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### **EEA LAW AND THE CLIMATE CHANGE. THE CASE OF NORWAY**

**Abstract:** In 2019 the European Economic Area Agreement (EEA) celebrated 25 years of promoting the European integration and cooperation in economic and many other relevant matters. Climate issues were, however, not included in the negotiations of the EEA Agreement. Combating climate change is thus not listed as one of the objectives of the EEA environmental law. Furthermore, the Main Part of the EEA Agreement has not been updated since its entry into force. Still, the Agreement is the most relevant platform for the European cooperation in combating climate change. This article sheds light on the EU/EEA climate law and policy from the perspective of Norway that due to its energy sector is quite unique in the context of the EU climate policy. Moreover, Norway not only participates in most of the EU initiatives, but also takes actions to strengthen the EU/EEA cooperation in climate action and promotes setting ambitious climate goals.

**Keywords:** European Economic Area Agreement, European Union, EEA EFTA states, EU/EEA climate policy, climate change, Norway, EU Emission Trading System, State aid

## 1. Introduction

In 2019, the EEA Agreement celebrated 25 years of promoting European integration and cooperation in economic and many other relevant matters.<sup>1</sup> One of these is the EU/EEA climate policy that addresses one of the largest global threats of our time - climate change.<sup>2</sup>

The EEA Agreement was signed on 2.05.1992, in Porto, in Portugal, and entered into force on 1.01.1994.<sup>3</sup> Pursuant to Article 1(1) of the Agreement, its aim is

to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.

At present, the Contracting Parties to the Agreement are the EU and all its 27 Member States and three EFTA states, that is Norway,

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<sup>1</sup> The 25<sup>th</sup> anniversary of the EEA Agreement has prompted a profound legal analysis of its role and impact on numerous areas of law, see F. Arnesen, H. H. Fredriksen, H. P. Graver, O. Mestad, Ch. Vedder eds., *Agreement on the European Economic Area. A Commentary*, C.H.Beck–Hart–Nomos–Universitetsforlaget 2018.

<sup>2</sup> Some of the most striking consequences of climate change in Norway may be observed on Svalbard where several unusually warm years were documented, particularly after 2000, and a number of records have been set. In 2016, the average temperature in Svalbard was 6.6 °C above normal. For further information, see *Miljøovervåking Svalbard og Jan Mayen (MOSJ) [Environmental monitoring programme for Svalbard and Jan Mayen: air temperatures and precipitation]* <http://www.mosj.no/no/klima/atmosfare/temperaturnedbor.html> (accessed 6.3.2020).

<sup>3</sup> Agreement on the European Economic Area - Final Act - Joint Declarations – Declarations by the Governments of the Member States of the Community and the EFTA States – Arrangements - Agreed Minutes - Declarations by one or several of the Contracting Parties of the Agreement on the European Economic Area], OJ L 1, 3.1.1994, p. 3; and EFTA States' official gazettes.

Liechtenstein and Iceland.<sup>4</sup> There are over 450 million people living in the EEA, which makes it the world's largest single market.<sup>5</sup>

For Norway, Liechtenstein and Iceland, the EEA Agreement provides a viable though quite peculiar alternative to EU membership. The EEA EFTA states have no formal ties to the supranational institutions of the EU and they have no formal access to the EU decision-making process. They may merely give their input during the preparatory phase, when the European Commission draws up proposals for new legislation. Yet, Norway, Liechtenstein and Iceland are bound to incorporate the EEA-relevant EU legal acts into their national laws.<sup>6</sup> This implies a substantial transfer of sovereignty and a democratic deficit that is being debated by both politicians and legal scholars.<sup>7</sup>

Irrespective of one's opinion on the EEA Agreement, however, one must agree that it is 'an international treaty *sui generis* which contains a distinct legal order of its own'.<sup>8</sup> As regards combating climate change, climate issues were not included in the negotiations of the Agreement. Thus,

<sup>4</sup> The European Free Trade Association, EFTA, is the intergovernmental organisation of Iceland, Liechtenstein, Norway and Switzerland. It was set up in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK to promote closer economic cooperation and free trade in Europe, see <https://www.efta.int/> (accessed 6.3.2020). The fourth EFTA state – Switzerland – is not a Contracting Party to the EEA Agreement, but has a set of bilateral agreements with the EU, see <https://www.eda.admin.ch/dea/en/home/bilaterale-abkommen.html> (accessed 6.3.2020).

<sup>5</sup> This has not changed following the so-called Brexit on 31.1.2020 that reduced the population of the EEA by approximately 67 million people.

<sup>6</sup> For further information on this obligation and the so-called right of reservation, see K. Almestad, *The Notion of 'Opting-out'*, [in:] C. Baudenbacher (eds.), 'Handbook of EEA Law', Springer 2016.

<sup>7</sup> See e.g. *Outside and Inside. Norway's agreements with the European Union*, Report by the EEA Review Committee, appointed on 7.01.2010. Submitted to the Ministry of Foreign Affairs on 17.01.2012, full version in Norwegian only: <https://www.regjeringen.no/contentassets/5d3982d042a2472eb1b20639cd8b2341/no/pdfs/nou201220120002000dddpdfs.pdf> (accessed 6.3.2020). See also E.O. Eriksen, J.E. Fossum (eds.), *Det norske paradoks: Om Norges forhold til Den europeiske union*, Universitetsforlaget 2014. The latter is a result of a project launched by the Norwegian Research Council on the occasion of celebrating 200 years of the Norwegian Constitution "Grunnloven" in 2014. The project 'The Norwegian Constitution in a Changing European Context' examined how Norway's constitutional development is tied up with and affected by the EU.

<sup>8</sup> *Erla María Sveinbjörnsdóttir v Iceland*, Case E-9/97, Advisory Opinion of the Court of 10.12.1998, E1997J0009, para. 59.

combating climate change is not listed as one of the objectives of the EEA environmental law. Yet, the EEA Agreement is the most relevant platform for pan-European cooperation and Norway actively participates in most of the EU initiatives.<sup>9</sup> As pointed out by the Council of EU:

The EU and Norway share a strong sense of responsibility towards our citizens, our natural environment and our future generations. The Council welcomes Norway's clear willingness to continue to be a driving force for international climate cooperation, and to work to fulfil the Paris commitments, together with the EU.<sup>10</sup>

The manner in which the EEA EFTA states are affiliated to the EU influences every area of law and policy that is directly or indirectly regulated by the EEA Agreement. Thus, in order to clarify how EEA law addresses climate change, this article provides some general information on the Agreement and its peculiarities.<sup>11</sup> In order to explain how the EU/EEA climate law and policy work in practice, this article analyses the example of Norway, an EFTA state that applied for EU membership four times: in 1962, 1967, 1970 and 1992.<sup>12</sup>

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<sup>9</sup> For further information, see H. Ch. Bugge, *EØS-avtalens rolle og betydning på miljøvernområdet*, Report no. 14, Europautredningen 2011; E.L. Boasson, *Norsk miljøpolitikk og EU – EØS-avtalen som inspirasjonskilde og maktmiddel*, Report no. 19, Europautredningen 2011.

<sup>10</sup> Council conclusions on a homogeneous extended internal market and EU relations with non-EU Western European countries, Press release 773/18 of 11.12.2018, <https://www.consilium.europa.eu/en/press/press-releases/2018/12/11/council-conclusions-on-a-homogeneous-extended-single-market-and-eu-relations-with-non-eu-western-european-countries/> (accessed 6.3.2020).

<sup>11</sup> For further information, see S. Norberg, M. Johansson, *The History of the EEA Agreement and the First Twenty Years of Its Existence*, [in:] C. Baudenbacher (eds.), 'Handbook...', Springer 2016.

<sup>12</sup> In 1962, Norway submitted its first application for the EEC membership together with Ireland, the UK and Denmark. When France decided to veto the UK membership, the negotiations with Norway were suspended. This happened again in 1967. In 1970, the Storting decided to apply for the EEC membership for the third time. The negotiations for the terms to govern the Norwegian membership were completed in 1972. However, in September 1972, in an advisory referendum, 53,5% of all Norwegian citizens voted against EEC membership. The election turnout was 79,2%. In 1992, Norway once again applied for EEC membership. Its application was considered together with the applications submitted by Sweden, Finland and Austria. At the same time, one discussed the EEA Agreement that was signed on 2.05.1992 and entered into force on 1.01.1994. In November 1994,

Norway is not only the largest EEA EFTA state. Most importantly, it is unique in the context of the EU climate policy. This is because of the importance and special characteristics of its energy sector.<sup>13</sup> On the one hand, Norway has the highest share of electricity produced from renewable sources in Europe. Hydropower accounts for most of Norway's power supplies,<sup>14</sup> while wind power is now dominating investments.<sup>15</sup>

On the other hand, the petroleum industry plays a vital role in the Norwegian economy and the financing of its welfare state. The oil and gas sector is Norway's largest measured in terms of value added, government revenues, investments and export value. Norway is one of the world's most relevant producers and exporters of oil and gas, while the EU Member States are mostly consumers and importers. The fact of having opposing interests unavoidably creates tensions between Norway and the EU and those are not limited to the necessity of combating climate change.<sup>16</sup>

There is a broad political consensus in Norway that safeguards a stable legal framework for the development of the oil and gas sector. As a result, the authorities are rather working towards limiting its impact on the environment than phasing out the production, and thus reducing budget revenues. Therefore, Norway accords great importance to developing Carbon Capture and Storage (CCS) technology. Indeed, Technology Centre Mongstad (TCM) is the world's largest facility for testing and improving CO<sub>2</sub> capture. It is a joint venture between the Norwegian state, Equinor

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the Norwegian citizens once again rejected the EU membership. This time 52,2% voted against joining the EU while the election turnout was 89%.

<sup>13</sup> See D.H. Claes, *The process of Europeanization – the case of Norway and the internal energy market*, 'ARENA Working Papers' WP 02/12 [https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2002/wp02\\_12.htm](https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2002/wp02_12.htm) (accessed 6.3.2020).

<sup>14</sup> In January 2020, the share of hydropower in electricity production was 90,1%, see Statistics Norway <https://www.ssb.no/en/energi-og-industri/statistikker/elektrisitet> (accessed 6.3.2020).

<sup>15</sup> More information on the Norwegian energy sector may be found at a website of the Norwegian Ministry of Petroleum and Energy <https://energifaktanorge.no/en> (accessed 6.3.2020).

<sup>16</sup> The Russia-Ukraine gas dispute concerning natural gas supplies, prices and debts in 2005-2006 made the EU aware of its dependence on the Russian supplies. Thus, in 2006-2007, the EU attempted to force Norway to increase its gas export to the EU Member States, but Norway refused.

(formerly Statoil), Shell and Total.<sup>17</sup> The public financing is granted under EU/EEA State aid rules that allow for addressing the problem of CO<sub>2</sub> emissions, while preventing undue competition distortions in the internal market.<sup>18</sup> Rules on environmental aid are also the legal basis for a State aid scheme supporting the demand for zero-emissions vehicles.<sup>19</sup> At present, no other country in the world has more electric cars per capita than Norway.<sup>20</sup> The approximately 200,000 electric cars constitute around 7% of the total passenger car fleet. In March 2019, for the first time in history, more than half of passenger cars that were registered were fully electric.<sup>21</sup>

Norway with its 8<sup>th</sup> longest coastline in the world is also leading an electric ferry revolution. It is estimated that '[by] as early as 2022, so many electric ferries will be in operation that annual emissions of CO<sub>2</sub> into the atmosphere will be 300 000 units less than at present, which corresponds to the discharges of 150 000 cars'.<sup>22</sup> A swift transition to electric maritime transport is one of the most relevant objectives pursued by the authorities as regards climate policy objectives. In this respect, there have been introduced different types of State aid measures that take into account both the technology at stake and the characteristics of the relevant market.<sup>23</sup>

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<sup>17</sup> For further information, see <http://www.tcmda.com/no/> and <https://www.regjeringen.no/no/tema/energi/co2-handtering/id86982/> (accessed 6.3.2020).

<sup>18</sup> EFTA Surveillance Authority Decision 146/17/COL of 8.08.2017 on continued financing of CO<sub>2</sub> Technology Centre Mongstad [2017], OJ C 377, 9.11.2017, p. 9.

<sup>19</sup> EFTA Surveillance Authority Decision 228/17/COL of 19.12.2017 Tax reductions on zero emission vehicles [2018], OJ C 107, 22.3.2018, p. 10.

<sup>20</sup> For more information on the zero emission vehicles and the technical and technological challenges raised by the increased number of such vehicles, see Hanne Saele, *Electric vehicles in Norway and the potential for demand response*, #SINTEFblog, 1.4.2019 <https://blog.sintef.com/sintefenergy/electric-vehicles-norway-demand-response/> (accessed 6.3.2020).

<sup>21</sup> According to the statistics provided by the Norwegian Road Federation (OFV), zero emission vehicles, that is electric vehicles and hydrogen vehicles, amounted to 58,4% of the market share: <https://ofv.no/bilsalget/bilsalget-i-mars-2019-1> (accessed 6.3.2020). Yet, in February 2020 the market share of zero-emission vehicles dropped to 49,7%, <https://ofv.no/bilsalget/bilsalget-i-februar-2020> (accessed 6.3.2020).

<sup>22</sup> See *Elektriske ferjer – suksess for klima og norsk batteriproduksjon*, Tekna Magasinet, 17.1.2019, <https://teknamagasinet.no/elektriske-ferjer-suksess-for-klima-og-norsk-batteriproduksjon/> (accessed 6.3.2020).

<sup>23</sup> For more details, see ENOVA on financing state aid to the maritime sector, <https://www.enova.no/bedrift/maritim-transport/> (accessed 6.3.2020).

At the EEA level, the most important cross-sectoral climate policy instrument for cost-effective cuts in greenhouse gas emissions is the EU Emission Trade System (ETS).<sup>24</sup> The EEA EFTA states joined the EU ETS through the EEA Agreement in 2008.<sup>25</sup> As described below, this cooperation has currently been substantially developed. In Norway, one should also mention the carbon tax.<sup>26</sup> Both ETS and the carbon tax apply to the petroleum industry, while most other sectors either have to take part in emissions trading or pay the carbon tax.<sup>27</sup>

## 2. The EEA Agreement and its peculiarities

The EEA Agreement is modelled on the Treaty of Rome of 25.03.1957.<sup>28</sup> This may seem odd given the fact that the Agreement has been negotiated in parallel with the Maastricht Treaty that was signed on 7.02.1992.<sup>29</sup> The Main Part of the Agreement cover the four freedoms, competition and State aid rules that are fundaments of the EU's internal market. The Annexes to the Agreement contain the relevant secondary EU law while Protocols specific EEA rules and some more secondary EU law.

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<sup>24</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13.10.2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003], OJ L 275, 25.10.2003, p. 32. For updated legal framework and policy, see [https://ec.europa.eu/clima/policies/ets\\_en](https://ec.europa.eu/clima/policies/ets_en) (accessed 6.3.2020).

<sup>25</sup> Directive 2003/87/EC was incorporated into the EEA by JCD No. 146/2007.

<sup>26</sup> Norway was one of the first countries in the world to introduce a carbon tax, in 1991. It is levied on all combustion of gas, oil and diesel in petroleum operations on the continental shelf and on releases of CO<sub>2</sub> and natural gas, in accordance with the CO<sub>2</sub> Tax Act on Petroleum Activities. The combination of the carbon tax and the ETS means that companies on the Norwegian shelf pay approx. NOK 700 per tonne for their CO<sub>2</sub> emissions, which is significantly higher than for most other businesses in Norway and much higher than in all other countries with petroleum activities, <https://www.norskpetroleum.no/en/economy/governments-revenues/#taxes> (accessed 6.3.2020).

<sup>27</sup> The EU ETS does not cover amongst other transport, that of agriculture, forestry and waste industry.

<sup>28</sup> The Treaty of Rome (The Treaty establishing the European Economic Community (EEC)).

<sup>29</sup> Treaty on European Union [1992], OJ C 191, 29.7.1992, p. 1.

A Final Act contains a number of Joint Declarations on different issues.<sup>30</sup> The Annexes and Protocols are an integral part of the EEA Agreement,<sup>31</sup> which is a part of the EU *acquis*.<sup>32</sup> The EU common agricultural and fisheries policies, customs union, common trade policy, common foreign and security policy, justice and home affairs,<sup>33</sup> direct and indirect taxation,<sup>34</sup> as well as economic and monetary union are not part of the EEA Agreement.

The EEA Agreement is based on a two-pillar structure, which consists of the EU pillar, the EFTA pillar and the joint EEA bodies situated in-between. In order to apply the EU law to the EEA EFTA states, certain competences and tasks that are carried out by bodies in the EU pillar, have to be conferred upon bodies in the EFTA pillar. Therefore, the EEA EFTA states established the EFTA Surveillance Authority<sup>35</sup> (ESA) and the EFTA Court.<sup>36</sup> The Agreement between the EFTA states on the Establishment of a Surveillance Authority and a Court of Justice (the SCA Agreement) is a crucial part of the EEA legal regime.<sup>37</sup> ESA has been granted competences

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<sup>30</sup> The main text of the Agreement, updated versions of all Annexes and Protocols, other legal documents, such as all adopted Joint Committee Decisions and the EEA status of EU legal acts are available at <https://www.efta.int/Legal-Text/EEA-Agreement-1327> (accessed 6.3.2020). For further information on the structure of the Agreement and its development, see H.H. Fredriksen, *EEA Main Agreement and Secondary EU Law Incorporated into the Annexes and Protocols* [in:] C. Baudenbacher (eds.), 'Handbook...', Springer 2016.

<sup>31</sup> See Article 119 EEA.

<sup>32</sup> See e.g. Article 216(2) TFEU.

<sup>33</sup> Yet, based on their respective association agreements, the EEA EFTA States are part of the Schengen area and the Dublin System.

<sup>34</sup> Under certain circumstances, however, tax measures such as tax reductions or tax waivers may amount to State aid within the meaning of Articles 107(1) TFEU and 61(1) EEA. Thus, Norway had to notify a zero VAT-rate on electronic news to ESA even though indirect taxation is not a part of the EEA Agreement, see EFTA Surveillance Authority Decision 23/16/COL of 25.01.2016 raising no objections to a zero VAT rate for electronic news services (Norway) [2016], OJ C 396, 27.10.2016, p. 6.

<sup>35</sup> For further information, see F. Büchel, X. Lewis, *The EFTA Surveillance Authority* [in:] C. Baudenbacher (ed.), 'Handbook...', Springer 2016.

<sup>36</sup> For further information, see C. Baudenbacher, *The EFTA Court: Structure and Tasks* [in:] C. Baudenbacher (ed.), 'Handbook...', Springer 2016.

<sup>37</sup> Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [1994] OJ L 344, 31.12.1994, p. 1; and EFTA states' official gazettes, a consolidated version is available at <https://www.efta.int/sites/default/files/documents/legal-texts/the-surveillance-and-court-agreement/agreement-annexes-and-protocols/Surveillance-and-Court-Agreement-consolidated.pdf> (accessed 6.3.2020).



mirroring those of the European Commission as regards surveillance,<sup>38</sup> while the EFTA Court correspond to those of the Court of Justice of the European Union (CJEU).<sup>39</sup> Yet, Advisory Opinions issued by the EFTA Court are not binding upon the EEA EFTA states and there is no obligation upon the last instance courts to request such an Opinion.<sup>40</sup>

The EEA Joint Committee has decision-making power and is responsible for the ongoing management of the EEA Agreement. This body plays a key role in the continuous process of incorporating EEA-relevant EU acts into the EEA Agreement by means of a Decision.<sup>41</sup>

Importantly, the Main Part of the Agreement has not been updated since it was adopted in 1992. At the same time, the EU's concept of the internal market and the European integration have been significantly modified.<sup>42</sup> At present, 'the internal market is conceptualized in more holistic terms, to include not only economic integration, but also consumer safety, social rights, labour policy, and the environment.'<sup>43</sup> The EEA Agreement being based on the origins of the internal market may thus appear to be more economically-oriented. This increasing distinction between the EU Treaties and the Main Part of the EEA Agreement is referred to as 'the Widening Gap'.<sup>44</sup>

In order to establish and safeguard a dynamic and homogenous EEA, it does not, however, suffice to incorporate the EEA-relevant EU acts into the EEA Agreement. Rather, it also requires that the common EU/EEA rules throughout the EEA are interpreted and applied in the same way.<sup>45</sup>

<sup>38</sup> Obviously, this does not concern those areas of law and policies that are not covered by the EEA Agreement.

<sup>39</sup> This two-pillar system of surveillance and judicial control was endorsed by the CJEU in its Opinion 1/92 and later reaffirmed in *Opel Austria GmbH v Council*, Case T-115/94, Judgment of the General Court, ECLI:EU:T:1997:3, para. 108.

<sup>40</sup> Compare Article 267 TFEU and Article 34 SCA Agreement.

<sup>41</sup> For further information, see G. Baur, *Decision-Making Procedure and Implementation of New Law* [in:] C. Baudenbacher (ed.), 'Handbook...', Springer 2016.

<sup>42</sup> Those modifications were carried out through the Treaties of Maastricht (1992), Amsterdam (1997), Nice (2001) and Lisbon (2007).

<sup>43</sup> See P. Craig, G. de Búrca, *EU Law. Text, Cases and Materials*, 6<sup>th</sup> ed, OUP, Oxford 2015.

<sup>44</sup> For further information, see H.H. Fredriksen, G. Mathisen, *EØS-rett*, 3<sup>rd</sup> edn, Fagbokforlaget 2018, at p. 76.

<sup>45</sup> See e.g. *Erla María Sveinbjörnsdóttir v Iceland*, Case E-9/97, Advisory Opinion of the Court of 10.12.1998, E1997J0009.

This is safeguarded by the principle of homogeneous interpretation<sup>46</sup> that applies to material, institutional and procedural rules.<sup>47</sup>

### **3. The EU/EEA climate policy – introductory remarks**

EU climate policy is often considered together with its environmental and energy policies.<sup>48</sup> While those areas are clearly linked to each other, the climate issues under EEA law raise specific concerns. As regards environmental protection, the EFTA states have cooperated with the EU in this area since the early 1970s. Environmental issues were also an important part of the negotiations with the EEC in the 1990s.<sup>49</sup> As regards the EEA Agreement, the provisions on the protection of environment are included in Chapter 3 in Part V that contains horizontal provisions relevant to the four freedoms. In this respect, Article 73 states the objectives of EEA environmental law, Article 74 refers to Annex XX to which the EEA-relevant EU law is being incorporated for the purpose of achieving the objectives

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<sup>46</sup> See amongst others Preamble recital 4, Articles 1(1), 105-107 EEA and Article 3(2) of the SCA.

<sup>47</sup> For a comprehensive analysis of the principle of homogeneity, see P. Wennerås, *Article 6 [Homogeneity]*, [in:] F. Arnesen, H.H. Fredriksen, H.P. Graver, O. Mestad, Ch. Vedder (eds.), *Agreement on the European Economic Area. A Commentary*, C.H.Beck-Hart-Nomos-Universitetsforlaget 2018. See also Council conclusions on a homogeneous extended internal market and EU relations with non-EU Western European countries, Press release 773/18 of 11.12.2018, at para. 3, available at <https://www.consilium.europa.eu/en/press/press-releases/2018/12/11/council-conclusions-on-a-homogeneous-extended-single-market-and-eu-relations-with-non-eu-western-european-countries/> (accessed 6.3.2020).

<sup>48</sup> See, e.g. D. Buschle, B. Jourdan-Andersen, *Energy Law*, [in:] C. Baudenbacher (ed.), *Handbook...*, Springer 2016.

<sup>49</sup> One of the provisions of the EU membership agreement that was signed on 25.6.1994, but subsequently rejected in the referendum, allowed Norway to introduce a four-year transition period during which Norway could maintain environmental standards that were more restrictive than those imposed by the EU. For further information, see L. Friis, *Breaking the waves: the European Union's enlargement negotiations with EFTA and central and eastern Europe*, [in:] O. Elgström, Ch. Jönsson (eds.), *European Union Negotiations: Process, Networks and Institutions*, Routledge 2004.

provided in Article 73, while Article 75 allows the EEA EFTA to maintain or introduce more stringent protective measures than those under Article 74.<sup>50</sup>

As regards energy, the EU common energy policy first gained momentum in the 1990s. When the EEA Agreement was negotiated, it was assumed that EEA law would have a very limited impact on the Norwegian energy sector.<sup>51</sup> As it turned out, however, rules on the four freedoms, competition and State aid, as well as legal acts dealing with the energy policy are EEA-relevant.<sup>52</sup>

As far as the EU climate policy is concerned, it was neither discussed nor considered to be EEA-relevant under the negotiations of the EEA Agreement in 1990-1991. This was simply because climate change was a relatively new issue. Hence, Article 73 EEA in which the objectives of the EEA environmental policy are stipulated does not mention climate change. As regards EU law, Article 191(1) TFEU provides that EU environmental policy shall contribute to 'promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.' This objective was, however, added by the Treaty of Maastricht.

#### **4. The Norwegian climate strategy – from national to EU/EEA policy and EEA law**

The beginnings of the Norwegian climate policy, its framework and development in 1990s were not linked to the EU, but were connected

<sup>50</sup> For further information on the EU and EEA environmental law and the differences between these two, see E. Nordtveit, S.E. Schütz, *Chapter 3: Environment*, [in:] F. Arnesen, H.H. Fredriksen, H.P. Graver, O. Mestad, Ch. Vedder (eds.), 'Agreement on the European Economic Area. A Commentary', C.H.Beck–Hart–Nomos–Universitetsforlaget 2018.

<sup>51</sup> The only mention of energy in the Main Part of the Agreement is in Article 24, in Part II, on the free movement of goods. When the Agreement was negotiated in the early 1990s, there were nine EC regulations and directives on energy that were incorporated into the Agreement. Currently, there are over 70 legal acts in the energy field.

<sup>52</sup> For further information, see O.G. Austvik, D.H. Claes, *EØS-avtalen og norsk energipolitikk*, Report no. 8, Europautredningen 2011. One of the most recent examples of the application of EU/EEA State aid law to the petroleum sector is the EFTA Surveillance Authority Decision 18/19/COL of 20.3.2019 Cash refund of the tax value of petroleum exploration costs, <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=4827> (accessed 6.3.2020).

with the 1992 United Nations Framework Convention on Climate Change (UNFCCC)<sup>53</sup> and the Kyoto Protocol of 1997.<sup>54</sup> During the climate negotiations, Norway was a member of the so-called Umbrella Group, together with USA, Canada, Japan, Australia and New Zealand. At that point, those countries had interests that were not entirely the same as those of the EU. In particular, while Norway and the USA were in favour of using carbon credits, the EU was rather skeptical. This has changed over time. Currently, the EU Emission Trade System (EU ETS) is an element of the EU/EEA climate policy, while in the USA, only a few states have decided to implement it.<sup>55</sup>

For some years, however, the Norwegian climate policy was being developed in parallel to EU climate policy. The 2001 white paper on climate policy, for example, mentions the EEA Agreement only with respect to the limitations that the EU/EEA Competition and State aid law may impose on the Norwegian emission trade system.<sup>56</sup> From 2000 onwards, however, it had become clear that EU climate policy is of relevance to Norway. In this respect, it was the establishment of the EU ETS in 2005 that changed the Norwegian position.<sup>57</sup> As a result, Norway dropped the idea of its own national system and together with Iceland and Liechtenstein, joined the EU ETS through the EEA Agreement in 2008.<sup>58</sup> As noted, the EU ETS is, at the moment, the most relevant EU/EEA law measure that addresses climate change.

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<sup>53</sup> United Nations Framework Convention on Climate Change of 9.5.1992.

<sup>54</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11.12.1997.

<sup>55</sup> For further information, see USA – Regional Greenhouse Gas Initiative (RGGI) of 5.4.2019, available at [https://icapcarbonaction.com/en/?option=com\\_etstmap&task=export&format=pdf&layout=list&systems\[\]=50](https://icapcarbonaction.com/en/?option=com_etstmap&task=export&format=pdf&layout=list&systems[]=50) (accessed 6.3.2020).

<sup>56</sup> St.meld. nr. 54 (2000 – 2001) *Norsk klimapolitikk*.

<sup>57</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community, and amending Council Directive 96/61/EC [2003], OJ L 275, 25.10.2003, p. 32. For updated legal framework and policy, see [https://ec.europa.eu/clima/policies/ets\\_en](https://ec.europa.eu/clima/policies/ets_en) (accessed 6.3.2020).

<sup>58</sup> Directive 2003/87/EC was incorporated into the EEA by JCD No. 146/2007, which also incorporated the amendments introduced by Directive 2004/101/EC. Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community has been incorporated into the Agreement at point 21(a)(l) of Annex XX.

Interestingly, however, until very recently, the participation of Iceland, Liechtenstein and Norway in the ETS was not full. The ETS implies that EEA EFTA states have a share of allowances to be auctioned and they have chosen to auction their allowances together with those of the 25 Member States participating in the common auction platform, rather than organise separate auctions. Yet, until the end of 2018, the EEA EFTA states were not able to auction their allowances – as the EEA Agreement had to be amended to allow them to participate in the Joint Procurement Agreement for the common auction platform.<sup>59</sup> Following the fulfillment of the formal requirements for auctioning and completing some practical arrangements, the EEA EFTA states started to auction allowances on the common auction platform on 3.06.2019. On 16.05.2019, the European Energy Exchange (EEX) published the revised 2019 calendars for the auctions of general and aviation allowances in order to include the auction volumes of Iceland, Liechtenstein and Norway. Aviation allowances of Norway and Iceland were included in the auctions of aviation allowances as from 17.7.<sup>60</sup> The 2020 auction calendars for aviation allowances for 25 EU Member States<sup>61</sup> and the EEA EFTA states Norway and Iceland was published on 5.11.2019.<sup>62</sup>

At present, about half of all Norway's emissions are included in the EU ETS. Per intent, ETS emissions are to be reduced by 43% by 2030 relative to the 2005 level. Norwegian installations in sectors covered by the system are playing their part in achieving this target in the same way as installations in other European countries. The EU ETS is a 'cap and trade' system, which sets a 'cap', or limit, on total greenhouse gas emissions within the system. This cap is reduced year by year so that the emission target for sectors covered by the system is met by the end of the period. Emission allowances are allocated by auctioning or free of charge. With regard to the latter, sectors that are considered to be at risk of carbon leakage receive some or all of their allowances free of charge. This applies to a certain proportion of petroleum-sector emissions to which the ETS

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<sup>59</sup> See [https://ec.europa.eu/clima/news/eu-emissions-trading-system-iceland-liechtenstein-and-norway-start-auctions-common-auction\\_en](https://ec.europa.eu/clima/news/eu-emissions-trading-system-iceland-liechtenstein-and-norway-start-auctions-common-auction_en) (accessed 6.3.2020).

<sup>60</sup> See [https://ec.europa.eu/clima/news/emissions-trading-revised-2019-auction-calendars-including-eea-efta-volumes-published\\_en](https://ec.europa.eu/clima/news/emissions-trading-revised-2019-auction-calendars-including-eea-efta-volumes-published_en) (accessed 6.3.2020).

<sup>61</sup> The EEX plans to conduct two separate auctions in its capacity as opt-out platform for Germany and auction platform auctioning for Poland in October and April 2020, respectively.

<sup>62</sup> See [https://ec.europa.eu/clima/news/2020-auction-calendars-aviation-allowances-published\\_en](https://ec.europa.eu/clima/news/2020-auction-calendars-aviation-allowances-published_en) (accessed 6.3.2020).

applies. Allowances for emissions from heating and electricity generation on offshore installations are not, however, allocated gratis. If a company's emissions exceed its free allocation, it must purchase additional allowances from other companies within the system. Companies that cut their emissions so much that they have a surplus of allowances can sell them to others. Thus, the trading system provides incentives for cost-effective cuts in greenhouse gas emissions.<sup>63</sup> The EU ETS is now in its third phase, which runs up to the end of 2020. The rules for the fourth period from 2021 imply a tightening of the emissions trading system.

On 10.04.2019, the Norwegian government confirmed its willingness to strengthen its cooperation with the EU with respect to combating climate change under the EEA Agreement, and requested the Storting to enter an agreement on joint fulfilment of the 2030 climate target.<sup>64</sup> This implied that Norway, Iceland and the EU would, from 1.01.2021, cooperate on reducing non-ETS emissions. Moreover, the proposed EU regulations on effort sharing and on land use, land-use change and forestry would become relevant to Norway. Biodiversity and forest policy are not covered by the EEA agreement, and the EU Forest Strategy and biodiversity strategy are, therefore, not implemented by Norway. In order to facilitate the inclusion of the forestry, in March 2019, the authorities finalized their proposed forestry accounting plan for 2021-2025.<sup>65</sup> On 17.06.2019, pursuant to §26(2) of the Constitution the Storting provided its consent to enter the proposed climate agreement with the EU and Iceland.<sup>66</sup> On 25.10.2019, the EEA Joint Committee incorporated the relevant pieces of EU

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<sup>63</sup> In 2018, the average cost of an emission allowance entitling the holder to emit one tonne of CO<sub>2</sub> was approximately 16,12 euros, corresponding to NOK 155. The increase in emissions trading represents more than the double from the previous year.

<sup>64</sup> Prop. 94 S (2018–2019) Samtykke til deltakelse i en beslutning i EØS-komiteen om innlemmelse i EØS-avtalen av rettsakter som inngår i felles oppfyllelse med EU av utslippsmålet for 2030, available at <https://www.regjeringen.no/no/dokumenter/prop.-94-s-20182019/id2641228/sec1> (accessed 6.3.2020).

<sup>65</sup> Norwegian Ministry of Climate and Environment, *National forestry accounting plan for Norway for the first commitment period 2021-2025*, 21.3.2019, available at [https://www.regjeringen.no/contentassets/116262fdbff147fab3b0d38b61ed258f/national-forestry-accounting-plan-for-norway\\_2021-2025\\_21march2019.pdf](https://www.regjeringen.no/contentassets/116262fdbff147fab3b0d38b61ed258f/national-forestry-accounting-plan-for-norway_2021-2025_21march2019.pdf) (accessed 6.3.2020).

<sup>66</sup> Prop. 94 S (2018-2019), Innst. 401 S (2018-2019) Samtykke til deltakelse i en beslutning i EØS-komiteen om innlemmelse i EØS-avtalen av rettsakter som inngår i felles oppfyllelse med EU av utslippsmålet for 2030, available at <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2018-2019/refs-201819-06-17?m=2> (accessed 6.3.2020).

legislation into the EEA Agreement.<sup>67</sup> Most importantly, the Committee decided to extend the cooperation of the Contracting Parties<sup>68</sup> to the EEA Agreement to: 1) Regulation on Land, Land-Use Change and Forestry (LULUCF),<sup>69</sup> and 2) the Effort Sharing Regulation.<sup>70</sup> As a result, the EU, Iceland and Norway significantly deepened their cooperation in climate action.<sup>71</sup> Through the said Agreement, Iceland and Norway take part in all three pillars of the EU climate policies, including the regulations for the non-ETS emissions. The Agreement extended the parties' cooperation to reduce greenhouse gas emissions by at least 40% by 2030 compared to 1990 levels. As regards the non-ETS emissions, Norway will cut emissions from transport, construction, waste and agriculture by 40 per cent by 2030 compared with the 2005 level. Importantly, while the Decision and the Agreement of 25.10.2019 require that Iceland and Norway act to fulfil their emissions reduction targets for the period from 1.01.2021 to 31.12.2030, it does not regulate how the EU, Iceland and Norway implement the Paris Agreement.<sup>72</sup>

<sup>67</sup> Decision of the EEA Joint Committee No 269/2019 of 25.10.2019 amending Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms.

<sup>68</sup> With the exception of Liechtenstein.

<sup>69</sup> Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, PE/68/2017/REV/1 [2018], OJ L 156, 19.6.2018, p. 1.

<sup>70</sup> Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, PE/3/2018/REV/2 [2018], OJ L 156, 19.6.2018, p. 26

<sup>71</sup> See the European Commission's press release, [https://ec.europa.eu/clima/news/european-union-iceland-and-norway-agree-deepen-their-cooperation-climate-action\\_en](https://ec.europa.eu/clima/news/european-union-iceland-and-norway-agree-deepen-their-cooperation-climate-action_en) (accessed 6.3.2020).

<sup>72</sup> The EEA Joint Committee's Decision of 25.10.2019 also incorporated the following EU legal acts: Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council [2018], OJ L 328, 21.12.2018,

As the Agreement stipulates, Norway and Iceland are obliged to communicate their revised proposed forest reference levels to ESA no later than nine months after the entry into force of Decision of the EEA Joint Committee of 25.10.2019 for the period from 2021-2025.<sup>73</sup> ESA shall publish the proposed forest reference levels communicated to it by Norway and Iceland. Norway and Iceland must also submit a strategy for the land use, land use change and forestry sector with a perspective of at least 30 years, including also ongoing or planned specific measures to ensure the conservation or enhancement, as appropriate, of forest sinks and reservoirs. Norway presented its National Plan related to the Decision of the EEA Joint Committee of 25.10.2019 in December 2019.<sup>74</sup>

The EEA Joint Committee Decision provides the details of obligations assumed by Norway and Iceland and puts ESA in charge of monitoring their compliance with the Decision. Moreover, while Iceland and Norway shall participate fully in the work of the Climate Change Committee, they shall not have the right to vote. Yet, when the Commission consults experts designated by the Member States, it shall consult experts designated by Norway and Iceland on the same basis.

The Decision of the EEA Joint Committee of October 2019 demonstrates the significance of the mechanisms under EEA Agreement to dealing with the threat of climate change. As the Decision provides, it contributes to (1) fulfilling the EEA EFTA states' commitments under the UNFCCC and the Paris Agreement to reduce anthropogenic greenhouse gas emissions and enhance removals by sinks and to promote increased carbon sequestration; (2) fulfilling the objective of the Paris Agreement

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p. 1, Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC [2013], OJ L 165, 18.6.2013, p. 13, Commission Implementing Regulation (EU) No 749/2014 of 30 June 2014 on structure, format, submission processes and review of information reported by Member States pursuant to Regulation (EU) No 525/2013 of the European Parliament and of the Council [2014], OJ L 203, 11.7.2014, p. 23.

<sup>73</sup> As noted, the Storting approved the Agreement in June 2019. The next step is the approval by the Icelandic Althing.

<sup>74</sup> Norwegian Ministry of Climate and Environment, *Norway's National Plan related to the Decision of the EEA Joint Committee No. 269/2019 of 25 October 2019, December 2019*, available at [https://www.regjeringen.no/contentassets/4e0b25a4c30140cfb14a40f54e7622c8/national-plan-2030\\_version19\\_desember.pdf](https://www.regjeringen.no/contentassets/4e0b25a4c30140cfb14a40f54e7622c8/national-plan-2030_version19_desember.pdf) (accessed 6.3.2020).



of holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1,5 °C above pre-industrial levels; and (3) achieving long-term greenhouse gas emission reductions and enhancements of removals by sinks to the extent relevant for the LULUCF sector, in accordance with the objective, in the context of necessary reductions according to the Intergovernmental Panel on Climate Change (IPCC) to reduce EEA EFTA states greenhouse gas emissions in a cost-effective manner and enhance removals by sinks in pursuit of the temperature goals in the Paris Agreement so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

According to the Norwegian government, the October Agreement with the EU and Iceland is one of the most relevant and ambitious achievements as regards climate action. Yet, Norway constantly tries to set even more ambitious goals. Just a few months later, on 7.02.2020 Norway submitted an enhanced climate target under the Paris Agreement. Norway's new and strengthened target is to reduce emissions with at least 50%, and towards 55 % by 2030 compared to 1990 levels. As explained in the submission, Norway seeks to fulfil the enhanced ambition through the climate cooperation with the EU. In the event that Norway's enhanced nationally determined contribution goes beyond the target set in the updated nationally determined contribution of the EU, Norway intends to use voluntary cooperation under Article 6 of the Paris Agreement to fulfil the part that goes beyond what is fulfilled through the climate cooperation with the EU. This will require consent of the Storting.<sup>75</sup>

Finally, the EU/EEA climate policy is amongst the priorities of the Norwegian Chair for the EFTA Standing Committee during the first half of 2020. The Standing Committee serves as a forum in which the EEA EFTA States consult one another and arrive at a common position before meeting with the EU in the EEA Joint Committee.<sup>76</sup> In

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<sup>75</sup> Update of Norway's nationally determined contribution, available at [https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Norway%20First/Norway\\_updatedNDC\\_2020%20\(Updated%20submission\).pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Norway%20First/Norway_updatedNDC_2020%20(Updated%20submission).pdf) (accessed 6.03.2020).

<sup>76</sup> It consists of the Ambassadors to the EU of Iceland, Liechtenstein and Norway, and observers from Switzerland and ESA. For more information, see <https://www.efta.int/eea/eea-institutions/standing-committee> (accessed 6.3.2020).

the area of decision-shaping, one of the main priorities of the Norwegian Chairmanship is to maintain and further develop EEA/EFTA cooperation with the EU on EEA relevant initiatives under the European Green Deal,<sup>77</sup> including the new climate law, financing mechanisms, transport, and the circular economy action plan.<sup>78</sup> Norway is thus highly engaged in making the EEA EFTA states involved in the Commission's new strategy to tackle climate and environmental-related challenges.

## 5. Conclusions

As described above, in spite of not including climate issues in the EEA Agreement, EEA law provides an efficient legal framework for combating climate change. The procedure of incorporating the relevant EU legislation into the EEA Agreement may be time-consuming and may require a certain consensus, but the EEA model has turned out to be surprisingly stable and efficient. In October 2019, Norway and Iceland significantly deepened their already extensive cooperation with the EU as regards combating climate change. Interestingly, this Agreement is based on Protocol 31 of the EEA Agreement, which concerns a voluntary cooperation outside the four freedoms. Yet, as the Norwegian authorities stressed, this does not mean that the new climate Agreement is 'less binding'. It simply does not oblige Norway to cooperate with the EU after 2030. Still, as Norway constantly sets more ambitious climate goals and encourages other European states to adopt them, one may expect that the EEA Agreement will develop as a relevant platform of the European cooperation. This cooperation may well gain a new momentum owing to the European Commission's 'European Green Deal'. The Norwegian government announced its plans to carefully follow the European Commission's actions both in its capacity as Chair for the EFTA Standing Committee during the first half of 2020 and as

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<sup>77</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, Brussels, 11.12.2019 COM(2019) 640 final.

<sup>78</sup> See <https://www.efta.int/sites/default/files/documents/about-efta/chairmanship/20-598%20Priorities%20of%20the%20Norwegian%20Chairmanship.pdf> (accessed 6.3.2020).

one of EEA EFTA states.<sup>79</sup> This is undeniably good news for our planet. The immense task of countering climate change requires joint action and ambitious partners standing by their commitments.

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<sup>79</sup> See Utenriksdepartementet, *Norge i Europa 2020, Regjeringens arbeidsprogram for samarbeidet med EU*, [https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/europapolitikk/arbeidsprogram\\_eu\\_2020.pdf](https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/europapolitikk/arbeidsprogram_eu_2020.pdf) (accessed 6.3.2020).

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