

Taking back control – lessons from Norway, Iceland & Liechtenstein

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Introduction

Journalist **Stephen Bush** recently wrote an article for the New Statesman in which he criticised those advocating an EFTA-style soft Brexit.

In the article he wrote:

“...the difficult truth is that these countries are, de facto, in the European Union in any meaningful sense. It’s hard to see how, if the United Kingdom continues to be subject to the free movement of people, continues to pay large sums towards the European Union, and continues to have its laws set elsewhere, we have “honoured the referendum result”...”¹

While incorrect, we can see where he picked up such inaccuracies.

It was regularly stated during the 2016 UK EU referendum campaign that countries such as Norway in the EEA (European Economic Area) but not in the EU (European Union) have something like ‘second class’ EU membership.

The ‘remain’ side politicians also stated that such countries were ‘rule takers, not rule makers’. Former Prime Minister David Cameron was especially hostile to this option.²

A prominent example was former MEP and former Deputy Prime Minister Nick Clegg, who stated during a debate with Eurosceptic Nigel Farage that:

“Now Nigel Farage, I’ve heard this many, many times, and you’ll hear it this evening, says that we should be like Switzerland or Norway. Let’s just think about that for a minute. Switzerland and Norway have to pay into the European Union coffers. They have to obey all European Union laws. That’s why they call it “fax democracy” in Norway: everything gets decided by everybody else in Brussels. They then have to transpose it into law in Oslo. They have no British MEPs, they have no Norwegian or Swiss MEPs or

Commissioners, they have no passport checks, no power whatsoever, all the rules are made by foreigners – utter powerlessness. That is how perverse the patriotism of Nigel Farage has become that he now advocates that we become like two countries that have less power than we do in the world's largest economy.”

It is interesting that since the referendum, both Nick Clegg³ and former Prime Minister David Cameron have both now stated we *should* seek a Norway-style relationship with the EU.⁴

We at EFTA4UK do not believe that the EFTA/EEA countries have a second class form of EU membership, neither do we believe they are as Barry Gardiner MP stated this past week on BBC Radio Four⁵ that adopting the ‘Norway model’ for Brexit "would be to become a vassal state" with "less control over the regulations than you do now, with the seat round the table".⁶

In this report, we will explore the reality of those states that are members of the EEA but not EU, and assess the impact on the UK’s sovereignty of such a change.

Does Norway have to follow EU law?

This may seem to go without saying, but as EFTA/EEA states, Norway (and Iceland and Liechtenstein) are not in the European Union and as such are not directly subject to EU law. Neither are they subject to the EU’s Treaty that calls for **“an ever closer union among the peoples of Europe”**.

Instead, they are subject to the rules of the EEA (European Economic Area) agreement.

To quote the EFTA website:

“The EEA Agreement does not cover the following EU policies:

Common Agriculture and Fisheries Policies;

Customs Union;

Common Trade Policy;

Common Foreign and Security Policy;

Justice and Home Affairs; or

Monetary Union (EMU).”⁷

If the UK was like Norway then, we would be exempt from many EU policy areas.

We would no longer be constrained by Article 34 of the EU treaties, which transfers huge powers from the UK to the EU.⁸

We would be able to make our own trade deals, run our own foreign policy (limited of course by our rights and obligations under NATO) and would no longer be subject to EU rules on fisheries. We would also have input into EU rules.

An official report by the **Norwegian Ministry of Foreign Affairs** states:

“Norway and the other EEA EFTA states have the opportunity to participate in the development of EU legislation during the preparatory stage. Within the framework of Norway’s agreements with the EU, Norway has greatest opportunity to participate in the development of EU policy and legislation at an early stage of the legislative process, i.e. during the preparation of Commission proposals and during preliminary discussions in the Council of the EU (the Council) and the European Parliament.”⁹

But how many ‘EU laws’ do end up being transposed through into EEA rules? It is difficult to get a precise figure.

In a 2005 article for the Bruges group, MEP Dan Hannan wrote on this issue:

“...because EFTA states are obliged to adopt several single market measures, their lawmakers are portrayed as sitting next to their fax machines waiting for the directives to come from Brussels. It is certainly true that the three EEA states, Norway, Iceland and Liechtenstein, have to apply a number of single market regulations. But these tend to be technical in nature, and are limited to a clearly defined part of their economy.

Since the EEA was born in 1992, Norway and Iceland have each adopted around 3,000 EU legal acts (the figure is lower in Liechtenstein, which joined later). But few of these rules were important enough to need legislation in those countries: the 3,000 legislative acts have required fewer than 50 parliamentary statutes in the Norway’s Storting and Iceland’s Althing. They deal with such matters as the correct way to list ingredients on a ketchup bottle; they do not tell the Norwegians and Icelanders what to tax, where to fish, whom to employ or what surplus to run. And it is not true that the EEA states have no say over these rules. There are formal consultation mechanisms built into the EEA accord. Oddly, those who point so excitedly to the 3,000 Euro-laws adopted by Norway neglect to mention the 18,000 that Britain has had to accept over the same period.”¹⁰

A 2015 report in the Icelandic press entitled 'Iceland has adopted 10% of EU laws' stated that a:

"...study was carried out for the Foreign Ministry a decade ago regarding the period from 1994, when Iceland's membership of the EEA Agreement came into effect, to 2004. Based on the two replies from the Foreign Ministry a total of 62,809 pieces of legislation were passed by the EU from 1994 to 2014. Some 6,326 of those were included in the EEA Agreement or about 10%."¹¹

The Norwegian Nei Til EU campaign group reported in 2016 that:

"In the period of 2010-2013, EU adopted 14,117 pieces of legislation, while 1,605 directives and regulations were incorporated into the EEA agreement. This amounts to 11.37 per cent of the total."¹²

An article on the website of The Alliance of European Conservatives and Reformists (AECR) stated that:

"...the EU adopts about ten times as many laws as are introduced in Norway through the EEA Agreement. During the period 2000-2013, a total of 4,724 acts were incorporated into the EEA Agreement. Over the same period, the EU simultaneously adopted 52,183 directives, regulations and other legal instruments. Only 9.05 percent of the new EU laws were thus incorporated into the EEA Agreement."¹³

In 2015, **Dr Richard North** contacted the EFTA secretariat, to see if they could clarify further. They reported that 10,862 acts had been incorporated into the EEA Agreement since its inception in 1992, but that there were only 4,957 acts remaining in force at the time of their reply. Dr North stated in response that:

"By contrast, the very latest count of the EU laws in force (today) stands at 23,076. As a percentage of that number, the EEA acquis of 4,957 acts currently stands at 21 percent. In effect, the EEA (and thus Norway) only has to adopt one in five of all EU laws – not the three-quarters that is claimed."¹⁴

So exactly how much EU law is incorporated into EEA law is difficult to say, but based on the above sources, a figure somewhere between 15 and 20 percent seems likely.

But what is this EU Law and where does it come from?

Michael Emerson, Associate Senior Research Fellow at the Centre for European Policy Studies and former EU Ambassador to Moscow wrote in 2015:

“The large majority of EU rules are those governing health and safety standards of industrial and food products for consumers and workers, of which about one quarter are international (ISO) standards, these being usually copy-and-paste identical to EU ones.”¹⁵

The International origins of EU law?

At the start of his report ‘The Life of Laws’ Dr Lee Rotherham wrote:

“BREXIT would also mean the UK regaining actual power in crafting legal standards at their source. While the UK joined the EEC in order to increase its national clout in trade talks, in reality the UK has ceded what amounts to an international veto for a mere QMV vote at Brussels.”¹⁶

He goes on to say that:

“In terms of the ‘food chain’ of laws, neither Westminster nor Brussels (and certainly not Edinburgh, Cardiff or Belfast) sits at the apex in the hierarchy of law makers. Global bodies come in a range of forms and rubrics, many under the flag of the United Nations or the WTO. The list is astonishing.”

He describes in the report a:

“...two-tier system of members at these bodies, between those with full rights, and those who have surrendered much or all of their powers to a surrogate representative from the European Commission or the EU’s External Action Service (EEAS).

Since these rules are formed by consensus, it correspondingly means that countries outside the EU have more power to shape those very rules. (Properly speaking, representatives at international meetings of this type do not tend to have a veto, but as the widest application of a standard is sought, persistent objection by a party is treated as requiring a new draft; where a state still differs it is not bound by the end text.)

As the Commission itself recognises, 90% of decisions made within the EU are now reached by QMV, and this includes reaching the common starting position for the EU’s negotiators before they set off for their day’s work at New York or Geneva. In effect and as a consequence, EU

member states have surrendered what amounts to their trade veto both within the EU and internationally, while countries outside the EU still retain their own national veto at these international fora.”

What Dr Rotherham is saying is that there is a complex interlocking process between countries and international organisations such as the WTO, and what we see at national parliaments or discussed at the European Parliament are only small parts of a much larger whole.

The existence of the multitude of international bodies covering everything from food additives to working conditions to automotive standards has led to a form of quasi-law that often becomes national law, whether a country is in the EU or not.

While a country outside the EU cannot have a vote on EU law, they can alter, influence, slow down or in some cases block this ‘quasi-law’ before it reaches Brussels.

Dr Rotherham is not the only academic who has explored these concepts.

Dr Richard North, in his report *The Norway option*¹⁷ states that:

“The rules which constitute the Single Market do not by any means originate solely with the European Union. In a global trading environment, regulation is being globalised and standard-setting is now shared between many different bodies. Many of these act at a global level. There, Norway has considerable influence, far greater than is exerted by individual EU Member States. This more than compensates for the notional lack of influence within EU institutions”

He goes on to write that:

“...the passage of laws through the formal stages of EU law-making is most often only the visible part of a much longer processes that can take many years and even decades. The processes are diffuse, obscure and very often invisible.

Thus there is not and cannot be any single mechanism for exerting influence.

There is no single protocol and no single route, by which legislation is shaped.

The situation is complex, nuanced and highly variable, exactly reflecting real life and the realities of politics. Look at only part of the process, and in particular the visible part of the lawmaking process managed by the European institutions, is likely to present an entirely false picture.”

A key passage in the report states that:

“Much of the work in creating standards which later become EU law is either managed or co-ordinated through international treaty bodies. One of the most important is the World Trade Organisation (WTO).”

**WORLD TRADE
ORGANIZATION**



Norway is a WTO member and speaks for itself there. As a current EU member state, the UK is a *member* of the WTO, but as the WTO website states:

“The European has been a WTO member since 1 January 1995. The European Commission — the EU’s executive arm — speaks for all EU member States at almost all WTO meetings.”¹⁸

Researcher **Jonathan Lindsay** wrote in his report ‘The Norwegian Way’ for the Civitas think-tank:

“There are a number of bodies in which all EU member states, even those as important as Germany and Britain, are collectively represented by the European Union. These include the WTO’s highest decision-making body, the Ministerial Conference, as well as lesser committees and the General Council. This means that in many cases the European Commission forces all 28 members into a kind of fuggy consensus, with compromises made by most players and an indistinct final message. Norway, on the other hand, can speak purely for itself, sometimes ‘in cases of conflict with the EU where Norway has been successful.’ This means non-EU countries have the opportunity to contribute to important global rules before they come to the EU’s legislative process to set out exactly how they should be codified in EU law.”¹⁹

Ramses A. Wessel (Professor of International and European Law & Governance) and **Steven Blockmans** (Professor of EU External Relations Law and Governance) writing in their paper ‘The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union’²⁰ clarifies these concepts in greater detail:

“The influence of the WTO on the EU cannot be understated. WTO primary and secondary law have had a considerable influence on EU primary and secondary law and their interpretation. Much of the EU's primary law on the free circulation of goods has been inspired by GATT 1947...Moreover, many pieces of secondary EU legislation either transpose WTO norms or have been modified to bring them into line with world trade standards after adverse WTO judicial decisions.”

They go on to explain that:

“By now the notion that international organizations can take decisions and that these decisions may be legally binding is well-accepted.

International organizations have found their place in global governance, and are even considered ‘autonomous actors’, following an agenda that is no longer fully defined by their Member States, which has caused the latter to devote much of their time and energy to responding to what has been termed the ‘Frankenstein problem’.

There is nothing new in arguing that international organizations engage in decision-making in a sense that can even be viewed as ‘law-making’.

It is well-accepted that also many decisions of international organizations can be seen as ‘law’. Institutional law-making has moved beyond the traditional methods and actors and is increasingly studied in a broader sense, including new actors and new regulatory activities.

The role of many international institutions developed well beyond a ‘facilitation forum’, underlining their autonomous position in the global legal order. Rules, standards, codes of conduct, guidelines, principles, recommendations and best practices developed within a variety of international organizations and bodies influence the development of EU law, even if they are not strictly legally binding upon the Union.

Thus, norms developed within several bodies, be it within the UN family such as the Food and Agriculture Organization (FAO), the Codex Alimentarius Commission and the World Health Organization (WHO), or the OECD, the G20 and some of the machinery this ‘international regime’ has brought to life, such as the Financial Stability Board (FSB), and specific bodies bringing together financial watchdogs like the Basel Committee on Banking

Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) – have been dealt with within the EU legislature and/or judiciary.”

In a chapter of the ‘Handbook on the Theory and Practice of International Law-Making’²¹ Professor Wessel describes more about the complex web of organisations that influence state and EU law:

“Organizations with some competence to take legally binding decisions which go beyond a mere application of the law include the EU, the UN, the World Health Assembly of the WHO, the Council of the ICAO, the OAS, the WEU, NATO, OECD, UPU, WMO and IMF. In addition, as Alvarez’s survey reveals, it includes standard setting by the IMO, the FAO, the ICAO, the ILO, the IAEA, UNEP, the World Bank, and the IMF. Furthermore, the fact that many international conventions – including UNCLOS (on the law of the sea) and a number of WTO agreements – incorporate generally accepted international rules, standards, regulations, procedures and/or practices may effectively transform a number of codes, guidelines and standards created by international organizations and bodies into binding norms. This reveals the complexity of institutional lawmaking: it is not just about clearly legally binding decisions of international organizations; it may very well be about an acceptance of rules and standards because there is simply nothing else and the rules need to be followed in order for states to be able to play along.”

Why have the EU been incorporating international rules into their body of rules – their *aquis*?²² The answer is to be found in the EU’s own treaties.

Article 220 of the Treaty on the Functioning of the European Union states that:

“The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development.”

Article 216 of the Lisbon Treaty states (emphasis ours):

“1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a

legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."

The EFTA Court

The EFTA countries that are signed up to the EEA Agreement are not subject to the European Court of Justice (ECJ) but the independent EFTA Surveillance authority and **EFTA Court**. Each member country sends a judge to sit on this court.

Some critics say that the EFTA Court has to slavishly follow ECJ rulings, but this is not the case. It is true that pre-1992 ECJ caselaw is binding on the EFTA Court, but it must only "pay due account to the principles" of relevant ECJ caselaw after the date of signature of EEA Agreement (post-1992).

The President of the EFTA court has stated that:

"Our setup is more sovereignty friendly than the EU's. There is no written obligation on any court of last resort to make a reference to us, and our rulings in these reference cases are strictly speaking advisory. There is no direct effect and no primacy of EEA law, and if you do not implement an infringement judgment there is no possibility to impose a penalty payment. That shows greater flexibility."²³

So to recap what we have explored so far;

- Norway speaks for itself at the international organisations (many of them virtually unknown), decisions made at these organisations have a significant impact on what will eventually become EU law.
- Norway and other EFTA states meet regularly with EU officials to discuss future legislation that could end up in the EEA agreement. It can help shape it and has many opportunities to provide input.
- Since Norway is not in the EU, it is only asked to accept between 15 and 20 % of EU law via the EEA agreement. Much of this relates to health and safety standards and product standards.
- Norway can argue that some EU rules are 'not EEA relevant' and thus contest their legitimacy in Norway. They can negotiate derogations, delay implementation of EEA rules or implement transitional periods, and dilute and have leeway to interpret EEA rules loosely into Norwegian law if they seem too imposing.

- Norway is not subject to the European Commission, but rather the EFTA Surveillance Authority – one of the three ‘college members’ of this body is Norwegian.
- Norway is not subject to the ECJ, but rather the EFTA court – one of three Judges is a Norwegian.²⁴ The court is less intrusive and more sovereignty-friendly than the ECJ.

In summary then, the EFTA/EEA option does indeed restore sovereignty to the UK but would still enable us to participate in the Single Market.

Any loss of influence from no longer being in the EU would be made up by greater independence and influence on global bodies. As the **Change or Go** report by the Eurosceptic group ‘Business for Britain’ stated:

“Contrary to what some incorrectly argue, however, leaving [The EU] would not entail a loss of British influence on the world stage. The EU is increasingly not at the top of the food chain when it comes to the formulation of the regulations it then imposes on Britain. More and more often, these rules are being made at international bodies. Instead of having its position represented by the EU at these organisations, after leaving, the UK would be able to have a direct say over these international standards rather than hope that the EU takes its interests into account. Certainly Britain would have more influence from the outside than it could expect inside a further-integrated EU, in a permanent minority against a Eurozone bloc.”

And what of *services*, so important to the UK economy? The same report states that:

“The UK would remain a member of the key international organisations that deal with financial services, including the Basel Committee on Banking Supervision, the Financial Stability Board and the OECD.

Key international bodies
• Basel Committee on Banking Supervision
• Committee on the Global Financial System
• Committee on Payment and Settlement Systems
• Financial Action Task Force
• Financial Stability Board
• G7
• G20
• International Monetary Fund
• Organisation for Economic Co-operation and Development
• United Nations
• United Nations Conference on Trade and Development

Outside the EU, the UK could well become one of the leading voices in the

global harmonisation of financial regulation. There is no doubt that, upon leaving the EU, the UK would continue to have a large voice in the global bodies that deal with financial affairs. These global bodies are fast becoming the most important institutions in deciding financial regulation.”

The EFTA/EEA ‘Norway’ option therefore does indeed count as a ‘true’ Brexit and would return substantial powers to Westminster.

This option would be cheaper than EU membership²⁵ and we would not be paying money to the EU budget (rather a form of foreign aid).²⁶ In addition, it is likely we could negotiate more stringent rules around freedom of movement.²⁷

In short, the government should re-examine this as a valid, possibly the best; option for Brexit.

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