Iceland and the European Economic Agreement: 25 Years of Cooperation

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Abstract

In 2019 the Minister for Foreign Affairs of Iceland presented for the first time a special report to the Parliament (Althingi) on the status and implementation of the European Economic Area (EEA) Agreement. This international/European treaty based on a two-pillar structure (EU on one side and EFTA-EEA States on the other) has transformed the Icelandic legal, political and economic environment in the 25 years since its ratification. The objective of this study is to review the story of this successful European cooperation (extension of the internal market and fundamental freedoms) while focusing on difficult issues that appeared in the aftermath of the financial crisis (Icesave saga, finally resolved in favour of Iceland by the EFTA Court). It also aims to explain some reasons behind Eurosceptism in the country. Primary sources are both legal acts and relevant case-law from European courts, combined with doctrinal studies in the fields of law and political science. Methodology is both descriptive and analytical since all legal issues are approached from a wider economic, political and sociological context. The most important finding of the study is that nothing substantially important has altered fundamentally the preference of Iceland for EEA cooperation rather than full EU integration.

Keywords: *Iceland; European Economic Area; cooperation; international law.*

JEL Classification: K22, K33

1. Introduction

This study explores most important issues related to the celebration of the 25 years anniversary of the European Economic Area (EEA) Agreement based on economic cooperation. While it relies on the 2019 Report on the EEA Agreement commissioned by the Ministry of Foreign Affairs of Iceland and presented to the Parliament; it also addresses other some difficult milestones in this other successful story (Icesave saga after the financial crisis, 2013 and current constitutional resistance to EEA law by Supreme Court of Iceland, 2017-present). The structure of the study starts with a review of the period 1994-2008 (section 1); moves to the aftermath of the financial crisis and different policies adopted to rescue/not rescue banks in trouble (section 2); summarizes the Icesave saga and ruling from the EFTA Court in 2013 (section 3); describes the everlasting dilemma of accession or not to the EU (section 4); and ends with some legal and political analysis on the Report on the EEA Agreement and its impact on Iceland completed in 2019 (section 5). In a final section 6 some conclusions are offered with research results. Most relevant reference works (books, articles, book chapters, etc.) are listed both in footnotes and at the end at a brief bibliography in the language of publication. Applicable legislation, selected case-law of European courts, policy documents and news are only referenced in footnotes. Two annexes are important: Annex 1 is a political statement on the 25 years EEA anniversary. Annex 2 contains the final suggestions for improvement of EEA cooperation put forward by the 2019 Report of Experts.

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2. Iceland and the EEA Agreement: the story of a smooth economic cooperation from 1994 to 2008

The signing in 1992 (Porto, Portugal) and entry into force of the European Economic Area (EEA) Agreement on 1 January 1994 between the EC/EU and most EFTA (European Free Trade Association) Member States at the time marked the beginning of the Europeanization of the Icelandic economy and legal order[2]. Iceland joined the European internal market adding this international-European free trade law+ to its legal, political, and economic landscape. The nature of this agreement, an international treaty creating a new legal order "sui generis" combining the respect for the autonomy of sovereign nations in public international law with the opportunities and effectiveness of EU legal integration for individuals and economic operators fitted well with the political and economic needs of the country. Iceland was given access to the whole internal market while preserving the autonomy of its legal system and its sacrosanct principle of being a parliamentary democracy of Nordic tradition. Twenty-five years later, both politicians[3] and academics[4] agree in principle that the EEA agreement has worked well and in the way that it was meant to, securing a single market with fundamental freedom of goods, services, people, and capital, and even extending European cooperation to new related areas which were not foreseen at the beginning (ie: citizens rights, energy policy, Schengen)[5].

The EEA Agreement was incorporated into the Icelandic legal order with the domestic Act no 2/1993.[6] For many years the miracle of squaring the circle, mixing "oil and water" as the EEA experiment was once described, worked smoothly without any fundamental tensions. The political, legal and economic landscape and context made

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[2] Agreement on the European Economic Area. European Union and European Free Trade Agreement (EFTA). Official Journal L 1 3.1.1994, pp. 3-522 Available online at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A21994A0103%2801%29> last accessed 25.9.2020.

[3] On 22 March 2019, for the first time in 25 years, the Prime Ministers of Iceland, Liechtenstein and Norway met all leaders of all EU Member States at the European Council, to mark the 25th anniversary of the European Economic Area, the EEA. In a joint statement, the three Prime Ministers from Iceland, Liechtenstein, and Norway, reaffirmed their shared values of democracy, individual freedom, the rule of law and human rights, and a common commitment to open societies and open economies. They also stated in a formal ceremony that the EEA Agreement had guaranteed equal treatment, legal certainty and predictable conditions for citizens and businesses. See document online at <https://www.efta.int/sites/default/files/documents/eea/eea-news/EEA-25%20-Years-EEA-EFTA-Prime-Ministers-22-March-2019-Joint-Statement.pdf> last accessed 25.9.2020.

[4] For instance, Arnórsson, A., Bailes, A. *et al*., *Saga Evrópusamrunans: Evrópusambandið og þátttaka Íslands.* Reykjavík, Alþjóðamálastofnun Háskóla Íslands, Reykjavik, 2015; Fredriksen, H. H. og Franklin, C. N. K. *Of pragmatism and principles: The EEA agreement 20 years on*, „Common Market Law Review", 2015, vol. 52, pp. 629-684; Arnesen, F., Fredriksen, H. H., Graver, H. P., Mestad, O. and Vedder, C. *Agreement on the European Economic Area: A commentary*.. C. H. Beck, Munich, 2018.

[5] Since the signature of the EEA Agreement, the scope of legislation considered to be "EEA-relevant" has widened considerably producing unintended consequences such as the obligation to accept the Citizenship Directive 2004/38/EC because the European institutions made it very clear that there was no alternative possible and suspension of free movement rights for persons was and still is unthinkable. On this issue see Conrad, M., Review of book by Jóhanna Jónsdóttir, *Iceland and the EU: Europeanization as an unintended consequence of the EEA Agreement*, Routledge, 2013, in „Stjórnmál og stjórnsýsla", 2013, vol. 9 (2), pp. 21-24.

[6] Icelandic Parliament (*Althingi*), *Lög um Evrópska efnahagssvæðið*. Act no. 2/1993, 13 January 1993.

Icelanders very satisfied with this economic cooperation. In parallel to the Court of Justice of the European Union, the EFTA Court managed the task of assuring effectiveness by a dynamic interpretation of the EEA Agreement, even if this seemed to contradict the constitutional constraints of the Icelandic legal order, in which law-making is reserved for the Parliament (and ultimately sanctioned by the President), and judges are not supposed to create but interpret the law.[7]

While the 1992 EEA Agreement was very innovative in the 90s, now, twenty-five years later, it is mostly perceived as technical and responsive in nature compared to the European Union Treaties. A paradox has become more visible for new generations who lack the historic memory of negotiations and concessions made once. While nobody denies that the EEA has offered an internal market which has provided general economic prosperity and extended rights, the silent success of the EEA Agreement has not altered the nature of EEA legal order and institutions, characterized by what can be called a "double democratic deficit" with respect to the participation of citizens and parliament in Iceland in the European formal legislative procedure.[8] For many, the EEA represents a liberal economic internal market excluding –at least on the surface- areas such as the protection of fundamental rights[9] and democratic participation in the European integration process.

Moreover, even though the EEA agreement follows the development of EU legal order with a view to achieving homogeneity and similar rights for citizens and economic operators, the EU has gone through five fundamental treaty reforms that are not mirrored in the EEA Agreement.[10] This has led to a widening gap between the EU extending its scope far beyond economic policy (ie: free movement of persons intertwined with European citizens rights) and the international/hybrid EEA, which is more limited in its scope and is more constrained by the logic and dynamics of the internal market and economic law.[11]

In any case, the Europeanization of the Icelandic legal system stood at a crossroads after the financial crisis of 2008. On one hand, the so called "Icesave" dispute, finally resolved by the EFTA Court in 2013 after the failure of a diplomatic relations approach, revealed certain defects of the EEA legal architecture that became obvious

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[7] See legal turmoil caused by case *Erla María Sveinbjörnsdóttir v Iceland*, judgment of the EFTA Court, 10 December 1998; Supreme Court Judgment in case 236/1999, judgment of 16th December 1999. For a good comparison between EU and EEA law see Stefánsson, S.M. *Evrópusambandið og Evrópska efnahagssvæðið*. Orator, Reykjavík, 2000. See also on Nordic law tradition Letto-Vanamo, P., Tamm, D. and Mortensen, B.O.G. (eds.). *Nordic Law in European Context.* Springer international publishing, New York, 2019.

[8] Bergman, E. "Iceland and the EEA 1994-2011". Rapport # 7, *Utvalget for utredning av Norges avtaler med EU*, Norway, 2011, available online at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.452.9349&rep=rep1&type=pdf>. According to Bergman, the formal right to refuse new EU legislation has proved to be an unusable tool. However, Iceland has on few occasions been able to negotiate opt-outs and derogations from European legislation.

[9] There is no EEA Charter of Fundamental Rights paralell to the EU Charter. In the EEA, it is the European Convention of Human Rights that constitutes the implicit general framework in the background. See Davíð Þór Björgvinsson. (2006). *EES-réttur og landsréttur*. Reykjavík: Codex.

[10] Similarly, Bergman, Eiríkur *Sense of Sovereignty* in *Stjórnmál og Stjórnsýsla*, 2. tbl. 5. Árg, 2009 at p. 206.

[11] Norberg, S. og Johansson, M., *The history of the EEA agreement and the first twenty years of its existence*, In C. Baudenbacher (ed.), *The handbook of EEA law*. Springer, London, 2016, pp. 3-42.

during 2009-2012[12]. On the other hand, on 23rd July 2009, the Icelandic Parliament (*Althingi*) adopted a bill with the official application requesting negotiations for EU accession.[13] This process was to be short lived because in 2013-2015, after new legislative elections and a change of government, the official application process was frozen[14]. Today, Iceland remains in the EEA and never became a member of the EU. The following sections go deeper into both issues.

3. The aftermath of the financial crisis in 2008: different methodologies to "bail-in" or "bail-out" the banks in trouble

While there were no fundamental divergences between the EU/EEA and Icelandic interests for the initial 20 years, the situation changed dramatically in the aftermath of the financial crisis. The policy responses adopted in an emergency situation by Icelandic Parliament and authorities led to disputes between the contracting parties of the EEA Agreement. The Icesave controversy reflected in a nutshell the disagreement on the two sides of the EEA legal order on essential matters where Icelandic national interest clashed with EU law and European financial/banking interests.

In response to the collapse of its entire financial system, Iceland did not see any other choice than to let the banks fail or what is called "bail-in"(owners and shareholders sharing the losses) and not go for a "bail-out" (socialising losses to tax payers as it was done across Europe). Emergency legislation adopted by the Althingi allowed banks to fail and go through winding-up and bankruptcy national procedures in order to prevent bankruptcy of the Icelandic state.[15] Two different methodologies were adopted: one for deposits in domestic banks situated in Iceland and other for deposits in foreign jurisdictions, an approach which was finally contested before the EFTA-Court but was approved by Icelandic citizens in two referenda held in 2010 and 2011[16]:

- Domestic deposits were fully recapitalised by the Icelandic State into the new three banking institutions created *ex novo*. After the Icelandic Króna devalued for about 50%, capital restrictions were imposed (see below).

- Non-domestic deposits were given priority in the bankruptcy proceedings of the three old banks and were paid in original foreign currencies for their nominal value

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[12] Méndez-Pinedo, M.E. (2011), *The Icesave Dispute in the Aftermath of the Icelandic Financial Crisis: Revisiting the Principles of State Liability, Prohibition of State Aid and Non-discrimination in European Law*, „European Journal of Risk Regulation", 2011, vol. 2, Issue 3, pp. 356-372, republished online by Cambridge University Press on 20 January 2017, available online at <https://doi.org/10.1017/S1867299X00001379> and Méndez-Pinedo, M.E., *The Icesave saga: Iceland wins battle before the EFTA Court*, Symposium on Multi-level Adjudication of EU financial crisis reforms: Constitutional Questions in Comptemporary EU Law, in „Michigan Journal of International Law", 2013, pp. 101-11.

[13] Icelandic Parliament, Resolution on accession petition to the EU 1/137 from 16 July 2009 (*Þingsályktun um aðildarumsókn að Evrópusambandinu*).

[14] See Euroactiv news from 13 March 2015 at <https://www.euractiv.com/section/enlargement/news/iceland-officially-drops-eu-membership-bid/> last accessed 25.09.2020.

[15] Icelandic Parliament, Emergency law – *Neyðarlögin.* Act no. 125/2008.

[16] On the first referendum see Ice News 7 March 2010 online at <https://www.icenews.is/2010/03/07/official-confirmation-of-huge-iceland-no-vote-in-icesave-referendum/>last accessed 25.9.2020. On the second referendum on Icesave see Ice news 10 April 2011 online at https://www.icenews.is/2011/04/10/statement-from-the-government-of-iceland-on-the-outcome-of-the-referendum-on-the-icesave-agreements/ last accessed 25.9.2020.

with the assets of the banks ("bail-in"). While recovery of all amounts beyond the minimum of 20.887 guaranteed by Directive 94/19 on deposit guarantee schemes[17] was respected for both individual depositors and institutions, the liquidation of assets took obviously some years.[18]

Iceland also unilaterally imposed restrictions and derogations to the free movement of capital. This was also challenged before the EFTA Court. However, in the *Sigmarsson* case[19], the Court ruled that the measures taken were justified under the exceptions of Article 43 (2) and (4) EEA Agreement, which allow for restrictions of free movement of capital in case of disturbances of the national capital market and in case of a serious threat of difficulties with regard to balance of payments. The Court further stated that Iceland had a wide margin of discretion with a view to assessing the complex macro-economic situation in the aftermath of the financial crisis.

The re-structuring of external debt and the restrictions on capital outflows, coupled with austerity in fiscal policy and tax increases for higher income groups, resulted in an improving macroeconomic outlook for Iceland during 2010-2012. The International Monetary Fund (IMF), while recommending to lift the capital restrictions, attested at the time that Iceland was gradually emerging from the crisis and has made significant steps in restoring macroeconomic and financial stability[20]. However, problems remained for example with regard to private debt (ie. household debt restructuring), an issue that would become essential and would influence later legislative elections in 2013[21].

Some years after the crisis, Iceland's recovery stood in stark contrast to the situation in many EU Member States especially in the periphery of the EU.

During the same period, the banking and financial crisis together with the sovereign debt crisis in Europe questioned the basic design of the Eurozone[22] . For many Icelanders, these troubles showed that mere accession to the EU and the Eurozone did not alone guarantee economic stability.

4. The Icesave saga 2009-2013: a legal dispute that probably derailed Iceland´s accession to the EU

As stated before, the Icesave legal dispute exemplified the tensions in the EEA and EU legal order and different positions on globalisation and European integration,

[17] Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes. *OJ L 135, 31.5.1994, p. 5–14*, no longer in force.

[18] For an overview of the measures taken see Gunnarsson, E.G. *The Icelandic Regulatory Responses to the Financial Crisis*, „European Business Organization Law Review", 2011, vol. 12, pp. 1-39.

[19] EFTA Court, case E-3/11 *Sigmarsson v Central Bank of Iceland*, Judgment of 14 December 2011.

[20] International Monetary Fund (IMF). Public Information Notice (PIN) No. 12/34, April 12, 2012.

[21] In 2013 a center-right coalition came back to power suspending the accession negotiations to the EU started by a different social democrat-left wing government in 2009. The key issue discussed was the promise to do a "leiðrétting" or restructuring/revision of mortgage credit for all households affected by the indexation of credit to inflation. See Méndez-Pinedo, M. E., *Iceland. The new plan for debt-relief to help over-indebted households after the crisis: Jubilee or Waiting for Godot?, European Journal of Risk Regulation* 2014, issue 4, pp. 517-530. Republished online by Cambridge University Press: 20 January 2017 available online at <https://doi.org/10.1017/S1867299 X00004104>.

[22] See for example Charlemagne. *The end of Monnet,* „The Economist", 3 September 2011.

especially the problems of fully integrating financial services, justice, fundamental rights, and solidarity between European nations. After the failure of a diplomatic approach, the issue was finally solved by the EFTA Court in 2013.[23] While this Court has contributed to the homogeneity of the EU and EEA legal order by making individual rights of citizens and economic operators effective; this was, however, a very difficult issue since it fell into the intersection of EU law, EEA law and international economic law. The different positions could not be more apart. The arguments for a sovereign guarantee of last resort for all deposits, mainly advocated for by the U.K., Holland, the European Commission and the ESA, were based on a perceived implicit state guarantee in case of bankruptcy of the Deposit Security Fund established by Directive 94/19.

Proponents also pointed at the fundamental principle of non-discrimination in the EU/EEA legal order, which requires similar treatment of comparable cases and thus the recapitalisation of deposits in Icesave, the foreign branch of Landsbankinn, by the Icelandic State.

In contrast, Iceland did not read neither saw a legal basis for state liability in Directive 94/19 and interpreted the Directive as to not establishing automatic state liability. It pleaded instead that the general requirements of state liability post-*Francovich*[24] (EU law) and post-*Sveinbjörnsdóttir*[25] (EEA law) should apply. As for the non-discrimination, Iceland clarified the problem. It was not a direct discrimination on the basis of nationality but an indirect discrimination (where justification is allowed) on the grounds of fiscal residence. Iceland argued that the discrimination or different approach reflected the fundamental principle of the territorial jurisdiction of a Sate and the scope of its national tax and budgetary legislation. To recapitalise the banks within the national territory after the collapse of 85% of its financial sector fell well outside of the scope of the EEA legal order and went well beyond the obligations assumed by the guarantee insurance scheme for banks deposits. All residents and companies located in Iceland were treated equally and there was no discrimination on nationality whatsoever. Moreover, it argued that the effectiveness of EU law vis-à-vis European citizens could not be a point at issue; because the UK and Holland had substituted themselves in the position of individual depositors converting the dispute into a conflict between States of public international law.[26] Last but not least, Iceland argued that the assets of the failed bank allowed for the gradual payment of the debt to the Treasures of the UK and Netherlands and that EU/EEA law imposed no obligation to convert private debt of a failed bank into sovereign debt of the state. As long as Iceland assured the payment of the principal – far beyond the minimum 20.887 € required by the Directive – through the winding-up of the assets of the bank, there should be no dispute on the methodology followed except maybe for the interest.

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[23] EFTA Court. Case E-16/11 *EFTA Surveillace Authority vs. Iceland* (Icesave) [2013]. EFTA Ct. Rep. 4. See also press release of 28 January 2013 online at <https://eftacourt.int/wp-content/uploads/2019/01/16_11_PR_EN1.pdf> last accessed 25.9.2020.

[24] CJEU, Judgment of the Court of 19 November 1991.Case *Andrea Francovich and Danila Bonifaci and others v Italian Republic*. *European Court Reports 1991 I-05357* or ECLI:EU:C:1991:428.

[25] EFTA Court. Judgment of the Court of 2 April 2013. Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland.* EFTA Court Rep.available online at <https://eftacourt.int/cases/e-09-97/> last accessed 25.9.2020.

[26] The UK and Netherlands reimbursed the deposits to the citizens and institutions right away with their Treasure funds (however with a limit of 100.000 euros in Netherland).

Iceland finally won the case before the EFTA Court on 28 January 2013[27]. In the process, however, Icelanders saw how the EU took sides with the financial institutions (creditors) and all EU countries against them.[28] The window for opportunity that had opened in after the crisis of 2008 for the EU to prove that accession would be beneficial for Iceland and that solidarity was not an empty word in EU Treaties closed again.[29] Some years later, Iceland was saved by a tourism boom without precedents that led to the overheating of the economy[30]. Accession to the EU was therefore quickly forgotten by general public and politicians.

5. Iceland and Europe: the everlasting political dilemma

Iceland's application for EU membership was submitted by its Parliament in July 2009, put on hold in 2013 after legislative elections and lately frozen in 2015 by a letter from the Ministry of Foreign Affairs to the EU Presidency and European Commission. One decade later, the legal status of Iceland remains to say the least, rather unique. Iceland is a non-candidate country.[31]

The political landscape has changed a lot during the last ten years and a gap between Iceland and the EU has only grown wider. There are still strong arguments in favour and against EU membership of Iceland. On the EU side, the EEA legal order is sometimes regarded as an experiment that will end with the EEA countries in the end joining the EU. Icelanders are traditionally divided among themselves on the issue of European integration.[32]

Icelanders in favour of EU membership point at the shortcomings of the EEA Agreement concerning lack of participation of the EFTA/EEA countries in the legislative process. The EEA makes Iceland a policy-taker rather than a policy-maker and questions

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[27] EFTA Court, Judgment in Case E-16/11 EFTA Surveillance Authority v Iceland (Icesave), available online at <https://eftacourt.int/download/16-11-judgment/?wpdmdl=1260>; and press release with a summary at <https://eftacourt.int/wp-content/uploads/2019/01/16_11_PR_ EN1.pdf>, both last accessed 25.9.2020.

[28] Méndez Pinedo, M.E., *Iceland at the crossroads: a dilemma in European integration. Þjóðarspegill, Félagsvísindirannsóknir, Háskóla Íslands*. University of Iceland, Reykjavik, 2009, pp. 329-340.

[29] M. Elvira Mendez-Pinedo, *The Icesave dispute and other national measures in response of the financial crisis,* European Journal of Risk Regulation, 2011, vol. 3, pp. 354-369. Republished online by Oxford University Press on 20 January 2017, available at <DOI: https://doi.org/10.1017/S1867299X00001379> last accessed 25.9.2020; M. Elvira Méndez-Pinedo, *Iceland and the EU: Bitter lessons after the bank collapse and the Icesave dispute*. Contemporary Legal and Economic *Issues III*, University of Osijek, Croatia, 2011, pp. 9-42. See also Bergman, E. *The Icesave dispute: case study into crisis of diplomacy during the Credit Crunch*, ECPR, 2014, and chapter in the book from same author *Iceland and the International Financial Crisis: Boom, Bust and Recovery*. Palgrave Macmillan, Basingstoke and New York, 2014 available online at <https://ecpr.eu/Filestore/PaperProposal/9d850d33-d60a-4ee1-a5fd-067dfcb3922b.pdf> last accessed 25. 9.2020.

[30] M. Elvira Mendez-Pinedo, *Islandia: La economía de la montaña rusa. 2007-2017*, at <https:// elfaro.is/2017/03/28/la-economia-de-la-montana-rusa-islandia-2007-2017/>; and "Iceland-Spain. 2008-2018. Two countries ten years after the crisis" at <https://www.theeconomyjournal.eu/texto-diario/mostrar /1336287/iceland-spain-2008-2018-two-countries-ten-years-after-the-crisis> both last accessed 25.9.2020.

[31] European Council, see <https://www.consilium.europa.eu/en/policies/enlargement/iceland/> last accessed 25.9.2020.

[32] On the question of why the EEA and not the EU, see Bergmann, E. *Hvers vegna EES en ekki ESB? Tímarit um félagsvísindi*, 2007, vol 1(1), pp. 9-17.

its independence and sovereignty. As Bergman has claimed, the "sovereignty equation" is influenced by the fact that Iceland has already transferred decision-making rights to Brussels institutions through the EEA Agreement, but might gain increased control over the decision-making processes in the fields already covered by the EEA Agreement.[33] The democratic deficit was nevertheless the price to be paid for access to an internal market of circa 500 million citizens (before Brexit).

Another important argument is that in the medium and long term the Icelandic currency (ISK Króna) has limited and difficult future as an independent currency. Accession to the eurozone area would, for example, help to lower the traditionally high interest rates that are the necessary price for such a small highly volatile currency. The loss of financial and monetary policy could be, however, fatal for Icelandic economy, not always synchronised with the euro area.[34]

On the other hand, many Icelanders regard the EEA Agreement as an acceptable default position instead of EU membership and as a perfect basis for further internationalization. The Euro troubles and difficulties of Member States to act concertedly in the last decade fundament this opinion. Afterall, the devaluation of the ISK króna after the financial crisis helped Iceland in an amazing process of economic recovery until 2018.[35]

Furthermore, the management of fisheries and other natural resources is a contentious point at issue. The Iceland fisheries and agricultural interest groups are strong opponents of EU membership, and, with regards to the success in building up a sustainable and economically profitable Icelandic fishery sector, many Icelanders share their opinion. At the same time, the EU is reforming its own fisheries policy and has already signalled the possibility of a compromise between the EU fisheries policy and the Icelandic fishing rights system. Apart from environmental sustainability and economic efficiency, the social pillar and the redistribution of profit resulting from use of natural resources seem to be key differences.[36]

But, more fundamentally, the ideas of sovereignty and independence are crucial arguments in the debates again and again. But they are also elusive concepts subject to a changing understanding of what sovereignty means in contemporary Europe. Arguments have been put forward, exceptionally, in the Icelandic legal literature that the traditional notions of sovereignty are not applicable any longer to the European integration process. For example, G.G. Schram has pointed out that the concept of sovereignty has developed and changed, both in international law and national law.[37] B.

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[33] Bergman, E. *Sense of Sovereignty*, „Stjórnmál og Stjórnsýsla", 2009, vol. 2 (5) at. p. 212.

[34] Mendez-Pinedo, M.E. *Islandia: La economía de la montaña rusa. 2007-2017*, available online at<https://elfaro.is/2017/03/28/la-economia-de-la-montana-rusa-islandia-2007-2017/> last accessed 25.9. 2020.

[35] Ibid.

[36] Helga Hafliðadóttir, *The European Union´s Common Fishery Policy and the Icelandic Fishery Management System. Effective implementation of sustainable fisheries.* Master´s thesis. University of Iceland, 2012 available online at <https://skemman.is/handle/1946/10586> last accessed 25.9.2020.

[37] Schram, G.G. "Framsal ríkisvalds til Evrópubandalagsins", in *Ármannsbók: afmælisrit helgað Ármanni Snævarr í tilefni sjötugsafmælis hans 18. september 1989.* Sögufélag Reykjavíkur, 1989, pp. 219-247. The author points out that since World War II nations have increasingly limited their sovereignty willingly by rendering powers to international or supranational organisations. Such rendition is not regarded, according to him, as an indentation/curtailment of sovereignty, since these States have done this freely in accordance

Thorhaldsson points in the same direction.[38]

To complicate the matter, Icelanders seem to neither interpret nor perceive the concept of sovereignty in a rational, but in an emotional manner. Strong independence is a concept deeply anchored in the Icelandic society and perceived as different from other independence movements in that it is a means of formal control over domestic patterns and independence of foreign control rather than as a matter of internal society building.[39]

At the same time, as claimed by Kristinsson, although the word "independence" is always used in political rhetoric within the debate on the relations between Iceland and the EU; it might also be the case that some factors and fears are being overstated.[40] In the same vein, Miles adds that the discussions could be artificial as there are already agreements with the EU in place which make complete exclusion from EU affairs virtually impossible.[41] In his view, "comprehensive (EU) membership is still elusive but a high degree of interdependence between Nordic countries and the EU means that their futures remain permanently entwined".

Iceland celebrated in 2018 one hundred years of sovereignty leading to independence.[42] In 2020, accession to the EU seems to be out of the picture and long forgotten. Euroscepticism remains strong and a mild nationalism is always present.

6. The EEA Agreement. 25 years of European cooperation celebrated in 2019

On 20 March 2019 Iceland also celebrated its twenty-fifth (25) anniversary of cooperation with the European Union (EU) through the EEA Agreement. The declaration commonly issued by the EEA Prime Ministers that day is included as Annex 1.[43]

There is general consensus in the country on the success of this treaty that extends the single market and other common European policies to Norway, Liechtenstein and Iceland and that has become a fundamental pillar of its recent history. And this despite the fact that it is an extremely sui generis legal experiment that some predicted almost impossible in practice (a hybrid European legal order built on the grounds of public international law and European Community Law).[44]

However, beneath the story of general success, we find other underlying crises

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with their constitutional law. He concludes that this change in the "concept of sovereignty" can also be detected in Icelandic constitutional law.

[38] Thorhallsson, T. (ed.), *Iceland and European integration. On the edge*, Routledge, London, 2004, pp. 128-144.

[39] Bergmann, E. "Sense of Sovereignty". *Stjórnmál og Stjórnsýsla*, 2009, vol. 2 (5) pp. 210-211.

[40] See Kristinsson, G.H., "Iceland and the European Union. Non-decision on membership", in Miles, L. (ed). *The EU and the Nordic countries*, Routledge, London-New York, 1996, pp. 147-161.

[41] Miles, L. (ed). *The EU and the Nordic countries*, Routledge, London-New York, 1996, pp. 3-14.

[42] See news at Icelandic website on information about the country <https://www.iceland.is/ press/press--media-kit/centenary-of-icelandic-independence-and-sovereignty/> last accessed 25.9.2020.

[43] EFTA, AELC (EFTA en inglés). EEA EFTA Prime Ministers and EU council celebrate 25 years of European Economic Area. Bruselas 21 de Marzo de 2019. Declaration available online at <https://www.efta.int/EEA/news/EEA-EFTA-Prime-Ministers-and-EU-council-celebrate-25-years-European-Economic-Area-512671> last accessed 25.9.2020.

[44] Baudenbacher, C., Tresselt, P. and Orlygsson, T. "The EFTA Court: Ten year on". *EFTA Court Symposium* 21 October 2004. Bloomsbury Publishing, London, 2005, at p. 5.

or tensions that are not so obvious or well known to the public despite their extreme legal importance and their practical consequences for citizens. This is the case of the application and enforcement of the EEA Treaty with regards to the protection of individual rights and the authority of EEA law vis-à-vis national law. In December 2017, the EFTA supervisory authority, ESA, equivalent to the European Commission, formally sent a letter of notice to Iceland (beginning of infringement procedure).[45]

The ESA claims that Iceland does not provide EEA Law with the effectiveness and superior authority over national law (in case of conflict) that it did promise under the Protocol 35 of the EEA Treaty. The most recent research on which the European authority relies shows that the Icelandic Supreme Court recognizes in principle the need for a friendly/consistent interpretation of national law in light of European law (with its natural limits) but not the ultimate authority or quasi-primacy of EEA law vis-a-vis national inconsistent approved by the Icelandic Parliament (that should be set aside under EEA Agreement). In the opinion of the authority, this judicial violation of EEA Law would give rise to State responsibility for breach of the EEA Agreement (similar to that existing in EU Law by *Francovich*[46] and *Köbler*[47] jurisprudence from the Court of Justice of the European Union).[48]

The Icelandic Government has not formally replied to the letter since the correct implementation of Protocol 35 in Iceland involves a difficult question that has become more and more difficult to deal with as it probably requires constitutional amendment. At the time of writing, there has been no final decision to bring Iceland to the EFTA Court.

In September 2019, an important report commissioned by the Minister of Foreign Affairs on the advantages and disadvantages of Iceland's membership of the Agreement on the European Economic Area (EEA Agreement), the impact of the Agreement in Iceland and most important challenges that lie ahead was completed and released to the general public. [49]

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[45] EFTA Surveillance Authority (ESA). 2017. Letter of Formal Notice to Iceland from 17 December 2017 on application of Protocol 35 EEA Agreement available online at <http://www.eftasurv.int/da/Document DirectAction/outputDocument?docId=4071> last accessed 25.9.2020.

[46] In the EU legal order, Member States are liable for damages caused to individuals for breaches of EU law for which the State is responsible. See CJEU, Judgment in *Francovich*, Joined Cases C-*6l90* and C-9l90, EU:C: l99l:428.

[47] In *Köbler*, the CJEU clearly confirmed that this principle also applies to infringements of EU law stemming from a decision of a judicial body adjudicating at last instance. CJEU, Judgment in *Köbler*, C-224101, EU:C:2003:513, paragraphs 39 and 40. It seems, however, that the *Köbler* doctrine is far from settled from the perspective of 27 national legal orders. For a comment of case *Köbler* in all European jurisdictions see Varga, S. "The application of the Köbler doctrine by Member State Courts", *ELTE Law Journal*, 2016 (2) available online at <https://eltelawjournal.hu/the-application-of-the-kobler-doctrine-by-member-state-courts/> and "Why is the Köbler principle not applied in practice", *Maatricht Journal of European and Comparative Law*, 2016, vol. 23 (6), pp. 984-1008, available online at <https://doi.org/10.1177/1023263X1602300605> both last accessed 25.9.2020.

[48] EFTA Surveillance Authority (ESA). 2017. Letter of Formal Notice to Iceland from 17 December 2017 on application of Protocol 35 EEA Agreement available online at <http://www.eftasurv.int/da/ Document DirectAction/outputDocument?docId=4071> last accessed 25.9.2020.

[49] See Iceland. Ministry for Foreign Affairs. Report on the Working Group for EEA Cooperation. Reykjavík, September 2019, executive summary in English available online at <https://www.government.is/library/01-Ministries/Ministry-for-Foreign-Affairs/PDF-skjol/EEA%20report%20executive%20summary.pdf>. Full

A Committee of domestic experts was requested to complete the following tasks: 1) to summarise and assess the benefits to Iceland of participation in the EEA cooperation and the principal challenges faced by government in implementing the EEA Agreement; 2) to assess the legal framework transposed into Icelandic law in the areas covered by the EEA Agreement and, additionally, to analyse the attendant business, economic, political and democratic dimensions; 3) to survey trends in the relations between the EEA/EFTA states and the EU, including all changes resulting from the United Kingdom's exit from the EU and the position of relations between the EU and Switzerland; 4) to consider the reports that have been issued in recent years that address the relations between Iceland and the European Union; taking special account of the extensive report prepared by Norway, concerning Norway's relations with the EU; and 5) to compile a list of references and scholarly works relating to Iceland's membership of the EEA Agreement.[50]

The report issued in September 2019 is interesting for many reasons. In the first place, it has a contextual nature and a multidisciplinary approach. In the second place, it looks at the EEA cooperation from both an Icelandic and European/international perspective. It examines Iceland's membership of the EEA in the historical context of the development of international co-operation on economic and financial affairs since the end of the Second World War. Regarding legal matters, the report tries to summarize the most relevant substance of the Agreement as well as all formal procedures followed for its regular update (a process done amending regularly the annexes to the EEA Agreement, not the EEA Treaty itself). A repertoire or compilation is done with all domestic laws approved by the Parliament/Althing since 1992 to September 2019 with so-called EEA relevance (falling under the scope of the EEA Agreement). There is also a report listing summaries of different constitutional opinions that have been issued regarding the EEA cooperation and the constraints imposed by the Icelandic Constitution. From a political point of view, it is interesting to see the examination of most important trends in domestic governance related to the EEA. We also find a list of all policy areas falling under the Agreement as well as a description of the corresponding institutional and political framework.[51]

As the members of the Committee state, the objective of the report was not to take a positive, neutral or negative stand on the advantages and disadvantages of the EEA co-operation, but only to establish the facts to enable readers of the report and general public to arrive at their own conclusions.[52] In this regard, the report is exemplary since different complex and difficult legal, political and economic matters are very well explained in an organised manner and contextualised with a present historical perspective. Although it ends up with some important recommendations for improvement, it is clear that the EEA Agreement is well alive and has served the interests of the country for 25 years. The goal seems attained, the report makes it easier for

version in Icelandic is available at <https://www.stjornarradid.is/lisalib/getfile.aspx?itemid=013b2f1a-e447-11e9-944d-005056bc4d74>. Both documents last accessed 25.9.2020.

[50] Iceland. Ministry of Foreign Affairs. Report on the Working Group for EEA Cooperation, 2019, at p. 3. Document available online at https://www.government.is/library/01-Ministries/Ministry-for-Foreign-Affairs/PDF-skjol/EEA%20report%20executive%20summary.pdf last accessed 25.9.2020.

[51] Ibid, pp. 6-12.

[52] Ibid, p. 3.

politicians and the general public to weigh and assess all rights, obligations and benefits for Icelandic people that derive from the EEA membership.

In a separate Annex 2 are listed the conclusions of the EEA Working Group Committee with fifteen points or issues that need to be improved *de lege ferenda*. Some of them had been previously studied by Margrét Einarsdóttir in her doctoral thesis defended at the University of Iceland.[53]

As this professor concluded in this research project, the execution of the EEA Agreement has proved to be a complicated task relying on two consecutive and essential steps; Firstly, EU acts (that are considered EEA-relevant), have to be incorporated into the EEA Agreement (by the EEA Joint Committee). Secondly the EEA acts need to be implemented at national level by the legislative and executive powers. This two-step process has not been working sufficiently well in recent years, resulting in failure by the Icelandic state to fulfil its obligations on the basis of the EEA Agreement. Einarsdóttir explains the reasons behind this problem by mapping and analysing all the different factors that hinder both the incorporation of EU/EEA law into the EEA legal order and the implementation of EEA law into Icelandic law. Most importantly, she provides important suggestions on how to improve these processes.[54]

7. Final comments

The EEA Agreement is by far the most extensive international agreement Iceland has ever signed and ratified as an EFTA State. It has played a vital role in the country´s economy for 25 years giving it access into the European internal market (four freedoms, ie free movement of goods, persons, services and capital together with other policies). The question: "Why is Iceland so deeply integrated into this European legal order without being a full member of the EU and having a voice and full voting rights (a formal role and weight in the legislative process)?" remains difficult to answer. The reply traditionally given by political scientists is qualified as an expression of what is called "rational choice institutionalism": as a typical export economy, Iceland is strongly dependent on access to the internal market. [55]

This author agrees with that doctrinal conclusion. At the time when it was created, the EEA Agreement was a perfectly rational way of gaining access to the internal market without any of the politically sensitive implications of full EU membership. Twenty-five years later, this is still the case. Nothing substantially important has yet altered the preference of Iceland for EEA cooperation and access to the European single market. In 2020, full EU integration is out of the picture.

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[53] Einarsdóttir, M., *Incorporation and Implementation – The Execution of the EEA Agreement by the Icelandic State*, „Nordic Journal of European Law", 2019, vol. 2, no. 1.

[54] Ibid. Einarsdóttir argues that there are two underlying principal reasons for this poor performance. Firstly, changes within the EU constitutional legal order have added new challenges to the execution of the EEA Agreement (ie. EU Treaties have been modified several times after 1992). Secondly, there seems to be a certain lack of willingness among Icelandic politicians to accept the legal realities of the EEA agreement. The two factors combined have led to delays in the processes of implementation of EEA law in Iceland to the detriment of citizens and economic operators in the country.

[55] On this issue see review by Conrad, M. Review of book by Jóhanna Jónsdóttir, *Iceland and the EU: Europeanization as an unintended consequence of the EEA Agreement*, Routledge, 2013, in *Stjórnmál og stjórnsýsla*, 2013, vol 9 (2), at p. 24.

However, the story of celebration and success must not hide other important issues. One of them is the recognition that this EEA Agreement had always a price tag attached to it, that is to say, a lack of participation in the EU legal-making process. This is an important issue in the political science arena. Iceland is not a policy-maker but a policy taker (a policy shaper in the best case). This price (democratic deficit) is becoming more and more difficult for newer generations of Icelanders to accept since the standards concerning democracy and rule of law tend to improve with time. The generation that negotiated the EEA Agreement is not anymore in power. Some proposals for improvement are signaled in the 2019 Report on the EEA Agreement in this regard (Annex 2, points 9-14).

The other important issue belongs to the legal arena. It refers to the constitutional and fundamental rights importance of the correct application and implementation of EEA law by the Supreme Court of Iceland (obligation resulting from Protocol 35 of the EEA Agreement). The Commemorative Statement of the EEA Prime Ministers on 20 March 2019 refer to the overall balance between rights and obligations and benefits as key to maintaining the integrity of the EEA (Annex 1, point ii). Going even further, the 2019 Report on the EEA Agreement concludes with a last point for improvement (Annex 2, point 15) where it says: *"Over the years, tens of thousands of Icelanders have taken advantage of the rights conferred by the EEA participation, including the right to seek an education or seek medical help in other countries. To create a balance between rights, obligations and benefits has been, and remains, one of the chief objectives of the EEA co-operation. This should be respected by Icelandic government authorities."*

This author concludes with a similar note. The European legal cooperation process is a dynamic project always in the making and never finished completely. Rights and obligations are inseparable and go together. The EEA Agreement must be secured every day by the legislative, executive and judicial powers of in all EU-EFTA/EEA countries that signed it and ratified it as a twin European legal order based on homogeneity and reciprocity. Our European rights are at stake.

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Annex 1
Commemorative Statement of the EEA Prime Ministers on 20 March 2019[56]

On the occasion of the 25th anniversary of the EEA Agreement, the prime ministers of Iceland, Liechtenstein and Norway gathered in Brussels on 22 March 2019 and issued the following declaration:

i. We reaffirm our shared values of democracy, individual freedom, the rule of law and human rights, and a common commitment to open societies and open economies. We rededicate ourselves to building a peaceful and economically strong Europe for future generations.

ii. For 25 years, the EEA Agreement has guaranteed equal treatment, legal certainty and predictable conditions for citizens and businesses. The two-pillar structure ensures uniform interpretation and application of EEA law through parallel institutions for surveillance and judicial review. The overall balance between rights, obligations and benefits is key to maintaining the integrity of the EEA.

iii. The EEA Agreement also provides a framework for extensive rules-based multilateral cooperation in Europe. It promotes prosperity, innovation, competitiveness and general welfare, and plays a key role in fostering high social, consumer and environmental standards.

iv. Iceland, Liechtenstein and Norway contribute actively to shaping EEA relevant EU legislation and programmes through their participation in EU committees and expert groups.

v. The EEA is a manifestation of solidarity among the countries of Europe in overcoming shared social and economic challenges. The EEA and Norway Financial Mechanisms are making a lasting contribution to reducing social and economic disparities in the EEA and supporting a free and vibrant civil society, to the benefit of Europe as a whole.

vi. During the last 25 years, Europe has undergone profound changes. The positive spirit of cooperation has allowed for adaptations and pragmatic solutions to meet our common challenges. Taking stock of these achievements, we reconfirm our support for the EEA Agreement as the cornerstone of our relations with the European Union.

[56] See Report of the Working Group of the EEA available online at https://www.government.is/library/01-Ministries/Ministry-for-Foreign-Affairs/PDFskjol/EEA%20report%20executive%20summary.pdf, p. 5.

Annex 2.
Report of the Working Group on the EEA co-operation. September 2019
Fifteen points for improvement (EEA Agreement) [57]

1. Since 1992, no comparable opportunity has materialised for a trade and co-operation agreement with the EU that matches the participation in the EEA. No bilateral agreement could replace the EEA Agreement. Doubts regarding the constitutionality of full participation in the EEA co-operation weakens Iceland's position vis-à-vis its partners, especially Norway and Liechtenstein.

2. Constitutional disputes relating to the EEA membership need to be brought to a conclusion, either by recognising that the membership has achieved a constitutional status like other unwritten constitutional rules or by inserting a provision on the membership in the Constitution.

3. It needs to be recognised indeed that the participation in the EEA shapes Icelandic society; the participation should not be regarded as foreign encroachment. It should be confirmed that integration is an integral part of free international co-operation and that sovereign states are at liberty to decide how far to proceed on that path.

4. On the basis of the EEA Agreement, the Icelandic government is afforded scope to take independent decisions and defend Iceland's interests. If there is a desire to expand this scope, an unequivocal position should be taken as to what the changes should involve, and they should be presented jointly by the EEA/EFTA countries. The EU will not take the initiative in making any such amendments to the EEA Agreement.

5. The EEA/EFTA countries should place serious emphasis on strengthening the two-pillar structure and safeguard the credibility of its institutions. The system will not survive unless the EFTA pillar is strong. It needs to be ensured that the EFTA Court continues to enjoy respect and trust both inside and outside the EEA/EFTA pillar. A response is needed to the increased specialisation in the collaboration with the EU's agencies by reinforcing the EFTA Surveillance Authority (ESA).

6. The assignment of competencies of the EU Commission to agencies gives the EEA/EFTA countries greater scope to influence decisions than they had before vis-à-vis the EU Commission. The agencies and their work should be seen as presenting opportunities for the EEA/EFTA countries, and not a threat.

7. If Iceland were to stand outside the legislative co-operation within the EU, and if it planned to function based on homespun rules, this would entail a significant risk of isolation, stagnation and regression in all sectors of the Icelandic society. This applies particularly to the economy and the industries and the areas most affected by technological advances. In this regard the translation centre of the Ministry for Foreign Affairs plays a key role as an invaluable venue for innovation and translation.

8. In the European Economic Area there is tension between countries in the north and the south, particularly in the social dimension and with regard to the rights of labour unions and workers. In order to safeguard institutes of general economic significance and the core values of Icelandic society in this regard, the Nordic legislative co-operation should be made more influential in the shaping of EU legislation. The report of the Nordic Council of Ministers of 2018, prepared by Inge Lorange Backer, suggests some

[57] Ibid, pp. 13-15.

good ways to achieve this.

9. Reports produced under the aegis of the Althing and state government are evidence that a great deal of effort has been spent on deliberating on the best means of governance regarding the EEA co-operation. A firm decision needs to be made on the handling of EEA matters within the Cabinet by means of a presidential decree on the division of ministerial responsibility. It needs to be recognised in the government system that large parts of the EEA co-operation are entirely domestic matters, and the role of the Ministry for Foreign Affairs should be defined accordingly.

10. A foundation should be laid for greater discipline in all management and procedures regarding EEA affairs on the home front. An administrative coordination centre for EEA affairs should be established within the government with a permanent staff that continuously monitors everything that concerns the policy area in question at the decision-shaping and implementation stages.

11. A governmental priority list compiled annually on principal EEA matters should be followed up in a systematic manner. Specific policy areas should be given greater weight in the ministries with trained staff and decision-making based on political guidance. By strong arguments and coordinated efforts the EEA/EFTA countries can achieve significant results within the EEA in advancing their interests.

12. A human resource policy needs to be shaped regarding government participation in the EEA co-operation. The people who do this work need to be given the opportunity to obtain specialised knowledge through study and research leaves at foreign universities, academies or research institutes.

13. Greater research activities should be promoted on EEA matters and in more disciplines than law. Through co-operation between the government, stakeholders and research institutes a think tank should be established on EEA affairs to serve as an advisory agency, contribute to the public debate and organise seminars.

14. Politicians, ministers and members of parliament need to devote more attention to EEA matters; without their participation it is impossible to promote Iceland's political viewpoints. The Althing should enhance its relationship with the EU Parliament by posting a liaison officer in Brussels.

15. Over the years, tens of thousands of Icelanders have taken advantage of the rights conferred by the EEA participation, including the right to seek an education or seek medical help in other countries. To create a balance between rights, obligations and benefits has been, and remains, one of the chief objectives of the EEA co-operation. This should be respected by Icelandic government authorities.