

LAW-MAKING IN THE EEA: THE CAPACITY OF EEA/EFTA STATES TO INFLUENCE THE LEGISLATIVE PROCESS WITH REGARD TO THE ADOPTION OF EEA-RELEVANT ACTS¹

Mgr. Igor Sloboda

Comenius University Bratislava, Faculty of Law
Institute of European Law
igor.sloboda@flaw.uniba.sk

Abstract: As members of the European Economic Area (EEA) but not of the European Union (EU), Norway, Iceland and Liechtenstein have specific mechanisms through which they can influence EEA law and thus EU law. However, their ability to enforce amendments to acts adopted in the EU is limited compared to EU Member States. They can propose amendments and provide input during consultations and decision-making processes, but ultimately must rely on negotiations and agreement with the EU to incorporate these changes. Direct enforcement of amendments to EU legislation is not within their legal powers, which highlights the limitations of their status as non-EU members within the EEA. In the present article, we look at the different ways in which Norway, Iceland and Liechtenstein can interact with EEA and EU legislation and influence its shape at different stages of the legislative process. In particular, we will focus on a content analysis of EEA/EFTA comments over the last thirty years since the EEA was established.

Keywords: EEA, EFTA, EEA EFTA Comments, Decision Shaping, Legislative Procedure

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Introduction

The European Economic Area (EEA) is a unique framework that extends the European Union's (EU) internal market to the three member states of the European Free Trade Association (EFTA): Norway, Iceland and Liechtenstein.² This agreement allows the named EEA/EFTA member states to participate in the EU internal market without being full members of the EU. In addition to access to the four freedoms: free movement of goods, services, persons and capital through the internal market, the agreements allow the possibility to cooperate in other areas. However, this participation is subject to certain restrictions, in particular in the area of law-making.³

The EEA/EFTA countries are obliged by the agreement to adopt EU legislation on the internal market. The incorporation of EU legislation into the EEA Agreement primarily entails the adoption of secondary legislative instruments, including regulations, directives, and decisions. These acts are fundamental to ensuring that the EFTA States fulfil their obligations under the EEA Agreement. Nevertheless, EEA membership has not conferred upon the EFTA States representation in the EU's principal law-making institutions, including the Commission, the Council and the Parliament. In comparison to other EU Member States that have elected representatives in EU institutions, the EEA/EFTA States are subject to a notable democratic deficit. Their influence on the drafting of this legislation is limited only to the possibilities arising from the agreement. In particular, their ability to reach consensus within the area defined by the agreement, not only among themselves but also through negotiations with their partners in the EU pillar, plays an important role in influencing the shape of the relevant legislation in the most effective way.

The present article examines the legislative dynamics within the EEA, with a particular focus on the ability of EFTA Member States to enforce changes in secondary legislation. The article examines the mechanisms available to these states to participate in EU legislative processes, the challenges they face in advancing their interests, and the broader implications for the sovereignty and legal autonomy of EFTA states within the EEA. Through this analysis, the article aims to shed

² Swiss citizens reject joining the EEA in a referendum held on 6 December 1992

³ Baur, G., Rydelski, M., S., Zatschler, C.: European Free Trade Association (EFTA) and The European Economic Area (EEA) p. 62

light on the complex balance between integration and independence that characterises the EEA legal and political environment.

The following section outlines the structure of the present article. In the initial section, we provide a concise overview of the institutional framework of the EEA. The following chapter will examine the options available to EEA/EFTA Member States for influencing EU lawmaking under the EEA Agreement. In the third chapter, we will examine the influence of EEA/EFTA Member States on EU lawmaking through indirect instruments. The fourth chapter will primarily define and characterise the EFTA comments, before proceeding to analyse them comprehensively over the years 1994 to 2024. We will then present our conclusions, which will include a formulation of the findings and an evaluation thereof.

1. Institutional aspects of the EEA

Prior to undertaking a detailed examination of the means by which EEA/EFTA Member States can shape the final form of EU/EEA legislation, it is essential to first define the legislative process as it occurs in EEA terms. The two-pillar structure established by the Agreement on the European Economic Area (the Agreement) not only establishes new bodies but also creates a distinctive procedural mechanism through which secondary acts of EU law are transposed into the legal order of the three EFTA Member States that are EEA Member States. In this regard, one of the fundamental limitations of the agreed system is evident: citizens of the EEA/EFTA Member States do not have guaranteed political rights within the EU structures to participate or to be involved in their operation or processes.⁴

The EFTA pillar is constituted by the representation of the EFTA States, the Standing Committee of the EFTA States, the EFTA Surveillance Authority, the EFTA Court, the EFTA Parliamentary Committee and the EFTA Consultative Committee. The Standing Committee of the EFTA States, the EFTA Parliamentary Committee and the EFTA Advisory Committee operate within the EFTA Secretariat. In contrast, the Parliamentary Committee is the EU pillar and is constituted by the rotating Presidency of the Council and the Commission, the General Secretariat of the European Commission, the

⁴ Part V. and Part VI. EEA Agreement

European Commission, the Court of Justice of the EU, the European Parliament and the Economic and Social Committee.⁵

The institutional framework of the EFTA pillar in the EEA is designed to align with that of the EU pillar. This should formally guarantee the decision-making autonomy of both parties involved. The rationale behind the selected system is straightforward: to prevent a formal transfer of sovereignty from the EEA/EFTA states to the EU.⁶ The institutional system that was selected was an attempt to combine the decision-making autonomy of the EFTA States within the EEA with homogeneity within the EEA. The term 'homogeneity' refers to the fact that the same rules should apply and be interpreted similarly throughout the EEA.⁷ The EEA Joint Institutions serve as a conduit between the institutions in the EU pillar and their counterparts in the EFTA pillar.

The EEA institutional framework is particularly relevant in this context insofar as it is involved in the preparatory and decision-making processes pertaining to the drafting of EEA-relevant acts.

The EEA Council, which forms part of the EU pillar, is comprised of members of the EU Council and the Commission. Furthermore, members of the European External Action Service and the rotating Presidency of the Council (troika) are also included. With regard to the EFTA pillar, representatives from each EFTA member state that is also a member of the EEA are present. In particular, these are the Ministers for Foreign Affairs. The function of these bodies is to evaluate the overall performance of the Agreement and to identify any changes in its structure and operation. In this context, it is responsible for making political decisions that result in amendments to the Agreement.⁸ Despite its status as the highest political institution of the EEA, the imbalance between the two pillars has resulted in the resolution of Agreement-related issues being predominantly conducted at a technical level.⁹

The second joint institution is the EEA Joint Committee. According to Article 92 of the Agreement, the Committee shall ensure the effective implementation and functioning of the Agreement and, to this end, shall

⁵ Part VII. Chapter 1. EEA Agreement

⁶ Frommelt, Christian. 2019. "The two-pillar structure of the EEA". Online: <https://www.efta-studies.org/the-two-pillar-structure>

⁷ Van Stiphout, T. 2007. "Homogeneity vs. Decision-Making Autonomy in the EEA Agreement". *European Journal of Law Reform* 9(3), p. 432-33

⁸ Article 89 and 90 EEA Agreement

⁹ Frommelt, Christian. 2019. "The two-pillar structure of the EEA". Online: <https://www.efta-studies.org/the-two-pillar-structure>

take decisions in the cases provided for in the Agreement.¹⁰ The Committee is composed of representatives of the Contracting Parties at the level of Ambassador, in this case representing the EFTA pillar, with the EU pillar represented by the European External Action Service.¹¹ Within the Committee, the Member States shall consult each other on any point of relevance to the Agreement which gives rise to difficulties and which is raised by one of the Parties.¹² The Committee's primary responsibility is to guarantee the operational effectiveness of the Agreement on a daily basis. In order to fulfil the aforementioned obligations, the Committee shall convene at least once a month.¹³ Decisions shall be taken unanimously by the Committee, which requires consensus between the EFTA and EU Parties.¹⁴ In practice, however, unanimity is not easily achieved, as the views of the EEA/EFTA States and the EU representatives do not always coincide.¹⁵ For the purposes of the present article, the Committee is important for us in terms of taking decisions through which the new *acquis* is incorporated into the internal market. Since states can participate in commenting on proposed regulations, these comments often form the subject of the Committee's deliberations.¹⁶

The third entity established under the EEA is the EEA Joint Parliamentary Committee. The Committee is composed of 66 members.¹⁷ An equal number of members are nominated by the European Parliament on the EU side and an equal number by the parliaments of the EEA/EFTA Member States on the other side.¹⁸ The Committee convenes twice annually, with additional meetings held at the discretion of the Committee or its Bureau.¹⁹ The Committee shall

¹⁰ Article 92 (1) EEA Agreement

¹¹ Article 93 (1) EEA Agreement

¹² Article 92 (2) EEA Agreement

¹³ Article 94 (2) EEA Agreement

¹⁴ Article 93 (2) EEA Agreement

¹⁵ Frommelt, Christian. 2019. "The two-pillar structure of the EEA". Online: <https://www.efta-studies.org/the-two-pillar-structure>

¹⁶ Arnesen, F., Haukeland, H. H., Graver, P. H., Mestad, O., Vedder, Ch., Agreement on the European Economic Area A Commentary – 1. ed. – München, Germany: C.H. Beck, 2018 p. 783 par. 5

¹⁷ Article 2 (1) Protocol 36 of the EEA Agreement on the Statute of the EEA Joint Parliamentary Committee

¹⁸ Article 95 (1) EEA Agreement

¹⁹ Article 4 Protocol 36 of the EEA Agreement on the Statute of the EEA Joint Parliamentary Committee

have an advisory role and, to this end, shall contribute to the dialogue between the two parties in the areas covered by the Agreement.²⁰

The final entity constituted by the EEA is the EEA Advisory Committee (which is also referred to as the Consultative Committee, although the Agreement employs the term Advisory Committee). The committee is composed of an equal number of members of the Economic and Social Committee on the EU side and members of the EFTA Advisory Committee on the other. The Committee convenes annually, and its function is to facilitate dialogue between the two parties, in a manner analogous to that of the EFTA Joint Parliamentary Committee. In this instance, the dialogue and cooperation are centred on the interrelationship between economic and social aspects within the context of the EEA.²¹ This is intended to create a platform for dialogue between the authorities and the social partners.

From the above, we can see that we have common institutions within the EEA at all levels, with the exception of the European Commission and the Court of Justice. In this case, the aforementioned institutions also have their equivalents at the level of the EFTA pillar. However, it should be noted that both bodies were not established by agreement, but rather by a separate agreement concluded between the Member States.²² The EFTA Surveillance Authority monitors, under the EFTA pillar, compliance with EEA-relevant legislation by the EFTA States, thereby ensuring that the obligations under the Agreement are fulfilled. At EFTA level, it also has specific powers in relation to ensuring the application of the Agreement's competition rules.²³ However, unlike the Commission, the EFTA Surveillance Authority's responsibility is limited to the control of (trade) between EEA/EFTA States, whereas the Commission also covers trade not only within the EU but also between EFTA States.²⁴ The EFTA Court is established by the same agreement as the EFTA Surveillance Authority. In this case, the EFTA Court has powers similar to those of the Court of Justice under the EU pillar. It can issue advisory opinions on the interpretation of the Agreement if requested to do so by one of the national courts of the EEA/EFTA Member States which are also members of the EEA. Similarly to

²⁰ Article 95 (3) EEA Agreement

²¹ Article 96 (1) – (3) EEA Agreement

²² Article 108 (1) and (2) EEA Agreement

²³ Article 5 (1) Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice

²⁴ Frommelt, Christian. 2019. "The two-pillar structure of the EEA". Online: <https://www.efta-studies.org/the-two-pillar-structure>

infringement actions brought by the Commission, the EFTA Court decides infringement actions. It also has jurisdiction to rule on actions brought by EEA/EFTA Member States against decisions of the EFTA Surveillance Authority. Similarly, any natural or legal person against whom a decision of the EFTA Surveillance Authority is addressed may bring an action before the Court, even if the decision is addressed to another person but directly and personally concerned by the decision.²⁵

In light of the aforementioned details, it can be concluded that the institutional framework of the EFTA pillar within the EEA fulfils a number of functions. Primarily, it serves a political and decision-making role within the EEA Council and the EEA Joint Committee. Secondly, it provides a consultative function within the EEA Joint Parliamentary Committee and the EEA Advisory Committee. Finally, it performs a monitoring, executive and judicial function through the EFTA Surveillance Authority and the EFTA Court.

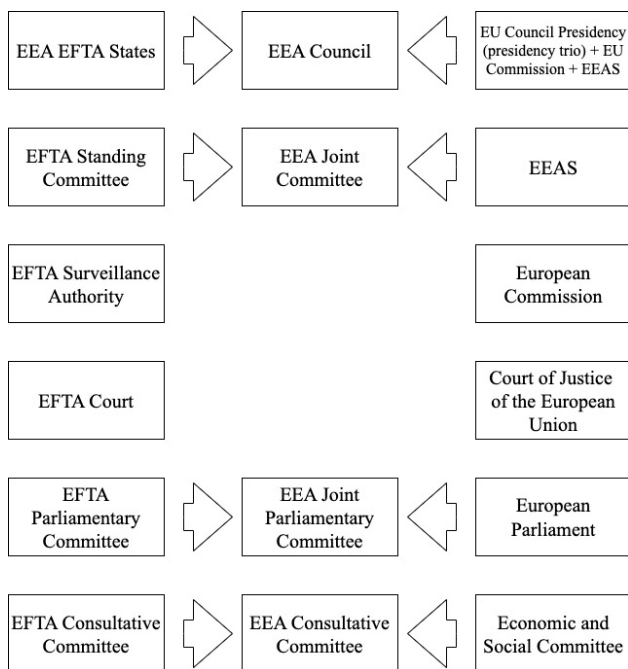


Figure 1: The Two-Pillar EEA Structure Source: Own data processing²⁶

²⁵ Article 34 - 38 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice

²⁶ Part VII. Chapter 1. EEA Agreement and EEA Institutions – Two-pillar Structure online: <https://www.efta.int/eea-relations-eu/eea-institutions-two-pillar-structure>

2. Influencing lawmaking through the EEA Agreement instruments

In the event that the Commission drafts new legislation in one of the areas covered by the Agreement, it should informally seek advice from experts from EEA/EFTA States.²⁷ The initiative itself to propose new legislation is not affected or modified by the Agreement and the Commission's "monopoly" on the submission of proposals remains, as in the case of the EU. However, EEA/EFTA States may submit their proposals to the EEA Council or the Joint Committee.²⁸ This gives EEA/EFTA States access to both the preparatory phase of the proposals and the so-called decision-shaping phase of the legislative procedure. The term 'decision-shaping' itself is not legally defined in this case; it is a 'sui generis' term which can be encountered exclusively in documents associated with decisions of the EEA/EFTA institutions. What can we understand by this term? In the EFTA Bulletin from 2002 we find this term defined as *„phase of preparatory work undertaken by the European Commission to draw up new legislative proposals...,’* *‘...participation in committees is not the only channel for EEA EFTA influence...’*²⁹ In the more recent 2009 EFTA Bulletin, the term is defined as *„the process of contributing to and influencing policy proposals up until they are formally adopted.’*³⁰ In this context, we can also encounter the term *„policy shaping’*. In the context of the EEA, this would perhaps be a more precise meaning, as the process is not limited to influencing decisions, but also EU policies that have a broader significance.^{31 32} A more specific definition limits the process to *„opportunities mandated by the EEA Agreement, particularly measures aimed at the development of legislative proposals within the scope of the EEA.’*³³ EEA/EFTA Member States have a number of ways in which they can intervene in the course of the legislative process. In this case, the Agreement allows EEA/EFTA Member States to participate in three types of committees and groups - programme

²⁷ Article 99 (1) EEA Agreement

²⁸ Baudenbacher, C. The Handbook of EEA Law – 1. ed. – Springer Cham, 2015. p. 56

²⁹ EFTA Bulletin 1/2002, The European Economic Area: Decision Shaping and Participation in Committees p. 12

³⁰ EFTA BULLETIN 1/2009 March Decision Shaping In The European Economic Area p.20

³¹ Ibid. p. 20

³² EEA EFTA comments are not only addressed to draft legislative acts, but also to various strategies, action plans, etc.

³³ Ibid. p. 20

committees, expert groups and comitology committees. However, they may also participate in some other committees.

2.1 Programme committees

The legal basis for the Programme Committees is set out in Article 81 of the Agreement. The fundamental purpose of the Programme Committees is to provide the Commission with assistance in the management and development of programmes to which EEA/EFTA Member States may contribute on the basis of participation. As part of this, they assist with the specification of the programme content, the preparation of the call for tenders and the selection of projects for funding. Joint Declaration No. 15 in the Final Act of the Agreement states that the Commission shall take due account of the views of the EEA/EFTA States in the same way as those of the EU Member States when taking decisions.

The disadvantage of this approach is that the groundwork for the participation of EEA/EFTA Member States in the new programme can only be finalised once it is established, which leaves them out of important discussions at the beginning of the programme's establishment. In practice, this obstacle is overcome by the fact that when an existing programme is replaced by a new one, participants from EEA/EFTA States are invited as observers and await their formal entry. This ensures their continued participation.³⁴

2.2 Comitology committees

Under comitology, EEA/EFTA Member States may participate in the relevant committees, but EEA/EFTA Member States do not have voting rights. The basis in this case is the provision of Article 100 of the EEA Agreement, under which *„The EU Commission shall ensure experts of the EFTA States as wide a participation as possible according to the areas concerned, in the preparatory stage of draft measures to be submitted subsequently to the committees which assist the EU Commission in the exercise of its executive powers. In this regard, when drawing up draft measures the EU Commission shall refer to experts of the EFTA States on the same basis as it refers to experts of the EU Member States.“*³⁵ The objective of the involvement

³⁴ EFTA BULLETIN 1/2009 March Decision Shaping In The European Economic Area p. 21

³⁵ Article 100 EEA Agreement

of representatives and experts from EEA/EFTA States is primarily to guarantee consistent developments and to consider the experience and circumstances in the EEA/EFTA States. However, participation is only ensured in informal discussions.³⁶ In this regard, the EEA/EFTA Member States are thus taking advantage of the opportunities available to them in the context of their participation in Commission committees preparing specific legislation or managing programmes. Subsequently, they are involved in their development, for example by submitting specific contributions or proposals.

As Dystland, Finstad and Sørebo point out in their part of the commentary to the EEA Agreement, while the right of EEA/EFTA States to participate in Commission committees is generally accepted, in some instances it is necessary to negotiate potential participation in a committee, particularly in cases where newly constituted committees or discussions within newly regulated areas are involved.³⁷

The revision of primary law through the Lisbon Treaty, particularly in the case of legislative procedures, has had a significant impact on the EEA/EFTA States' capacity to influence EEA-relevant legislation. This has been manifested in particular by the creation of a trilogue³⁸ between the European Parliament, the Council and the Commission, to which they do not have access, and in which negotiations on the final form of legal acts are also taking place on substantive issues in relation to the EEA. As this has the effect of undermining participation in accordance with Article 100 of the Agreement, it is now more important for EEA/EFTA States to participate in the negotiations and to seek support for their arguments in a constructive manner. The more EEA-related issues are resolved at this stage of the process, the less room will be left for later trilogue, increasing the chances for the EEA/EFTA States to influence the content of the acts.³⁹

³⁶ Arnesen, F., Haukeland, H. H., Graver, P. H., Mestad, O., Vedder, Ch., *Agreement on the European Economic Area A Commentary* – 1. ed. – München, Germany: C.H. Beck, 2018 p. 800 par. 1

³⁷ *Ibid.* p. 801 par. 4

³⁸ Article 295 TFEU

³⁹ Arnesen, F., Haukeland, H. H., Graver, P. H., Mestad, O., Vedder, Ch., *Agreement on the European Economic Area A Commentary* – 1. ed. – München, Germany: C.H. Beck, 2018 p. 801 – 802 par. 7 and 8

2.3 Expert groups

The Commission establishes expert groups with the objective of providing assistance and advice during the drafting phase of new legislation. The groups are composed of independent experts who provide opinions and suggestions. In this regard, the Commission's responsibility is to ensure the widest possible participation of experts, informally seeking advice also from experts from EEA/EFTA States. However, neither the manner nor the form of consultation is regulated by the provision in question.⁴⁰ Determining whether a proposed act is also EEA relevant may be difficult. To some extent, this task has been made more difficult by the amendment through the Lisbon Treaty, which has abolished the three-pillar structure. The EEA/EFTA Member States must therefore remain vigilant in this respect, lest their right to participate be disregarded by the Commission.⁴¹ However, in this agreement, the States are guaranteed to be informed of the Commission's initiatives in relation to draft acts.⁴² In this regard, the EEA Joint Committee plays an important role, within which consultations take place, which may be assisted by subcommittees and working groups. Furthermore, the EFTA States engage in consultations and coordination of their perspectives on this matter within the EFTA Standing Committee. In the context of the aforementioned consultations, the EFTA States are entitled to submit so-called EEA EFTA comments at any stage prior to the adoption of a proposal.⁴³

2.4 Other options for participation

Where neither Article 81 nor Article 100 of the Agreement applies to the committees, „*when this is called for by the good functioning of this Agreements*“ experts from EFTA countries also participate in the

⁴⁰ Article 99 (1) EEA Agreement

⁴¹ Arnesen, F., Haukeland, H. H., Graver, P. H., Mestad, O., Vedder, Ch., Agreement on the European Economic Area A Commentary – 1. ed. – München, Germany: C.H. Beck, 2018 p. 798 par. 2

⁴² Article 99 (2) EEA Agreement

⁴³ Arnesen, F., Haukeland, H. H., Graver, P. H., Mestad, O., Vedder, Ch., Agreement on the European Economic Area A Commentary – 1. ed. – München, Germany: C.H. Beck, 2018 p. 799 – 800 par. 5 - 9

work of these committees^{44 45}. These committees are mostly composed of scientists, trade union representatives and representatives of professional or economic activities, in addition to representatives of the States.⁴⁶

3. Influencing lawmaking through indirect instruments

In the previous chapter, we noted that participation in committees is not the only way EFTA States can influence the development of EEA law. At the general level of the legislative process, whether at the level of countries or supranational organisations, we can encounter cases where interventions are made in the legislative process by other - indirect - instruments than those known to the legal order. What can we understand by this in the case of the EEA ? This situation is best demonstrated by the example of Norway, which, through the development of diplomatic relations with some EU Member States - especially (but not exclusively) Nordic ones - has also oriented itself towards the states that currently or in the future will hold the rotating presidency.⁴⁷ Nor can we neglect the opportunities provided by the EU institutions for lobby groups, for example in the context of public consultations, which is just one of the ways in which EU lawmaking can be influenced.⁴⁸ According to the available data from the EU voluntary Transparency Register (EUTR), established under an interinstitutional agreement between the European Parliament, the

⁴⁴ They are listed in Protocol 37 to the EEA Agreement, and includes following committees: Scientific Committee for Food, Pharmaceutical Committee, Scientific Veterinary Committee, Committee on Transport Infrastructure, Administrative Commission on Social Security for Migrant Workers, Contact Committee on Money Laundering, Advisory Committee on Restrictive Practices and Dominant Positions and Advisory Committee on Concentrations. It should be noted, that the protocol may be amended to include additional committees, if the necessity arise.

⁴⁵ Article 101 (1) EEA Agreement

⁴⁶ Arnesen, F., Haukeland, H. H., Graver, P. H., Mestad, O., Vedder, Ch., Agreement on the European Economic Area A Commentary – 1. ed. – München, Germany: C.H. Beck, 2018 p. 802 par. 1

⁴⁷ Haugevik, K. (2017). Diplomacy through the back door: Norway and the bilateral route to EU decision-making. *Global Affairs*, 3(3), p. 283 - 286

⁴⁸ KORKEA-AHO, E. “‘Mr Smith Goes To Brussels’: Third Country Lobbying and the Making of EU Law and Policy.” *Cambridge Yearbook of European Legal Studies* 18 (2016) p. 56–60.

Commission and the Council⁴⁹ Norway is one of the countries from which a large number of registered entities originate.⁵⁰

4. EEA EFTA Comments

As noted in the previous chapter, the Agreement foresees that EEA/EFTA Member States will be involved in EEA-relevant rulemaking through consultations and discussions.⁵¹ This implies the possibility for them to send comments to the Commission. The Agreement itself does not define or deal with the term 'EEA EFTA comment' in any of its provisions. These comments are therefore considered for the purposes of the Agreement as an element of the consultation process under Article 99 of the Agreement and are subsequently taken into account and commented on in the EEA Joint Committee's deliberations.⁵² But, what about their definition? On the official EFTA website, the comments are described as „*One of the ways in which the EEA EFTA States participate in shaping EU policies, programmes and legislation is by agreeing on common position papers, called EEA EFTA Comments, to be shared with the EU.*“⁵³ In its priorities, the Norwegian Chairmanship of the EFTA Standing Committee for the first half of 2023 stated, that the active use of EFTA comments is an effective tool to influence the EU decision-making process.⁵⁴ Similar statements can also be found in the priorities of the Liechtenstein⁵⁵ and Iceland Chairmanships⁵⁶. For the EEA/EFTA Member States, they thus represent „*a particularly important way for the EEA EFTA States to provide input on emerging EU policy*“ The primary objective of these states in providing comments is not only to exert influence over the final form of EU legislation but also to participate in the shaping of current and future policies. Consequently,

⁴⁹ Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register

⁵⁰ Korkea-aho, Emilia. (2023). The End of an Era for Foreign Lobbying? The Emergence of Foreign Transparency Laws in Washington, Canberra and Brussels. *JCMS: Journal of Common Market Studies* <https://doi.org/10.1111/jcms.13396>

⁵¹ Article 99 (1) EEA Agreement

⁵² Baudenbacher, C., *The Fundamental Principles of EEA Law* p. 9

⁵³ EEA EFTA Comments online: <https://www.efta.int/eea-relations-eu/decision-shaping/eea-efta-comments>

⁵⁴ Priorities of the Norwegian Chair of the EFTA Standing Committee First half of 2023 p. 1

⁵⁵ Priorities of the Liechtenstein Chair of the EFTA Standing Committee Second half of 2023 p. 1

⁵⁶ Priorities of the Icelandic Chair Standing Committee of the EFTA States First half of 2024 p. 1

the comments vary considerably from one case to another, both in terms of the subject matter and the content, which may take the form of either a positive or negative assessment of legislative acts or non-legislative documents.

It should be noted here that in the past, particularly in the period shortly after the EEA was established, these comments were not referred to as '*EEA EFTA comments*' but used to be referred to as '*EFTA Working Group Comments*'.⁵⁷ Only later, in the course of the following years, did the designation settle down to its present form „*EEA EFTA Comments*“. There are currently no formal procedures in place for drafting EFTA Comments, only some guidelines. As part of this process, the EFTA Secretariat coordinates the views of the individual EEA/EFTA Member States in the relevant EFTA Working Groups, sometimes assisting with the drafting of the comment itself.⁵⁸

However, a further question arises with regard to the comments themselves, in terms of their addressability and content. Are these comments mainly directed at draft policies in which the EEA/EFTA Member States wish to participate or at draft legislative acts? To which areas covered by the EEA Agreement are the majority of comments directed? In order to respond to these queries, it is necessary to undertake a quantitative analysis of the comments submitted since the establishment of the EEA.

The background for the analysis was gathered through the EFTA website, where the decisions of its bodies are published. It should be noted at this point that the EEA Joint Committee publishes annually its annual reports, in which it assesses its activities over the last year. Each year, one of the chapters of the report is also devoted to the comments listed in the chapter. The number of comments listed in the annual reports is around 318.⁵⁹ However, not all of these comments are publicly available. Therefore, only those comments that are publicly available on the EFTA website have been included in the analysis carried out. The search criteria were as follows: document type: EEA EFTA Comments, time period: 1994 to 2024. As the EFTA website does not allow searching by author, addressee, area or responsible

⁵⁷ For example: Working Group on Transport: EFTA Comment on the Commission Proposal for a Council Directive on Manning Conditions for Regular Passenger and Ferry Services Between Member States 2/TR/W/006 from 16. September 1998

⁵⁸ EFTA Court: The EEA and the EFTA Court Decentred Integration p. 511

⁵⁹ EEA Joint Committee Annual Reports online: <https://www.efta.int/document-library?f%5B0%5D=type%3A2206&page=0>

subcommittees or working groups, all data had to be abstracted from all results found.⁶⁰

Since 1994, when the EEA was established, a total of 273 comments have been submitted to the Commission by EEA/EFTA States. As can be seen in Figure 1, the number of comments sent is not constant, but reaches a different value every year. For example, while 1997 saw the highest number of comments, up to 20, there are also years when no comments were sent by the EFTA, e.g. 1994, 1995, 2010 and 2011.

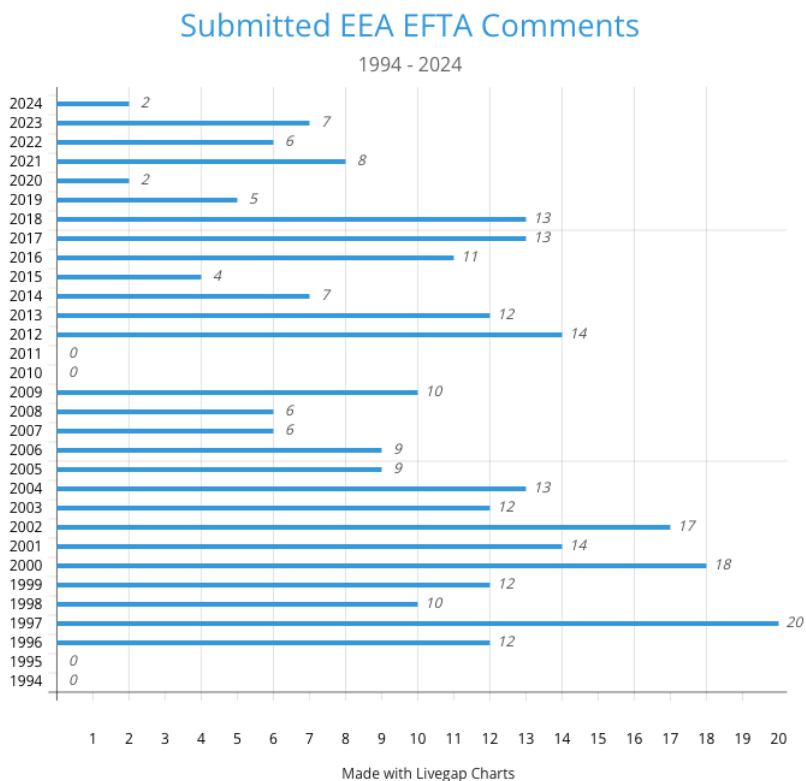


Figure 2: Submitted EEA EFTA Comments (1994-2024)

Source: Own data processing⁶¹

In terms of addressability, the comments were directed at draft regulations in 65 cases, at draft directives in 64 cases, at draft decisions in four cases, and at draft recommendations in six cases. In the

⁶⁰ EEA EFTA Comments online: <https://www.efta.int/eea-relations-eu/decision-shaping/eea-efta-comments>

⁶¹ EEA EFTA Comments online: <https://www.efta.int/eea-relations-eu/decision-shaping/eea-efta-comments>

remaining cases, comments were made on communications issued by the Commission. A total of 29 comments were made on Green Papers, 20 on White Papers, 32 on other documents (including comments on summit conclusions, public consultations, evaluations of past practice in the application of the rules, etc.), one on a Commission report, and 44 on strategic documents (including long-term strategies, action plans, packages of measures, etc.). It can be inferred from the aforementioned details that of the total number of comments, 139 are directed at draft secondary legislation, while the remainder are primarily focused on non-legislative documents. This constitutes approximately 50% of the total number of comments. In order to facilitate further analysis, the number of comments analysed in the following part of the article has been reduced and they are now limited to those that are specifically directed against draft of EU legal acts in the form of directives, regulations, decisions and recommendations. In this instance, the number of comments has been reduced to the aforementioned 139.

EEA EFTA Comments by addressed documents and acts

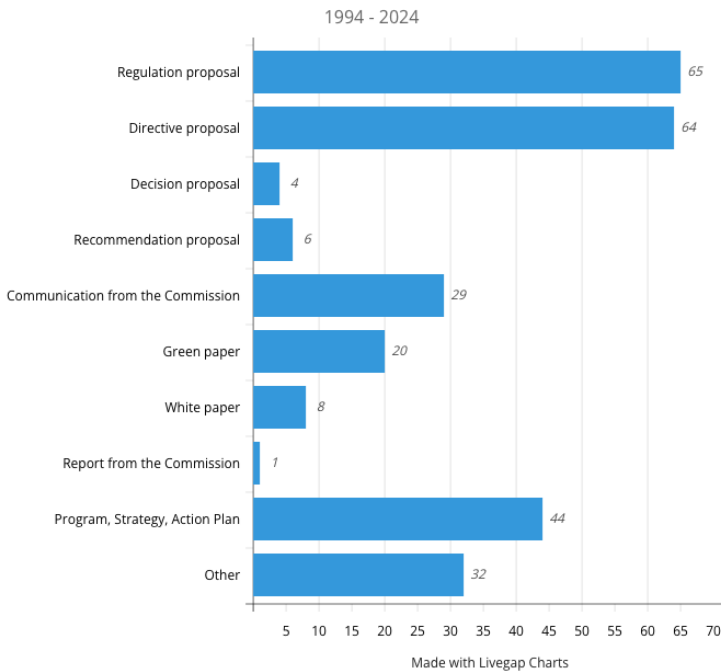


Figure 3: Comments by addressed documents and act (1994-2024)

Source: Own data processing⁶²

⁶² EEA EFTA Comments online: <https://www.efta.int/eea-relations-eu/decision-shaping/eea-efta-comments>

In the next part of the analysis carried out, we then focused on the areas that were the subject of specific comments. The EEA Agreement primarily covers the four freedoms and competition, i.e. the internal market.⁶³ However, cooperation also covers areas outside the four freedoms, which are: public procurement; intellectual, industrial and commercial property; research and technological development; information services; the environment; general and vocational education and youth; social policy; consumer protection; small and medium-sized enterprises; tourism; the audiovisual sector and civil protection.⁶⁴ However, the selected assignment does not exactly replicate these areas, but is modified for the purposes of the chart. The final breakdown is therefore as follows: (see Figure 3. on the following page) internal market; state aid, competition and public procurement; intellectual, industrial and commercial property; energy; travel and transport; telecommunications and data protection; environment; education, training and youth; healthcare and agriculture. The data shows that the majority of comments are addressed to directives and regulations governing the internal market - 67 comments, almost half. Transport and travel came second with 23 comments. Third in the number of comments is the area of telecommunications and data protection with 12 comments. This is followed by environment with 10 comments, education, training and youth and energy with 6 comments each, health, state aid, competition and public procurement with 5 comments each, intellectual property rights with 4 comments and agriculture with only one comment.

⁶³ Article 1 (2) EEA Agreement

⁶⁴ Article 65 and 78 EEA Agreement

EEA EFTA Comments by addressed areas

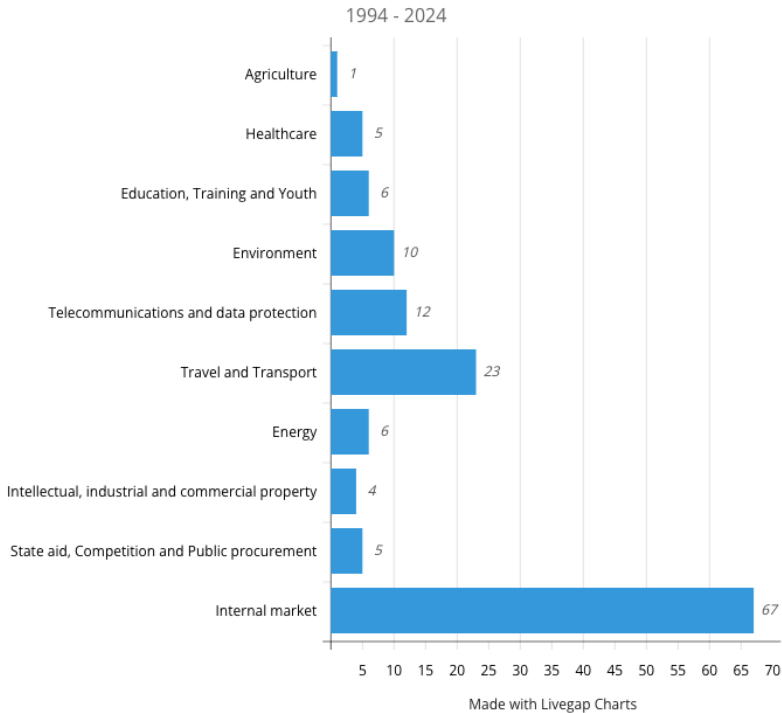


Figure 4: Comments by addressed areas (1994-2024)

Source: Own data processing⁶⁵

In the concluding section of the analysis of the comments made, the focus was on the EFTA States' Standing Committee. As previously stated, the Committee serves as a platform for the EEA/EFTA Member States to engage in consultations and achieve a consensus before convening with the EU representatives in the EEA Joint Committee. The selection is of particular relevance to us insofar as it comprises five subcommittees within the organisational structure. Each of the subcommittees is responsible for one of the four internal market freedoms, in addition to the other areas covered by the EEA Agreement. The responsibility for each of the aforementioned areas is assigned to a designated working group within the subcommittee. To provide a more comprehensive illustration, the first subcommittee on the free movement of goods comprises 11 working groups, each tasked with

⁶⁵ EEA EFTA Comments online: <https://www.efta.int/eea-relations-eu/decision-shaping/eea-efta-comments>

a distinct responsibility. These responsibilities encompass a range of areas, including state aid and intellectual property law.⁶⁶

For the purposes of this article, therefore, we have addressed the question of how many comments were made by a particular subcommittee. Our findings showed that the Subcommittee II on free movement of services and capital had the highest number of comments with 57, followed by the Subcommittee IV on other horizontal policies with 40. The Subcommittee I on the free movement of goods came third with 35 comments. The last two were the Subcommittee III on free movement of persons with 5 comments and finally the Subcommittee V on legal and institutional affairs with 2 comments.

EEA EFTA Comments by relevant subcommittees

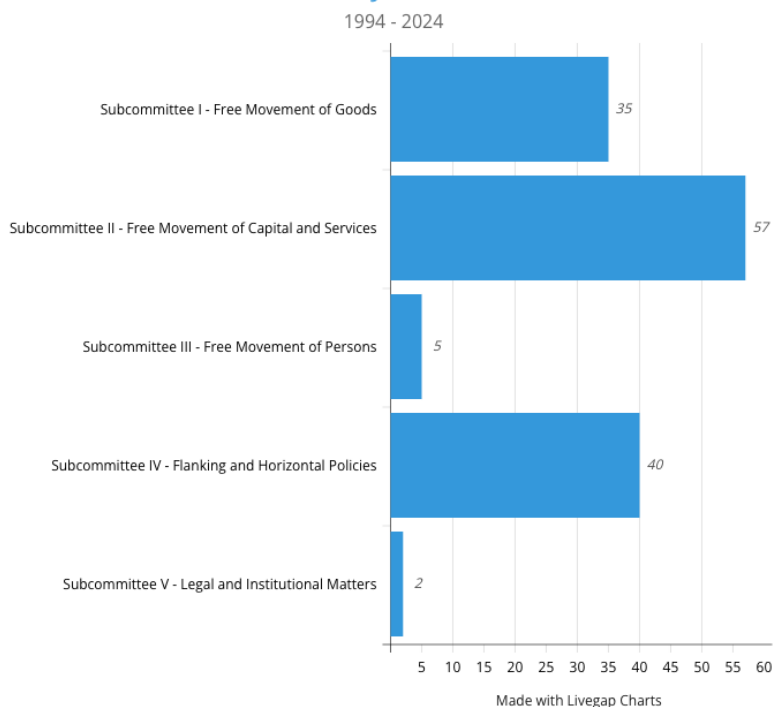


Figure 5: Comments by relevant subcommittees (1994-2024)

Source: Own data processing⁶⁷

⁶⁶ Standing Committee of the EFTA States <https://www.efta.int/eea-relations-eu/eea-institutions-two-pillar-structure/standing-committee-efta-states> see also article 18 Decision of the Standing Committee of the EFTA States No. 1/94/SC of 10 January 1994 Adopting the Rules of Procedure of the Standing Committee of the EFTA States

⁶⁷ EEA EFTA Comments online: <https://www.efta.int/eea-relations-eu/decision-shaping/eea-efta-comments>

In the analysis carried out, several administrative uncertainties had to be dealt with on the EFTA side. First of all, the fact that the EEA EFTA comments do not always mention the Subcommittee which drafted the specific comment. Although the wording of the comment may suggest which area the commented proposal falls under, the classification under a specific commission may already be slightly problematic. In order to resolve this, we have therefore subsumed the comments that did not contain the name of the subcommittee under the subcommittee whose working groups were the same in terms of content and subject matter as the area of the proposal to which the comment was addressed. Secondly, the fact that, until 2004, the comments used the name of a working party and not that of a subcommittee. Thus, again in this case, the working parties were classified under those subcommittee whose terms of reference were identical to those of the working parties. Why is this important or, to some extent, problematic? The use of an ad hoc classification system, even if not employed on a regular basis, has the potential to introduce some distortion of data, which in turn may result in the generation of evaluations and conclusions that are not fully accurate.

In terms of content, the comments provided by the EEA/EFTA are somewhat concise. In terms of length, comments may be relatively brief, not exceeding one page, including the header and footer.⁶⁸ Furthermore, none of the comments examined exceeded twenty pages. Thus, in many cases, even in the case of comments addressed to specific legislative acts, we can encounter content that is limited to a statement in which, for example, the States welcome the Commission's decision to proceed either to a new regulation or to a modification of an existing one. Therefore, in our view, these comments cannot be considered as comments in their entirety, even if they are attached to them, as they do not correspond to them in terms of content, as no new perspective is addressed through them through the EEA/EFTA States' lens. Respectively, they contain only general statements in relation to future developments.⁶⁹ In other instances, we may observe the presence of particularised responses, wherein the pertinent subcommittee (or,

⁶⁸ For example: Subcommittee I on Free Movement of Goods: EEA EFTA COMMENT on the revision of the Vehicle General Safety Regulation and the Pedestrian Safety Regulation

⁶⁹ For example: Subcommittee I on Free Movement of Goods: EEA EFTA COMMENT on the Commission proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) 2019/631 as regards strengthening the CO₂ emission performance standards for new passenger cars and new light commercial vehicles in line with the Union's increased climate ambition – (COM(2021)556

within it, working group) offers specific contributions, suggestions or concerns, both in general and specific terms.⁷⁰ Although the EEA EFTA Comment on the proposed Digital Markets Act is one of the more concise in terms of content, it contains a number of specific remarks, whether in relation to provisions of the regulation or the suggestion to establish an advisory group.

From the above, it can be seen that there is a considerable qualitative range of comments across the board in terms of content, scope and addressability. However, it is of positive significance for the EEA/EFTA Member States that the Commission responds and reacts to the comments of the EFTA Pillar Member States more frequently in the legislative process than in the past.⁷¹

Conclusion

In light of the aforementioned facts and the conducted analysis, we can proceed to the following evaluation.

By creating a two-pillar structure through the EEA Agreement, the legislator reflected in particular the demands of the EEA/EFTA Member States, which refused to transfer some of their competences to the EU institutions. This gives rise to a unique institutional framework in several respects, where not only political, but also decision-making, consultative and monitoring functions are exercised by the relevant institutions within the EFTA pillar on the basis of the EEA Agreement.

The principal obstacle preventing EEA/EFTA Member States from actively engaging in the standard-setting process of EU legislation can be attributed to the absence of representation within the key institutions involved in the legislative process. Member States thus need to make the most effective use of the narrow margin of manoeuvre within which they can engage in the drafting of new legislative acts within the framework of the agreed powers, particularly at the outset when work is being carried out at expert group level. Furthermore, in light of the amendment of primary law through the Lisbon Treaty, the EEA/EFTA Member States must utilise the limited scope to advocate for changes

⁷⁰ For example: Subcommittee II on the Free Movement of Capital and Services: EEA EFTA Comment on the Commission Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) - COM/2020/842

⁷¹ EFTA BULLETIN 1/2009 March Decision Shaping In The European Economic Area p. 24

pertinent to them before the legislative process transitions to individual readings.

Despite their limited powers to intervene in EU law-making, within the limits of the possibilities set out in the Agreement, the EEA/EFTA Member States have submitted 273 comments from 1994 to the present day, more than half of which relate directly to secondary acts. This confirms to us the high level of interest on the part of the EEA/EFTA Member States in the final form of specific measures. At the same time, our findings also show that, on the other hand, there is also a greater interest on the part of the Commission to reflect the needs of the EFTA Member States and to respond to their suggestions as well as to comments or possible concerns. However, especially after the adoption of the Lisbon Treaty, EEA/EFTA Member States need to be more vigilant in applying their comments.

On the other hand, answering the question of what real impact these comments have on the final form of the proposed and adopted legislation is a little more challenging. Despite attempts to assess this impact, its actual impact is very difficult to measure. This fact is confirmed by the fact that the legislative process involves a number of actors who can comment on the final form. One way in which we could try to evaluate this impact would be to analyse the content of the individual EEA EFTA comments and then focus on the comments from the other entities entitled to comment and compare them. Nevertheless, when several entities comment on the same matter at the same time, it is subsequently more difficult to evaluate whose specific comment led the legislator to make a change, or whether the legislator only made the change as a result of receiving several comments on the same matter. Thus, if these comments are addressed, for example, to specific provisions of the proposed legislative act, and we find them contained in the EEA/EFTA comments as well as those of other qualified entities, we could assume in this respect, that if the European Commission subsequently proceeded to change the content of the provisions commented on, it is the consensus of opinion and the number of comments addressed to that provision that may be decisive and we could thus have a polemic in this respect that the EEA/EFTA Member States may also have been involved in this change.

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