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**Norway's Planned Reservation of the Third
European Postal Directive and the Future of
the European Economic Agreement**

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edited by Siegfried Fina and Roland Vogl

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Abstract

On May 23rd, 2011, Norwegian Foreign Minister Jonas Gahr Støre informed the European Union (EU) of Norway's intention to exercise a reservation against the Third Postal Directive. Although Norway is not a member of the EU, it is a member of the European Free Trade Association (EFTA), along with Iceland and Liechtenstein, and a party to the European Economic Area (EEA) Agreement. According to the terms of the EEA Agreement, EFTA states implement substantially all EU law; although as non-member states, they have no formal voting rights in the EU. Norway's announcement marks the first time in EEA history that an EFTA state has announced plans to exercise a reservation. This paper describes the mechanics of incorporating EU law into Norwegian law and the legal basis for the reservation procedure, before addressing the potential legal and political consequences of a Norwegian reservation. Although there is still a possibility that negotiations with the EU will lead to a settlement that will avoid Norway's exercise of a reservation, the process thus far signals growing unease within Norway regarding the country's complex mode of cooperation with the EU. Although the EU may prove willing to compromise in order to avoid a Norwegian reservation in the short-term, it risks setting a precedent that may encourage Norway's growing EU opposition forces to push the envelope again in the future, for better or for worse.

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Introduction

On May 23rd, 2011, Norwegian Foreign Minister Jonas Gahr Støre informed the European Union (EU) of Norway's intention to exercise a reservation against the Third Postal Directive.¹ Although Norway is not a member of the EU, it is a member of the European Free Trade Association (EFTA), along with Iceland and Liechtenstein, and a party to the European Economic Area (EEA) Agreement.² According to the terms of the EEA Agreement, EFTA states implement substantially all EU law; although as non-member states, they have no formal voting rights in the EU.³ EFTA states retain the right to exercise a reservation against EU law that the state opposes.⁴ No EFTA state has ever availed itself of this right, however.⁵ In fact, Norway's announcement marks the first time in EEA history that an EFTA state has announced plans to exercise a reservation.⁶

A Norwegian reservation may be avoided, however. Norway is currently engaged in negotiations with the EU.⁷ If these lead to a compromise, Norway might not exercise a reservation against the Third Postal Directive. With that caveat in mind, this paper traces the contours of the EEA Agreement and of the internal political debate in Norway to

¹ Jonas Sætre, *Førebels Ingen EØS-Konsekvenser* [Still No EEA Consequences], NRK.NO (May 23, 2011), <http://www.nrk.no/nyheter/verden/1.7644683>. Directive 2008/6/EC, of the European Parliament and the Council of 20 February 2008 with Regard to the Full Accomplishment of the Internal Market of Community Postal Services, 2008 O.J. (L 052) 3.

² Agreement on the European Economic Area, May 2, 1992, 1994 O.J. (L 1), 572 [hereinafter EEA Agreement].

³ *Id.* art. 102.

⁴ *Id.*

⁵ The Economist Intelligence Unit, *Norway Politics: Will EU's Postal Directive be Rejected?*, VIEWSWIRE (May 23, 2011), http://viewswire.eiu.com/index.asp?layout=VWArticleVW3&article_id=888122073&country_id=1410000141&channel_id=210004021&category_id=500004050&refm=vwCat&page_title=Article (observing that none of the three European Free Trade Area states has exercised a reservation since the EEA Agreement entered into force in 1993).

⁶ *Id.*

⁷ Joint Press Release, Informal EU-Norway Consultations on the 3rd Postal Directive (June 29, 2011), available at http://www.eu-norge.org/Global/SiteFolders/webeu/110629_3rd_postal_directive_statement.pdf [hereinafter EU-Norway Press Release] (announcing the beginning of informal negotiations regarding Norway's planned reservation of the Third Postal Directive).

analyze the potential consequences of a Norwegian reservation. While Article 102 of the EEA Agreement outlines the general procedures for handling a reservation, ambiguities in the text of the Agreement suggest the precise outcome will depend primarily on political negotiations between the Norway, the two other EFTA states that are parties to the EEA Agreement,⁸ and the EU. Most importantly, the planned Norwegian reservation demonstrates increasing domestic opposition to the EU—and growing skepticism about whether the EEA Agreement is in Norway’s interest.

Part I of this paper describes the mechanics of incorporating EU law into Norwegian law, through the procedures outlined in the EEA Agreement. Part II outlines the legal basis for the reservation procedure. Part III discusses why Norway has not exercised a reservation previously and describes the country’s evolving political attitudes toward the EEA Agreement. Part IV explains Norway’s opposition to the Third Postal Directive. Lastly, Part V analyzes the potential legal and political consequences of a Norwegian reservation.

I. How EU Law Becomes Norwegian Law

A. Basics of the EEA Agreement

Norway rejected EU membership through nationwide referenda in both 1972 and 1994, most recently by a vote of fifty-two to forty-eight percent.⁹ Nevertheless, Norway maintains close ties to the EU as a party to the EEA Agreement, which entered into force

⁸ Although Switzerland is a member of EFTA, it is not a party to the EEA Agreement.

⁹ Norway Mission to the EU, Norway and the European Union, http://www.eu-norway.org/eu/norway_and_the_eu/ (last visited Mar. 31, 2012)

on January 1st, 1994,¹⁰ and the three EFTA states that are parties to the EEA Agreement are all members of the Schengen Area.¹¹

The EEA Agreement formalizes relations between the EU and three EFTA states: Norway, Iceland and Liechtenstein. The Agreement obliges state parties to uphold the EU's four fundamental freedoms, thereby permitting the three EFTA states to join the internal market.¹² The text of the EEA Agreement mirrors the text of the founding EU treaties in its discussion of the fundamental freedoms, and the ECJ is the ultimate arbiter of disputes concerning the interpretation of these provisions.¹³ The EEA Agreement does not encompass all EU law, however. In particular, the Agreement excludes the EU's Common Agriculture and Fisheries Policies, Customs Union, Common Trade Policies, Common Foreign and Security Policy, Justice and Home Affairs, and the Monetary Union.¹⁴

Parties to the EEA Agreement incorporate EU legislation through amendments to the Agreement.¹⁵ Over 6,000 EU legal acts have been incorporated into the EEA Agreement since it was signed.¹⁶ Parties to the EEA Agreement implement EU

¹⁰ EEA Agreement, *supra* note 2.

¹¹ Council Decision 2011/842/EU, On the Full Application of the Provisions of the Schengen *Acquis* in the Principality of Liechtenstein, 2011 O.J. (L 334), 54, 27; Council Decision 1999/439/EC, On the Conclusion of the Agreement with the Republic of Iceland and the Kingdom of Norway Concerning the Latters' Association with the Implementation, Application and Development of the Schengen *Acquis*, 1999 O.J. (L 176), 42, 35.

¹² EEA Agreement, *supra* note 2, art. 1.

¹³ *See id.*, art. 111(3) ("If a dispute concerns the interpretation of provisions of this Agreement, which are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee, the Contracting Parties to the dispute may agree to request the Court of Justice of the European Communities to give a ruling on the interpretation of the relevant rules.").

¹⁴ EFTA, EEA AGREEMENT, <http://efta.int/eea/eea-agreement.aspx>.

¹⁵ EEA Agreement, *supra* note 2, art. 102.

¹⁶ Report by the EEA Review Committee, OUTSIDE AND INSIDE: NORWAY'S AGREEMENTS WITH THE EUROPEAN UNION 8 (2012) NOU 2012: 2, *available at* http://www.regjeringen.no/pages/36798821/PDFS/NOU201220120002000EN_PDFS.pdf. At the time of

regulations if 1) the subject can be regulated under the Agreement; and 2) the subject matter is “relevant” to the Agreement.¹⁷ Determining relevance is not an exact science, however. “Relevant” EU legislation affects the substance of the EEA Agreement’s provisions.¹⁸ The overarching principle governing the EEA Agreement is the goal of creating a seamless web of legislation regulating the internal market between EFTA and EU states.¹⁹ The EEA Committee—which consists of each EFTA state’s EU ambassador, and a EU official who represents the European Commission—ultimately decides by consensus whether new EU law is “EEA relevant,” and the Committee’s decision may not be appealed.²⁰ If an act is deemed irrelevant, no further action is required.²¹

In practice, the EEA Committee has proven willing to incorporate EU legislation that appears only peripherally related to the EEA Agreement, thereby expanding cooperation with the EU.²² Thus, EFTA states have more commonly demonstrated an arguably over-inclusive, rather than under-inclusive, preference for adopting EU law.

B. EEA Amendment Procedure and Amendments to Domestic Norwegian Law

Article 102 of the EEA Agreement requires the EU to notify the EEA Committee of potential EU legislation that could be relevant to the EEA Agreement.²³ In practice,

writing, only the first chapter had been translated into English. Subsequent citations refer to the original Norwegian-language version of this report.

¹⁷ EEA AGREEMENT, *supra* note 2, art. 102(1)-(3).

¹⁸ Finn Arnesen & Fredrik Sejerstad, *Datalagringsdirektivet og EØS-Avtalen* [The Data Retention Directive and the EEA Agreement] 5 (2008), available at <http://www.jus.uio.no/europarett/forskning/vedlegg/Betenkning%20datalagring%20-%20IKT%20Norge%202008-06-06.pdf>.

¹⁹ EEA AGREEMENT, *supra* note 2, art. 102(1) (“In order to guarantee the legal security and homogeneity of the EEA . . .”).

²⁰ Arnesen & Sejerstad, *supra* note 18, at 4-5.

²¹ *Id.* at 5.

²² *Id.* at 6.

²³ EEA AGREEMENT, *supra* note 2, art. 102(1).

however, the EFTA Secretariat generally initiates the process by notifying the three member states and establishing a working group to evaluate whether the new legislation requires an amendment to the Agreement.²⁴ The Joint EEA Committee consists of representatives from each of the state parties.²⁵ Although the representatives divide into two separate blocs, decisions must be reached by consensus: “The EEA Joint Committee shall take decisions by agreement between the Community, on the one hand, and the EFTA states speaking with one voice, on the other.”²⁶ The EEA Committee meets monthly²⁷ and consists of each EFTA state’s EU ambassador and a EU official who represents the European Commission.²⁸

The EFTA working group—which generally includes a representative from Norway—submits a draft position note to the European Commission, thereby initiating a dialogue between the EFTA states and the EU.²⁹ The working group submits a final draft of the note to the Joint EEA Committee, in which the working group makes a recommendation on whether the legislation should be incorporated into the EEA Agreement.³⁰ The Joint EEA Committee must then decide whether to accept the working group’s proposal.³¹ Before making any decision in the EEA Committee, the Norwegian delegation must consult the Europe Committee in Parliament (known as the “Storting.”)³²

If the EEA Committee decides to amend the Agreement, the change does not necessarily take automatic effect under Norwegian law. According to Article 26 of the

²⁴ Arnesen & Sejerstad, *supra* note 18, at 2-3.

²⁵ EEA Agreement, *supra* note 2, art. 93(1).

²⁶ *Id.* art. 93(2).

²⁷ *Id.* art. 94(2).

²⁸ Arnesen & Sejerstad, *supra* note 18, at 4.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

Constitution of Norway, if a treaty involves a matter of “special importance,” then a formal change to Norwegian law is required before the treaty becomes effective.³³ A majority of members of the Storting must approve a bill containing the proposal, which becomes law once the King and the Prime Minister have signed it.³⁴ Article 103 of the EEA Agreement contemplates the parties’ need to fulfill this type of constitutional requirement, and allows for an adjustment of the amendment’s entry into force accordingly.³⁵

For legislation that involves a relatively minor issue, such as rules governing “food or veterinary issues,” Norway follows a simplified procedure to incorporate EU law into Norwegian law.³⁶ The process involves little more than a revision of any relevant provision of Norwegian law to comply with the newly adopted EU law.³⁷ There is no requirement to insert any mention that the change was made to comply with EU law.³⁸ As a result, it is nearly impossible to determine the full extent to which Norwegian law has been changed over the years to comply with EU law.³⁹

³³ Kongeriget Norges Grundlov, given i Rigsforsamlingen paa Eidsvold den 17de Mai 1814 [Constitution] May 17, 1814, SR 101, art. 26 (Nor.), available at <http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/> (unofficial trans.) (“Treaties on matters of special importance, and, in all cases, treaties whose implementation, according to the Constitution, necessitates a new law or a decision by the Storting, are not binding until the Storting has given its consent thereto.”).

³⁴ STORTINGET, LEGISLATION, <http://www.stortinget.no/en/In-English/About-the-Storting/Legislation/>.

³⁵ EEA Agreement, *supra* note 2, art. 103(1).

³⁶ Europautredningen, INNENFOR OG UTENFOR: NORGES AVTALER MED EU [Report by the EEA Review Committee, OUTSIDE AND INSIDE: NORWAY’S AGREEMENTS WITH THE EUROPEAN UNION] 8 (2012) NOU 2012: 108, available at <http://www.regjeringen.no/pages/36797426/PDFS/NOU201220120002000DDDPDFS.pdf> [hereinafter REPORT ON NORWAY’S AGREEMENTS WITH THE EU].

³⁷ *Id.* at 118.

³⁸ *Id.*

³⁹ *Id.*

II. The Reservation Procedure

This Part describes the basic legal procedure a reservation involves, while Part V applies the procedure to analyze the potential consequences of a Norwegian reservation against the Third Postal Directive. Although the EEA Agreement grants EFTA member states the right to exercise a reservation against EU legislation under Article 102(5), no EFTA state has yet exercised this right.⁴⁰ A state's decision to exercise a reservation triggers the procedures outlined in Article 102 of the EEA Agreement. First, Article 102(3) obliges the parties to "make all efforts to arrive at an agreement on matters relevant to this [the EEA] Agreement." If the parties fail to reach a consensus, they must refer the matter to the Joint EEA Committee.⁴¹ As noted in the preceding Part, EFTA states act as a group within the Joint EEA Committee, and the EU representatives act on behalf of the Community.⁴² This means that the EFTA states negotiate amongst themselves first before taking a position in the Joint EEA Committee.⁴³ From the time the Joint EEA Committee receives the dispute, the parties have six months to agree to a solution.⁴⁴

After six months, if the parties still have not reached an agreement—that is, if at least one EFTA state continues to insist on exercising a reservation—then the portion of the EEA Agreement that relates to the specific regulation that is the subject of the reservation will be automatically nullified: "the affected part thereof . . . is regarded as provisionally suspended, subject to a decision to the contrary by the EEA Joint

⁴⁰ *Id.* at 8.

⁴¹ EEA Agreement, *supra* note 2, art. 102(4).

⁴² *Id.* art. 93(2).

⁴³ Arnesen & Sejerstad, *supra* note 18, at 10.

⁴⁴ EEA Agreement, *supra* note 2, art. 102(4).

Committee.”⁴⁵ A decision by the Joint EEA Committee requires, however, consensus among all parties. Thus, to avoid automatic suspension, the EU would have to agree to waive nullification of the “affected part” of the EEA Agreement.⁴⁶ Waiving nullification could be difficult if the reservation would disrupt the “legal security and homogeneity of the EEA,”⁴⁷ such that existing EU legislation incorporated into the EEA Agreement no longer functioned as an integrated whole following an EFTA-state reservation.

A key to understanding the consequence of a reservation lies in the definition of the “affected part.” The Agreement provides no specific guidance on how to define subject of reservation. Since the Joint EEA Committee rarely decides the scope of the affected part at the outset, this question arises once the affected part has already been automatically nullified.⁴⁸ The legal consequences of this apparent paradox are unclear. Some scholars argue that the suspension does not operate until the parties agree on its scope;⁴⁹ while another scholar contends that the ambiguity leaves the EU with the power to decide the scope of the affected part, while depriving the EFTA states of any recourse to an appeal.⁵⁰ In practice, the ambiguity in the definition of the “affected part” suggests political, rather than legal, considerations will determine how broadly the suspension applies.

Lastly, the consequence of a reservation applies to *all three* EFTA states, not solely the state or states that wish to exercise a reservation. In practical terms, this means

⁴⁵ *Id.* art. 102(5).

⁴⁶ Arnesen & Sejerstad, *supra* note 18, at 12.

⁴⁷ EEA Agreement, *supra* note 2, art. 102(1).

⁴⁸ Arnesen & Sejerstad, *supra* note 18, at 12-13 (quoting Henrik Bull, Saksgangen ved Vedtakelse av Nytt EØS-Regelverk [Proceedings Upon Adoption of New EEA Regulations] 8 (Lovdata 2005)).

⁴⁹ *Id.* at 13 (quoting Arnesen et. al, Vetoretten i EØS [The Veto Right in the EEA] 115-131 Jussens Venner (2001)).

⁵⁰ *Id.* (quoting Henrik Bull, Saksgangen ved Vedtakelse av Nytt EØS-Regelverk [Proceedings Upon Adoption of New EEA Regulations] 8 (Lovdata 2005)).

each of the EFTA states holds a veto over the incorporation of EU legislation into the other two EFTA states' domestic laws. Oddly, this aspect of a reservation's consequences has not figured prominently in the debate over the Third Postal Directive in Norway. Part V discusses this consideration in more detail, as applied to the Third Postal Directive specifically.

III. Why Hasn't the Reservation Been Exercised Previously?

A committee appointed by the Norwegian Ministry of Foreign Affairs to document Norway's agreements with the EU noted the important "political and symbolic role" the reservation right plays, even though it has never been used.⁵¹ In a "few cases," one of the EFTA states (not Norway) waited so long before approving an EEA Agreement amendment that the delay triggered the Article 102 six-month deadline for EEA Committee negotiations, but the Committee always managed to resolve the dispute in time to avoid a reservation.⁵²

Although over 6,000 EU legislative acts have been incorporated into Norwegian law since the EEA Agreement entered into force in 1994, Norwegian members of parliament (MPs) have debated using the reservation right in consultations with the Storting's Europe Committee only 17 times, including the current debate over the Third Postal Directive.⁵³ Nevertheless, there is an increasing trend of discussing the reservation that is evident since 2005, concurrently with an increase in the number of MPs who support the exercise of a reservation.⁵⁴

⁵¹ REPORT ON NORWAY'S AGREEMENTS WITH THE EU, *supra* note 36 at 100.

⁵² The Report provides no further details on these incidents. *Id.* at 103.

⁵³ *Id.*

⁵⁴ *Id.* at 105.

Previously, Norwegian politicians were loath to discuss the reservation right,⁵⁵ implicitly regarding the provision as an emergency measure available only for legislation that threatened Norway's core interests. Increasingly, however, debates over the use of the reservation right reflect not only the controversial nature of some of the more recent EU directives, but also a growing Norwegian dissatisfaction with the EEA Agreement in general.⁵⁶ In fact, the current Norwegian government platform announces the government's openness to exercising a reservation: "If other means fail, the Government shall consider exercising its right to make reservations as laid down in the EEA Agreement if Norwegian interests of special importance are threatened by legislative acts planned for insertion in the EEA Agreement."⁵⁷

In early 2011, it appeared that Norway might exercise a reservation for the first time against the controversial Data Retention Directive.⁵⁸ Despite strong opposition from the Center (Sp) and Socialist Left (SV) parties in the current coalition government, in addition to the Christian Democrats (KrF), Liberals (V), and the Progress Party (FrP); the Data Retention Directive passed by a narrow margin after Conservative party (Høyre) brought dissenting party members in line.⁵⁹

IV. Why does Norway Oppose the Third Postal Directive?

The Third Postal Directive requires all member states to open their postal sector to the internal market, including areas formerly reserved for domestic postal service

⁵⁵ *Id.* at 103.

⁵⁶ *Id.* at 105.

⁵⁷ POLITICAL PLATFORM AS BASIS FOR THE GOVERNMENT'S WORK, FORMED BY THE LABOUR PARTY, SOCIALISTS LEFT PARTY, AND CENTRE PARTY 6 (2009-2013), *available at* <http://www.regjeringen.no/upload/SMK/Vedlegg/Rapporter/Plattform-sm2-a4-web-english.pdf> [hereinafter RED-GREEN PLATFORM].

⁵⁸ *Norway Politics: Will EU's Postal Directive be Rejected?*, *supra* note 5.

⁵⁹ *Id.*

under the First and Second Postal Directives: letters that weigh less than 50 grams.⁶⁰ The Third Postal Directive touches on three sensitive issues in domestic Norwegian politics: labor policy, the political strength of rural voters, and growing EU skepticism.

First, the postal service, Posten Norway, currently enjoys a monopoly over the delivery of letters under 50 grams within Norway, but the Third Postal Directive would open this service to competition from other European companies.⁶¹ Critics of the Third Postal Directive worry that increased competition will drive down wages for Norwegian postal workers.⁶² Posten Norway has already undergone a long-term cost cutting process that included controversial layoffs,⁶³ and the additional blow could prove difficult to handle politically.

Secondly, the Third Postal Directive is linked to Norway's rural policy and related state subsidies. Norway spends an enormous amount of resources to preserve current rural settlement patterns, through targeted agricultural, infrastructure, and local government financing policies.⁶⁴ Improving the quality of life in rural areas is a top priority of the current coalition government, led by the Center Party, which draws the majority of its support from rural voters.⁶⁵ The Center Party is also a staunch opponent

⁶⁰ Directive 2008/6/EC, 2008 O.J. (L 052) 3, art. 7.

⁶¹ *Norway Politics: Will EU's Postal Directive be Rejected?*, *supra* note 5.

⁶² Stine Barstad & Christiane Jordheim Larsen, *Jens Tapte Poststriden* [Jens Lost the Postal Directive Fight], *Aftenposten.no* (Apr. 10, 2011), <https://www.aftenposten.no/nyheter/iriks/politikk/Jens-tapte-poststriden-5115800.html#.T4IqZo5ORXQ>.

⁶³ NTB, *Gir E-Post Skylden for Nedbemanning* [Layoffs Blamed on E-Mail], *DN.NO* (Sept. 29, 2009), <http://www.dn.no/forsiden/naringsliv/article1751082.ece>.

⁶⁴ See, e.g. Paul Olav Berg, *Hundre Års Ensomhet? Norge og Sverige 1905-2005*, *SSBMAGASINET* [*One Hundred Years of Solitude? Norway and Sweden 1905-2005*, *STATISTICS NORWAY MAGAZINE*] (July 2005), available at http://www.ssb.no/magasinet/norge_sverige/ (comparing Norway's aggressive policies to stem urbanization to Sweden's more acquiescent approach).

⁶⁵ RED-GREEN PLATFORM, *supra* note 57, at 3 ("We shall work with a progressive rural and regional policy to promote comparable living conditions across the entire country, and uphold the main features of existing Norwegian settlement patterns.").

of Norwegian membership in the EU.⁶⁶ Currently, all parts of Norway enjoy mail service six days per week.⁶⁷ Due to Norway's mountainous geography, providing postal service to all parts of Norway at the same price requires state subsidies of about 497 million Norwegian kroner (approximately 65 million Euro) per year.⁶⁸ The Third Postal Directive would require mail service to most parts of the country only five days a week, and could allow postal companies to restrict mail service to remote areas to once a week.⁶⁹ Cutting mail service to outlying areas could accelerate the trend towards rural depopulation. Moreover, there is a concern that foreign private postal service firms would choose to enter only the lucrative urban Norwegian markets, thereby Posten Norway's from engaging in urban-rural cross-subsidization.

Lastly, opposition to the Third Postal Directive taps into general anti-EU sentiment, independent of the substance of the Directive itself. Support for EU membership among Norwegian voters stood at just 15.3 percent in January 2012, an all-time low.⁷⁰ Norway implements EU law at a rate that outpaces many EU members; nevertheless, as a non-member state Norway does not have any formal voting rights in

⁶⁶ Centre Party, *Here is 100 Good Reasons to Vote for the Centre Party!* [sic], <http://www.senterpartiet.no/sp-in-english/here-is-100-good-reasons-to-vote-for-the-centre-party-article62029-12924.html> ("96. No to Norwegian membership in the EU.").

⁶⁷ See Forlengelse av Konesjon til Posten Norge AS, Samferdselsdepartementet [Extension of Posten Norge's License, Ministry of Transport and Communications] 09/486- RHO (Oct. 25, 2010), available at http://www.regjeringen.no/Upload/SD/Vedlegg/Post/posten_konesjon_fornyelse_251011.pdf (extending the Norwegian Postal Service's previous operating license beyond the 2010 original deadline); Konesjon til Posten Norge AS [Posten Norge's License] 3.8.1, 3.8.2 (Dec. 18, 2006), available at <http://www.regjeringen.no/nb/dep/sd/dok/andre/konesjoner/2006/konesjon-til-posten-norge-as.html?id=439859> (detailing the conditions of the Norwegian Postal Service's operating license, including the requirement to guarantee mail service to all parts of Norway Monday through Saturday, excluding holidays).

⁶⁸ Stine Barstad & Christiane Jordheim Larsen, *Striden om Postdirektivet Lagt Død* [Debate over the Postal Directive Put to Rest], *Aftenposten.no* (Apr. 10, 2011), <https://www.aftenposten.no/nyheter/iriks/politikk/article4089037.ece#.T4IkKI5ORXQ>.

⁶⁹ David Vojislav Krekling et al., *Ap Sier Nei til Postdirektivet* [Labor Party Says No to Postal Directive], *NRK.NO* (Apr. 10, 2011), <http://www.nrk.no/nyheter/norge/1.7588168>.

⁷⁰ NTB, *Støre Usikker På EU-Medlemskap* [Støre Unsure About EU Membership], *DN.NO* (Jan. 23, 2012), <http://www.dn.no/forsiden/politikkSamfunn/article2315102.ece>.

EU. The reservation right was originally viewed as a political compromise to allow greater Norwegian integration with the EU short of full membership.⁷¹ One can question, however, the value of a reservation right that is never used. As anti-EU sentiment has grown, testing the boundaries of the EEA has become increasingly tempting.

Of the three governing parties, the Center and Socialist Left parties required no convincing to agree to exercise a reservation against the Third Postal Directive. Both parties have historically opposed the EU.⁷² As a result, the deciding vote came down to the largest coalition member, the Labor party. At the 2011 Labor Party Summit, party leaders recommended the members vote against exercising the reservation right.⁷³ Although no one in the leadership argued in favor the substance of the Third Postal Directive, party leaders argued that the consequence of a reservation could harm Norway's interests by placing the future of the EEA Agreement in jeopardy.⁷⁴ The Labor party membership succeeded nonetheless in winning the vote to exercise a reservation against the Third Postal Directive, especially through the engagement of Labor Youth Party (AUF) members.⁷⁵

The Norwegian Foreign Minister formally notified the EU of Norway's intention to exercise a reservation against the Third Postal Directive on May 23rd, 2011.⁷⁶ On June 29, 2011, Norway and the EU released a joint statement announcing that the two sides

⁷¹ REPORT ON NORWAY'S AGREEMENTS WITH THE EU, *supra* note 36 at 100.

⁷² The Economist Intelligence Unit, *Norway Politics: Will EU's Postal Directive be Rejected?*, ViewsWire (May 23, 2011), http://viewswire.eiu.com/index.asp?layout=VWArticleVW3&article_id=888122073&country_id=1410000141&channel_id=210004021&category_id=500004050&refm=vwCat&page_title=Article.

⁷³ Vojislav Krekling et al., *supra* note 69.

⁷⁴ Tore Eikeland, Labor Youth Party Member (AUF), Speech at the 2011 Labor Party Summit (Apr. 8, 2011).

⁷⁵ Vojislav Krekling et al., *supra* note 69.

⁷⁶ Jonas Sætre, *supra* note 1.

had met informally to air their concerns and agreed to discuss the issue further at their next consultation.⁷⁷ No further progress had been reported at the time of writing.

V. Consequences of a Norwegian Reservation

A. Article 97: Untested Option to Avoid a Reservation

According to Article 102(3), the Joint EEA Committee—which includes a representative from the EU Commission—shall “make every effort to find a mutually agreeable solution where a serious problem arises in any area in which, in the EFTA states, falls within the competence of the legislator.” In this respect, the EEA Agreement grants the parties relatively wide latitude to negotiate a creative solution. For example, Article 97—which has also never been used—appears to grant the parties the ability to allow a state to adopt national legislation that differs from the demands the EEA Agreement places on each state:⁷⁸

This Agreement does not prejudice the right for each Contracting Party to amend, without prejudice to the principle of non-discrimination and after having informed the other Contracting Parties, its internal legislation in the areas covered by this Agreement: if the EEA Joint Committee concludes that the legislation as amended does not affect the good functioning of this agreement”⁷⁹

Since Article 97 has never been used, there is no precedent to delineate the boundaries for national divergences from EU law that the Joint EEA Committee may accept.⁸⁰ At a minimum, Article 97 specifies that the domestic legislation must conform to the principle of non-discrimination. For the Third Postal Directive, Norway could potentially avoid exercising a reservation by seeking an exemption from the Joint EEA

⁷⁷ EU-Norway Press Release, *supra* note 7.

⁷⁸ Arnesen & Graver, *Rettslige Sider ved Norges EU-Rettete Avtaler*, MAKT OG DEMOKRATIUTREDNINGEN [Legal Dimensions of Norway’s EU-Directed Agreements, Report on Power and Democracy], Series No. 19, ¶ 2.2.2.1 (2000), available at <http://www.sv.uio.no/mutr/publikasjoner/rapp2000/Rapport19.html>.

⁷⁹ EEA Agreement, *supra* note 2, art. 97.

⁸⁰ Arnesen & Graver, *supra* note 78, ¶ 2.2.2.4.

Committee under Article 97 to adopt Norwegian law that departed narrowly from the Directive in a manner designed to address domestic concerns, provided the proposed domestic legislation operated non-discriminately.

B. Definition of the “Affected Part” Suspended Following a Reservation

In the event of a reservation, the portion of the EEA Agreement that relates to the Third Postal Directive would be suspended for all EFTA countries if the EEA committee determines that the reservation destroys the unity of regulation between EU and EFTA states in that particular subject area.⁸¹ Obviously, the Third Postal Directive would still remain applicable for EU member states. In the event of a reservation, it is unclear how the Joint EEA Committee would determine the breadth of subject matter that could be suspended from the EEA Agreement. Twenty-two annexes to the EEA Agreement list the various categories of regulation.⁸² Annex 11, “Electronic Communication, Audiovisual Services and Information Society” includes “Postal Services” as a sub-category.⁸³

For a reservation against the Third Postal Directive, there are broadly three potential definitions of the “affected part” of the EEA Agreement that would be subject to a suspension.⁸⁴ First, the Joint EEA Committee could determine that the reservation automatically suspends the entire annex. This would affect not only postal services, but

⁸¹ EEA Agreement, *supra* note 2, art. 102(5).

⁸² *Id.* Annex 1-22. The categories include 1) Veterinary and Phytosanitary Matters; 2) Technical Regulations, Standards, Testing and Certification; 3) Product Liability; 4) Energy; 5) Free Movement of Workers; 6) Social Security; 7) Recognition of Professional Qualifications; 8) Right of Establishment; 9) Financial Services; 10) Services in General; 11) Electronic Communication, Audiovisual Services and Information Society; 12) Free Movement of Capital; 13) Transport; 14) Competition; 15) State Aid; 16) Procurement; 17) Intellectual Property; 18) Health and Safety at Work, Labour Law and Equal Treatment for Men and Women; 19) Consumer Protection; 20) Environment; 21) Statistics; 22) Company Law.

⁸³ *Id.* Annex 11: Electronic Communication, Audiovisual Services and Information Society.

⁸⁴ These three scenarios track Arnesen’s and Sejerstad’s analysis of a potential reservation against the Data Retention Directive. Arnesen & Sejerstad, *supra* note 18, at 15-16.

also the following Annex 11 subparts: “telecommunication services,” “data protection,” “information society services,” “audiovisual services,” and “acts of which the Contracting Parties shall take note.”⁸⁵ This scenario is perhaps the most unlikely, as it would bar Norway, Iceland, and Switzerland from the internal market for a broad swathe of communications industries. This outcome appears undesirable to all parties from an economic perspective and untangling the three EFTA states from all relevant regulations would prove extremely cumbersome administratively. Alternatively, the Joint EEA Committee could decide that the suspension applies only to the Annex 11 subpart on postal services.⁸⁶ Lastly, the Joint EEA Committee could determine that the suspension applied only to the specific regulations on postal services affected by directive—for example, to letters that weigh less than 50 grams.

C. Political Consequences: Reaction from the Other EFTA States

As noted in Part II, the consequences of a Norwegian reservation would apply to all three EFTA states, not just Norway. Both Iceland and Liechtenstein have publicly debated exercising a reservation previously, but neither has done so.⁸⁷ In the Norwegian debate on the Third Postal Directive, Iceland’s and Liechtenstein’s concerns have been noticeably absent. Presumably, these negotiations are currently taking place behind closed doors. Nevertheless, this subpart provides a brief overview of the two states’ relations with the EU, and speculates on each state’s view of the Norwegian reservation.

⁸⁵ EEA Agreement, *supra* note 2, Annex 11, Table of Contents.

⁸⁶ *Id.* Annex 11, art. 5(d).

⁸⁷ REPORT ON NORWAY’S AGREEMENTS WITH THE EU, *supra* note 36, at 100.

Iceland applied to become a member of the EU in 2009, and began formal negotiations in 2011, which are expected to conclude in 2013.⁸⁸ Although Iceland maintains strong relations with the EU overall, the country is currently defending itself in a case in the EFTA court based on Iceland's failure to guarantee foreign bank deposits after the Icelandic government took over several of the country's bankrupt financial institutions that had attracted deposits from British and Dutch accountholders.⁸⁹ In terms of its relationship with Norway through EFTA and the EEA Agreement, official Icelandic reports document some degree of frustration over what Iceland perceives as a Norwegian tendency to dominate EFTA negotiations and to act without consulting the other two EFTA states.⁹⁰ For its part, Norway has expressed concern that Iceland lacks the administrative resources to manage its EEA responsibilities.⁹¹ A Norwegian reservation would certainly give Iceland cause for concern if the reservation weakens the EEA Agreement, and thereby, cooperation with the EU. The subject of postal services specifically is unlikely to be of central importance to Iceland, however, as the country's geographic isolation and small population suggest continental European postal service firms do not pose a significant competitive threat to current Icelandic postal services.

Liechtenstein is by far the smallest EFTA state, with a population of only 35,000.⁹² The country's experience with the EEA Agreement has been overwhelmingly positive, and there is no political party in Liechtenstein that opposes the EEA.⁹³ Both Iceland and Liechtenstein have received exemptions from certain EEA requirements, due

⁸⁸ *Id.* at 305.

⁸⁹ *Id.* at 306.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

to the countries' size—in addition to Iceland's geographic challenges and Liechtenstein's close relationship with Switzerland.⁹⁴ Despite differences in culture and foreign policy interests, Liechtenstein and Norway have cooperated well together as EFTA states.⁹⁵ The main exceptions to smooth cooperation concerned Liechtenstein's opposition to EU expansion in 2004, resulting from a land dispute between Czech authorities and the Liechtenstein royal family; and EU rules relating to international tax evasion.⁹⁶ Thus, Liechtenstein has already demonstrated a willingness to confront the EU regarding arguably quite narrow issues within the context of EEA cooperation. It may be less receptive to Norwegian efforts to challenge the EU, however, if a reservation against the Third Postal Directive promises no obvious benefits for Liechtenstein.

Conclusion

Significant uncertainties remain about the political and legal consequences of a Norwegian reservation against the Third Postal Directive—assuming Norway ends up exercising the reservation at all. This paper examines the domestic political debate in Norway and the substance of the EEA Agreement to theorize on the potential outcome of a reservation. Ambiguity in the legal text leaves the ultimate outcome to political considerations—namely, negotiations between the EFTA parties to the EEA and with the EU. All parties to the negotiations have an interest in maintaining the strength of the EEA and they will likely attempt to avoid a Norwegian reservation if at all possible. At the same time, Norway's announcement of the planned reservation signals something more ominous for EEA Agreement cooperation than simply opposition to liberalizing

⁹⁴ *Id.* at 305, 308.

⁹⁵ *Id.* at 308.

⁹⁶ *Id.* at 308-309.

postal services. The 2011 Labor Party Summit vote is a sign of growing unease within Norway regarding the country's complex mode of cooperation with the EU. From this perspective, the reservation can be thought of as something of a trial balloon designed to test the boundaries of possible resistance to the EU. Although the EU may prove willing to compromise in order to avoid a Norwegian reservation in the short-term, it risks setting a precedent that may encourage Norway's growing EU opposition forces to push the envelope again in the future, for better or for worse.