonetheless aims at ensuring fair competition in this sector, notably through setting rules governing competition and the allocation of government aid and subsidies. However, its implementation has been so far uneven.

The issue of transit of fish products through Norway has been lingering since the conclusion of the EEA Agreement. In a number of instances, EU fishermen have experienced problems when landing their catches in Norway, for further transport to the EU. In Norway, processing, selling or exporting raw fish is prohibited unless the fish has been sold at first sale by the intermediary or with the consent of a sales organisation. Transit of fish is subject to the prohibition of exporting fish without the intervention of a sales organisation. Pending an agreement on this issue, a temporary arrangement is currently in force allowing EU operators to perform transit operations in Norway for fish products.

3.2. Financial contributions from the EEA EFTA states

Since the entry into force of the EEA Agreement in 1994, the EEA EFTA States have, on a five-year renewable basis, increasingly contributed financially to reducing the social and economic disparities in the EEA. From their initial contribution of 500€ million[8] for the period 1994-1998, the contribution has increased to the current 1.79€ billion for the period 2009-2014. During the whole period 1994-2014, the EEA EFTA states will have contributed with an overall amount of 3.7€ billion.

The present contribution is composed entirely of grants, in contrast to EU development projects, which benefit from co-financing. While the EEA financial mechanism is widely appreciated, its total financial volume constitutes around 2,6% of the Cohesion fund (0,5% of all Cohesion Policy Funding) for the period 2007-2013. The contribution is made up of two financial mechanisms, the EEA financial mechanism and the additional Norway financial mechanism, with different beneficiary states but with very similar objectives, except for some exclusive domains.

The priorities of the EEA and Norway financial mechanisms support EU policies on environment, climate change, cultural heritage, civil society, research and scholarship, green industry innovation, justice and home affairs, decent work and social development, including regional policy and cross-border cooperation in the beneficiary states. Their implementation modalities are now more closely into line with the EU's regional policy approach, requiring strategic programming and management of the projects by the same authorities responsible for regional policy implementation.

The EEA and Norwegian financial mechanisms are implemented directly in co-operation with the beneficiary countries. There is no formal link to EU regional policy. Nevertheless, the Commission has been given the task to oversee that programming of this assistance is consistent with EU cohesion policy.

At present, the EEA EFTA states agree the amounts available under each mechanism for each beneficiary country and the areas of eligible expenditure. This is communicated to the National Authorities (NA), which then prepare programmes which are returned to the EEA office in Brussels. This office then forwards them, after a first scrutiny, to the Commission

[8] In grant aid and interest rebates of 2 percentage points per annum on 1,5€ billion in loans from EIB (including contributions from Austria, Finland and Sweden).

(DG REGIO), which has to take a decision on the compatibility of the programme with cohesion and EU general policy.

The screening procedure absorbs a considerable level of resources in the form of staff resources (144 programmes are envisaged). Only in cases of conflicting targets or violation of the *acquis,* can the Commission ask for adjustments to the programmes - although this extreme scenario has never occurred so far.

It should be considered whether the EEA and Norway financial mechanisms should entrust the NAs of the beneficiary states with the role of ensuring that their EEA and Norway financial programmes adhere to the basic principles and rules of regional policy as well as their complementarities to EU interventions. Consideration could also be given to limiting the screening by the Commission to exceptional cases where a pre-screening by the EEA EFTA authorities comes to the conclusion that a conflict with EU priorities might exist. This issue might be addressed when negotiating a prolongation of the financial contributions beyond 2014.

Moreover, it should be considered whether the EU should seek a permanent basis for the calculation of financial contributions, regularly adapted on the basis of pre-established criteria linked to the development of the EU cohesion policy.

3.3. Fight against fraud in the field of EU expenditure (financial cooperation)

Cooperation with EEA EFTA countries under the EEA Agreement covers a large number of areas and programmes which involve financial contributions from those countries and also EU financing (including procurement expenditure) going to these countries. Thus, it is in the interest of the EEA partners to protect their financial interests and cooperate in the field of the fight against fraud. This cooperation could possibly entail exchange of information and joint inspections concerning the disbursement of funds, including development aid.

Moreover, Norway is one of the largest donors of development aid in the world alongside the EU and possible cases of double (or multiple) funding make it all the more important to cooperate in this field. The Agreement does not, however, contain any provisions concerning co-operation in the fight against fraud. It could be envisaged to insert relevant provisions in a Protocol on financial cooperation to the EEA Agreement.

Such provisions would need to take into account the prospect of the signature of the Cooperation Agreement between the EU and its Member States and Liechtenstein on combating fraud and any other illegal activity to the detriment of their financial interests and on ensuring the exchange of information in tax matters.

The EU should seek to enhance its cooperation with the EEA EFTA countries in the fight against financial fraud.

3.4. Coal and steel

The Treaty establishing the European Coal and Steel Community (ECSC) expired in July 2002. Since that date, coal and steel products in the EU have been covered by the EC Treaty and from December 2009, by the TFEU. The EEA Agreement also covers coal and steel products but did not foresee the expiry of the ECSC Treaty in 2002. The expiry of the ECSC Treaty does not have any immediate effect as the EEA Agreement does not refer to the ECSC

Treaty. However, under the EEA Agreement, there is a special regime for coal and steel products, which now appears inconsistent, as there is no such special regime under the TFEU.

As such, the EEA Agreement could be aligned to the present situation inside the EU with regards to the applicable regime for coal and steel.

3.5. Temporary withdrawal of tariff preferences

The EEA Agreement does not contain a provision on the (potential) temporary withdrawal of tariff preferences in the event of problems with respect to the application of "administrative cooperation" provisions under the Origin Protocol (currently Protocol 4), or of the assistance under the Mutual Administrative Assistance Protocol (currently Protocol 11).

This EU policy introducing the possibility to temporarily withdrawing tariff preferences post-dates the adoption of the EEA Agreement. This possibility has been inserted into all trade arrangements negotiated since 2000. This possibility is inserted into earlier agreements as and when the opportunity arises.

Further, a clause on the management of administrative errors (MAE clause) is being introduced as a general policy in all preferential trade agreements currently negotiated by the EU. This clause relates to situations where, at the time of export of preferential goods, the competent authorities of the exporting country do not manage appropriately the issuing of certificates of origin granting the preferential status for the goods. The clause puts in place a platform for discussion with the interested parties where administrative errors lead to losses of import duties.

The EEA Agreement should contain both a provision on the (potential) temporary withdrawal of tariff preferences in the event of problems with regard to mutual administrative assistance and the MAE clause, in order to adequately protect the EU's financial interests.

Given this, the EU could consider including in the EEA Agreement a provision on the temporary withdrawal of tariff preferences in the event of problems with respect to the application of tariff preferences. The EU could also consider including in the EEA Agreement a clause on the management of administrative errors.

4. PROCEDURAL ISSUES

4.1. Involvement of social partners from the EEA EFTA side

In the area of social policy, including health and safety at work, the Commission, before submitting proposals, shall consult social partners (Article 155 of the TFEU). Currently, the EEA Agreement does not explicitly provide for the involvement of social partners either in drawing up legislation or deciding on its incorporation into Agreement.

Having regard to the provisions on Social policy in the TFEU on the involvement of social partners in the adoption of EU legislation, it is suggested to reflect social dialogue in the EEA Agreement and to decide on the content and scope of such provisions jointly with the EEA EFTA states, as well as to enhance social dialogue within the functioning of the EEA Agreement.

4.2. Political dialogue

Political dialogue with the EEA EFTA countries is held at different levels: two meetings per year in the margins of the EEA Council and, in principle, two meetings per year with seven Council working parties.

Consideration could be given to streamlining the number of political dialogues with the EEA EFTA countries.

4.3. Technological rationalisation of procedures

The current procedures for the incorporation of the acquis into the EEA Agreement – for the most part, developed 20 years ago – are resource-intensive and would gain from being adapted to the latest technological advances. In addition, there is no comprehensive and user-friendly system, which would allow stakeholders to follow the processing of the EEA-relevant acquis from the moment of its drafting to its adoption. Such a system would certainly benefit all sides and would contribute to facilitate the swift incorporation of acts into the EEA after their adoption by the EU.

Moreover, it would be useful to integrate references to the transposition of the EU directives in the national legal orders of the EEA EFTA states into the EUR-Lex database. This would facilitate access to EEA-related information by the authorities and interested parties.

5. THE NEED FOR A MORE COMPREHENSIVE APPROACH?

The EU has concluded more than 70 bilateral agreements with the EEA EFTA countries such as the Free Trade Agreements with Norway and Iceland, agreements on the participation of the three countries in Schengen acquis, agreements on "Dublin" and Eurodac cooperation, Scientific and Technical Cooperation Agreement, customs cooperation, etc.

In some cases these agreements have almost lost their *raison d'être* (FTAs are a case in point), whereas in other cases they have very specific rules different from the ones of the EEA and remain adequate as stand-alone measures (case of the Schengen agreements).

Benefits could be found in bringing some of these agreements under a single framework agreement for the sake of legal clarity, such as in the case of the Scientific and Technical Cooperation Agreement or in the case of the FTAs with Iceland and Norway (in order to bring together all tariff concessions and conditions in one agreement). However, these advantages might be outweighed by the disadvantages, for instance, taking the last example, the partner countries' attempt to renegotiate the tariff concessions to their advantage.

In the case of Liechtenstein, some elements of the EEA Agreement, namely in the field of veterinary and phytosanitary matters, are addressed through an existing bilateral agreement between the EU and Switzerland and hence, Swiss public authorities are responsible for such matters also in Liechtenstein. For this reason, Annex I to the EEA Agreement does not apply to the latter.

The Schengen agreements with the EEA states as well as the existing agreements with Norway, Iceland, Switzerland and Liechtenstein on "Dublin" and EURODAC seem adequate as stand-alone measures. Including the Schengen agreements within the wider EEA Agreement might pose a potential risk to the functioning of the Schengen area. Indeed, it is imperative to have associated countries accept unconditionally the acquis and to have the

possibility to terminate the agreement in case an EEA EFTA country decided not to accept the content of an act or measure under the Schengen acquis ("guillotine clause").

Questions:

- Should the EU seek for a common framework for some agreements between the EEA EFTA countries and the EU?

6. POSSIBLE DEVELOPMENTS IN THE PARTICIPATION IN THE EEA

The EEA has proven an efficient and broadly well-functioning means to extend the EU internal market and certain policies to the three EEA EFTA states with advanced legal systems and a high level of economic development. EEA participation requires a legal and economic capacity to assimilate and implement correctly a substantial volume of EU legal acts.

The Agreement foresees that participation in the EEA is possible only for EU Member States or EFTA members; and therefore precludes this possibility for other European countries, which would like to become part of the Agreement without necessarily becoming members either of the EU or of the EFTA. It means that, *de facto*, participation in the Agreement is open exclusively to the only remaining EFTA member, Switzerland, since other countries would be obliged first to become EFTA members, unless the EEA Agreement itself would be modified in this respect.

At a time when the EU is increasingly developing its relationship with its neighbourhood, there is some merit for engaging in further reflection on the advantages and disadvantages of enlarging the EEA Agreement or enlarging the geographical coverage of the EEA. This debate would become all the more relevant in case Iceland accedes to the EU, in which case the number of EEA EFTA countries will drop to two (Norway and Liechtenstein). As observed by the Norwegian EEA review committee, "a particularly vulnerable aspect is the institutional structure under the EEA Agreement, which has a large apparatus to look after the interests of three small states. Since 1995 it has been functioning in circumstances other than those for which it was designed, and it is now already vulnerable. If the EFTA/EEA pillar shrinks further, it is difficult to see how it could fail to need rebuilding".

Switzerland is part of EFTA but, following a referendum in 1992, rejected participation in the EEA. The Swiss position has not changed in the meantime. However, in view of Switzerland's increasing wish to participate in certain areas of the internal market and in EU activities in several cooperation fields, for which the EEA could offer an appropriate framework, this position should be re-evaluated. Indeed, in accordance with its Article 128, Switzerland can become a party to the EEA Agreement by an agreement with the other EEA partners, which lays down the terms and conditions for such participation.

Furthermore, Andorra, Monaco and San Marino would like to enhance their relations with the EU, including through greater access to the EU's internal market. In this connection, it is worth considering whether this could be achieved if they joined the EEA via EFTA. This would require the support from all contracting parties and a re-negotiation of the EEA Agreement, not least to provide for an adaptation of the EEA EFTA institutions.

Question:

- How does one ensure that the EEA EFTA institutions continue to function in a credible and legitimate manner in case Iceland joins the EU?
- How does one ensure coherence/linkage between the discussions between the EU and Switzerland on institutional matters and the EEA framework?
- How does one ensure coherence/linkage between the ongoing EU discussions on relations with the small sized states and the EEA framework?