THE RIGHT OF ESTABLISHMENT WITHIN EFTA: A COMPARISON WITH THE EEC

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INTRODUCTION

After the establishment of the European Economic Community, the United Kingdom proposed that there should be created a free trade area around the EEC with the participation of the other OEEC countries. This would secure an unrestricted flow of goods within that area, and it would not necessitate a common customs barrier against the rest of the world. Thus Britain would be able to preserve the customs preferences towards the Commonwealth. These negotiations within the OEEC broke down in November 1958. In the following year Britain, Denmark, Norway, Sweden, Switzerland and Austria established their own European free trade area (EFTA) by signing the so-called Stockholm Convention. Finland became an associate member in 1961, and later Iceland acquired full membership.

The organization of EFTA, which was meant only as a temporary arrangement until some sort of arrangement with the EEC could be reached, is relatively simple. The decision-making body is the Council, which meets both on a ministerial and on the official level. In the Council each member state has one vote, and decisions of major importance must be unanimous. The administrative work is taken care of by a secretariat situated in Geneva. Unlike the EEC Commission, the EFTA Secretariat has no decision-making competence. Disagreements concerning the interpretation and application of the Convention are primarily to be settled by means of informal bilateral negotiations between the member states affected. However, the Convention also embodies a procedure which implies sanctions against member states. The legal methods of EFTA have more in common with the rules of GATT than with those of the EEC.

1. THE RULES OF COMPETITION

The objectives of EFTA are to increase trade, economic activity and living standards by means of a more rational production and

distribution within a free trade area. In order to establish such a free trade area it is necessary to abolish direct obstacles to trade, such as duties and quantitative restrictions. Duties are, of course, a very elastic instrument that can easily be applied to bring about specific economic effects, and they are more flexible trade regulators than are the more indirect and subtle instruments. When states are prevented from applying direct regulations, they will nevertheless look for alternative means of protecting domestic production, such as trading monopolies, other public enterprises, state subsidies and restrictions on establishment. This is the reason why both EFTA and the EEC have extended their prohibitions to indirect restrictions. But although even indirect restrictions have to be abolished, such restrictions can be concealed with relative ease.

The EFTA Convention, arts. 13–17, regulates indirect restrictions. These provisions are often called the rules of competition because they have the common aim of ensuring trade between member countries on equal terms. Art. 17 prohibits certain restrictions *per se,* while other restrictions are prohibited only if they "frustrate the benefits expected from the removal or the absence of duties and quantitative restrictions on trade between Member States". This so-called "frustration clause" defines the scope of arts. 13–16 and reflects the fact that EFTA is only a free trade area. The competition rules have the limited aim of preventing restraints on freedom of trade. The right of establishment is not an objective in itself. The EFTA Convention does not aim at a harmonization of laws in the member countries. It is only protective restrictions on competition that have to be abolished. It should, for instance, be noted that according to art. 6 of the EFTA Convention direct and indirect fiscal charges that protect domestic goods are prohibited, but that the Convention, unlike art. 99 of the Rome Treaty, does not contain rules aiming at a harmonization of national laws concerning turnover taxes, excise duties or other forms of indirect taxation.

During the first years of EFTA the rules of competition attracted little attention. After the abolition of duties and quantitative restrictions this situation gradually changed. In the latter part of the 1960s the competition rules were studied by groups of experts. The examination of art. 15 concerning restrictive business practices was finished in 1965. Arts. 14 and 16 concerning public enterprises and the right of establishment were examined in 1966 and again in 1968, art. 17 concerning dumping in 1967 and, finally, art. 13 on government aid in 1968.

2. THE LEGAL CHARACTER OF THE EFTA OBLIGATIONS

Art. 16 (1) is the main provision concerning the right of establishment:

> Member States recognise that restrictions on the establishment and operation of economic enterprises in their territories by nationals of other Member States should not be applied, through accord to such nationals of treatment which is less favourable than that accorded to their own nationals in such matters, in such a way as to frustrate the benefits expected from the removal or the absence of duties and quantitative restrictions on trade between Member States.

Art. 16 (1) is very carefully formulated. "Member States recognise that restrictions ... should not be applied." The provision lays down an obligation for the member states to adhere to a general principle rather than to comply with specific rules of behaviour.[1] This interpretation is supported by a comparison with the words used in art. 16 (2). While existing restrictions are only described as unwanted, art. 16 (2) contains a stronger rule concerning new restrictions: "Member States shall not apply new restrictions." The vague expression in art. 16 (1) has its logical counterpart in art. 16 (4). This clause may be considered as the legal framework for the specific implementation of art. 16 (1) by means of unanimous decisions of the Council if the member states do not give effect to the general principle.

The parties to the EFTA Convention were not able to predict in detail to what extent restrictions on the right of establishment would frustrate free trade. They therefore preferred, at least in EFTA's first years, to let the member states themselves decide what restrictions would have to be abolished.[2] Therefore, art. 16 (1) should not be interpreted as a strictly binding provision. This means that in individual matters of complaint the Council only has the competence to make recommendations under art. 31 (3). This situation was changed at the meeting of the EFTA Council in Bergen in 1966. Then, by a unanimous decision the Council

[1] Lambrinidis, *The Structure, Function and Law of a Free Trade Area*, 1965, p. 132, and Leleux, "Companies, Investment and Taxation in the European Economic Communities", *I.C.L.Q.* Suppl. Publ. no. 1, 1961, p. 29.

[2] "The Stockholm Convention Examined", *EFTA Bulletin*, vol. III, 1962, p. 11.

made use of its competence under art. 16 (4), and the member states were thereby subjected to specific obligations in the field of establishment. This means that the Council can by a majority vote authorize sanctions according to art. 31 (4). Concerning enterprises that are not covered by the Bergen agreement there still prevails the earlier system that the Council can only make recommendations.

If the EFTA rules of establishment are interpreted in the way now presented, it seems obvious that they have much in common with the rules in the Rome Treaty.[3] Thus, art. 52 of the Rome Treaty does not contain rules immediately binding upon the member states.[4] The article has to be implemented by means of directives issued by the Council, until the end of the first stage by a unanimous vote and subsequently by means of a qualified majority vote (art. 54 (2)). After the Luxemburg agreement,[4a] unanimity will probably still be the rule in practice. Unlike the Rome Treaty, EFTA has no time limit for the Council's abolition of discriminations by means of decisions under art. 16 (4). The Rome Treaty, art. 52 (1), prescribes that the abolition shall be concluded in the course of the transitional period ending January 1, 1970. After that time art. 52 is immediately binding upon the member states, and they are under a duty to abolish discriminatory restrictions without preceding directives from the Council.[5] In practice, however, the Council has continued to issue directives also after the end of the transitional period. It is possible that the Court of Justice in a future interpretation will give the non-discrimination obligation in art. 52 the force of directly applicable law in the member states.

[3] Opsahl has made a comparison between the rules of establishment in the Rome Treaty and the EFTA Convention, see *Yearbook of the Association of Attenders and Alumni of the Hague Academy of International Law*, 1966, vol. 36, pp. 89 ff.

[4] The EEC Council has in certain fields, for instance restrictive business practices, authority to make regulations which are directly applicable at the national courts in the member states. In the field of establishment the Council can do no more than make directives, which only bind member states, while leaving to domestic agencies a competence as to forms and means.

[4a] The Luxemburg agreement of January 29, 1966, made it clear that France did not accept a qualified majority vote in matters of special national importance. The other member states insisted on the majority rule according to the wording of the Rome Treaty. All parties agreed, however, to continue the EEC cooperation despite this disagreement. They agreed to disagree. See H. Mosler, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 26, June 1966.

[5] Everling, *Aktuelle Fragen des europäischen Wirtschaftsrechts*, 1963, pp. 25 f.

3. THE RELEVANT ACTIVITIES

Both the EFTA Convention and the Rome Treaty clearly prohibit *new* restrictions. In the case of the EEC the prohibition is according to the Rome Treaty self-executing in the member states. This is not the case in EFTA.[6]

The rules on establishment in EFTA are applicable only to economic activities which directly affect trade between member states. The term "economic enterprise" in art. 16 (1) is defined in art. 16 (6) (b): an economic enterprise means any type of economic enterprise for the production of or commerce in goods which are of Area origin. This wording excludes service activities like transport, banking and insurance.

According to arts. 21 and 26 the rules of establishment are not applicable to agricultural goods or maritime products (listed in Annexes D and A).

The rule of origin is another important limitation. This rule is to be found in art. 16 (6) (b), and it refers to the rules of Area Tariff Treatment in art. 4 and in Annexe B to the Treaty.[7]

With regard to their establishment in an EFTA country, enterprises engaged in the production of, or commerce in, manufactured or other goods not qualifying for Area Tariff Treatment cannot claim the privileged national treatment. The EEC Treaty does not have any similar limitation. This is easily explained if one keeps in mind the inherent differences between a customs union and a free trade area. Big commercial enterprises often trade in goods originating both outside and inside EFTA, and sometimes with goods listed in Annexes A and E. In such cases a rigid interpretation of the term "EFTA goods" could prevent the commercial enterprises from enjoying a natural growth and make it difficult for them to adapt their sales policy to new market conditions. In practice, this would, especially in a period when the size of economic units shows a tendency to increase, limit the effect of art. 16. This limitation of the right of establishment could further create a distortion of competition even in the case of goods which *are* of EFTA origin because they would be more difficult to market than would domestic goods. Fair

[6] See the case *Costa* v. *ENEL, Common Market Law Reports,* 1964, pp. 426 ff., especially p. 458.

[7] A detailed description of the rules of origin in EFTA is given in *Building EFTA,* published by the EFTA Secretariat, 1968, pp. 80 ff.

competition between EFTA goods therefore demands that marketing and other service enterprises shall be able to establish themselves even if they deal in goods or provide services that are not EFTA products. In some cases the rule of origin may still be applied. If, for instance, a British commercial enterprise gets permission to sell British cars in Norway, and starts selling cars produced by a subsidiary in Germany, this extension of trade may be prohibited by the Norwegian authorities. Only where a rigid application of the rules of origin would make it difficult for a foreign commercial enterprise to compete with similar national enterprises must these rules be suspended. At a meeting of the EFTA Council on November 14, 1968, it was decided that in terms of *value* a *substantial* part of the goods should be of EFTA origin and have been imported from other member states. This means that in practice the rules of establishment for enterprises covered by the Bergen agreement are not very unlike the rules in EEC.

The interpretation of art. 16 of the EFTA Convention given by the Council through the Bergen agreement to some extent clarifies the obligations of member states in the establishment field. Since certain types of establishment by EFTA nationals are intended to expand intra-EFTA trade, the member states decided to allow, without restrictions implying less favourable treatment in practice, the following types of establishment:

(*a*) establishment of economic enterprises for commerce in goods which are of Area origin, including (i) the employment of commercial agents, (ii) the setting up of branches and subsidiaries, and

(*b*) establishment of economic enterprises for the assembly, finishing or servicing of goods which are of Area origin and are exported from one Member State to another,

(*c*) subject to art. 8 of the Record of Understandings, establishment of economic enterprises for production of goods which are of Area origin and of which a significant part is to be exported to other Member States.

In the cited cases one could presume that restrictions would frustrate the expected benefits, and it was therefore not necessary to demand specific proof of frustration.

According to art. 8 of the protocol to the EFTA Convention,[8] the so-called Record of Understandings, no member state can

[8] This protocol has never been published by the EFTA Secretariat. The protocol is translated into Norwegian in *St.prp.* no. 75 (1959–60), p. 46.

protest against restrictions applied by another member state in order to control access to its capital market, investment in existing domestic economic enterprises, or the ownership of natural resources, "unless their effect, on the facts of a specific case, were shown to frustrate the benefits expected ...". The reservation in the last sentence is considered, at least by Norwegian authorities, to be of little importance. It should be noted that the Bergen agreement means that the exception in art. 8 is no longer applicable to commercial enterprises,[9] but the exception is still applicable to all economic enterprises for production.[1] Without prejudicing art. 8, enterprises of production must automatically be granted national treatment if they satisfy the criteria in group (*c*) above. If they do not, the general frustration clause in art. 16 is applicable.

The Bergen agreement has made the distinction between commercial and production enterprises important, but the Council did not try to clarify the distinction in detail. The member states therefore have to develop such criteria themselves. What about, for example, an enterprise that is mainly engaged in selling photographic equipment but also develops films? Is development of films to be regarded as production, and is this sufficient to classify the whole enterprise as an enterprise of production even if it only represents a small percentage of the total turnover? This distinction has to be defined in relation to the aim of the EFTA Convention. But the EFTA Council is unlikely to be a satisfactory institution for the elaboration of such legal criteria. When EFTA moves from the traditional free trade problems to typical legal fields, the organization will need a court of justice able to create, through comparative studies of the legal systems of the various member countries, a common law that can be applied in all member countries. This means that a further development of EFTA will make it necessary to change its institutional structure.

The Bergen agreement is applicable only to enterprises for the production of goods of which a *significant part* is to be exported to other member states. As we have mentioned above, the exceptions in art. 8 of the Record of Understandings are applicable to such enterprises also. Nevertheless the Bergen agreement concerns many enterprises of production, especially in the metal industry.

[9] This was made clear in a decision of the EFTA Council on November 14, 1968.

[1] *Nordiska Rådet*, 1968, p. 1586.

The meaning of "a significant part" is not clear, but the EFTA Council stated at its meeting on November 14, 1968, that the interpretation should be "liberal".

4. THE FRUSTRATION CLAUSE

The scope of arts. 13–16 of the EFTA Convention is limited by the frustration clause. According to this clause restrictions are not contrary to the competition rules if they do not "frustrate the benefits expected ...". In the EFTA Convention the provisions concerning duties, fiscal charges and quantitative restrictions lay down precise treaty obligations. In the competition rules, on the other hand, it is the frustration clause that fixes the scope of the obligations in relation to certain effects. These effects are related to "expected benefits". This means that the provisions do not impose precisely defined obligations on the member states. The provisions only contain a rule that implies that the consequences of restrictions in relation to the benefits that the other member states may expect shall be taken into account. To evaluate the effect of an activity is very difficult, especially when it relates to future development. Because of this uncertainty it is also difficult for the individual businessman to foresee his own legal position under the treaty, and he might for that reason abstain from trying to establish himself in other EFTA countries.

One method of clarifying the frustration criterion is to investigate the economic consequences that the member states are entitled to expect from liberalization of trade. In this way it would be possible to define the legal scope of the competition rules by means of an economic analysis. Let us assume that all restrictions on exports and imports are abolished and that there are no other restrictions that distort competition. This means that the goods will flow to the country where the price is highest. Goods that are produced in countries with low costs of production will be sent to countries where the costs are higher. However, it is not the costs of production expressed in quantitative application of factors of production that decide whether a product will be sold from country A to country B. The real basis of trade is the difference between comparative advantages. The theory of comparative advantages was formulated some 150 years ago by David Ricardo and has since been further developed.

Let us first assume that, of two countries, one can produce more efficiently than the other, measured by the use of production factors per produced unit of all kinds of goods. It would, of course, be more profitable for the first country to produce more of those goods where its comparative advantages are greatest and to import more of the other goods. Since the comparative advantages of two states will never be symmetrical there will always be possibilities for trade. The difference in comparative advantages is due to the fact that each country will always have its peculiar combinations of resources, and that different products will be produced more cheaply with a greater use of one of the production factors.[2] If country A is utilizing its resources extensively, the trade with country B will make it profitable to transfer within country A production factors from goods where the comparative advantages are small to goods where the advantages are greater. The increased production of the last-mentioned goods may be exported to country B while the reduced production of other goods may be made up for by imports from that country. With a given demand, a given technology and a given quantity of resources in the two countries, both countries with the use of the same quantity of production factors will, by means of free trade, have more goods at their disposal and use their resources more efficiently. This should lead to a general increase in the standard of living. It is, however, not certain that all such advantages will occur at the same time in all countries, and that they will cover all economic sectors.

By having recourse to this generally accepted economic theory it is possible to describe the expected benefits.[3] The question is whether it is possible in this way to identify restrictions to which art. 16 applies. An alternative to an economic description of the expected benefits might be observations of the quantitative increase in the trade in a certain product, and in that product exclusively.[4] This latter method will lead to a limited interpretation of the right of establishment. In this case the right would not comprise enterprises of production if the only effect of the

[2] See Ohlin, *Interregional and International Trade* (Harvard University Press), 1933.

[3] See Kindleberger, *International Economics*, 1963, pp. 87 ff. On the expected economic effects of the EFTA Convention, see Meyer, *The Seven*, 1960, pp. 7–35.

[4] See the interpretation by Martin, "Legal Problems of the European Economic Community and the European Free Trade Association", *I.C.L.Q.* Suppl. Publ. no. 1, 1961, p. 93. This interpretation is criticized by Szokoloczy-Syllaba in the EFTA document EFTA/INF, 16/68, 1968, pp. 28 ff.

establishment would be an increased self-sufficiency in the country of establishment. Such an establishment would lead to a decrease of trade in this product. If, on the other hand, we apply the general economic theory, such establishments must be covered by art. 16 because it will probably give the same economic advantages as liberalization of trade. Further, rationalization of production due to free trade will be more rapid if there is at the same time a free movement of capital and know-how. In order to make possible the change in production that will become more profitable because of free trade, it is necessary to have sufficient capital and know-how. A possible argument against this wide economic interpretation of "the expected benefits" is that it will lead to a right of establishment just as extensive as in an economic union. But it must be assumed that the frustation clause limiting the competition rules in EFTA was introduced precisely because the member states did not want to go as far as that in giving up national sovereignty in order to increase economic efficiency.

A third method of interpreting "the expected benefits" is to connect it with the objectives of the EFTA Convention. According to art. 2 its objectives are to promote in the area of association and in each member state a sustained expansion of economic activity, full employment, increased productivity and the national use of resources, financial stability and continuous improvement of living standards. This wide interpretation of "the expected benefits" is very close to the general economic method. The aim pointed out in art. 2 of the EFTA Convention is very similar to the corresponding article in the Rome Treaty which presupposes an economic union. There is a counter-argument, however. The proclaimed policies of treaties are often very wide and imprecise, and it is therefore generally accepted that it is the specific provisions that confer rights and duties upon the member states. The policy of a treaty as a matter of principle represents the outer limit for its application.[5] Even if a decision is in accordance with a specific article, it is not lawful if it is contrary to the objectives of the treaty. Against this background it would not be advisable to interpret "the expected benefits" in art. 16 extensively by a reference to the very wide and general objectives of the treaty. The present author has therefore come to the conclusion that in order to be loyal to the logic and intention of the EFTA Convention one should interpret "the expected

[5] See Seyersted, *United Nations Forces*, 1966, pp. 158 ff.

benefits" as a quantitative increase in trade in specific goods. Indirect and related advantages should not be taken into consideration. This interpretation necessitates an artificial distinction between those enterprises of production that increase trade and those that do not, but this has to be accepted as one of the many difficulties in drawing a borderline between a free trade area and an economic union.

Nevertheless the EFTA Council at the meeting in Bergen in 1966 decided that "the expected benefits" implies not only an increase in value and/or quantity of trade between EFTA countries, but also other advantages to be derived from cooperation between member states under the Convention. It should, according to the Council, be read in conjunction with art. 2, which sets out the objectives of the Convention.[6] The Council found it difficult, however, to give an abstract interpretation to the frustration clause and no specific conclusions were drawn from the conjunction with the objectives. On the other hand, the Council explicitly declared that restrictions on some types of establishment *ipso facto* "frustrated the expected benefits", and that such establishments had to be allowed. This interpretation of the frustration clause has little in common with the British interpretation of the similar clause in art. 13 in the disagreement about government subsidies to British aluminium smelters. In this case the British argument was that the concept of frustration should be given the same meaning as in British contract law. With such an interpretation, art. 13 has a very limited applicability.

5. THE BURDEN OF PROOF

It is generally accepted in legal writing that it is the complaining party that has the burden of proof when claiming that a frustration has taken place.[7] This burden of proof makes it difficult to attack restrictions in practice. Production of proof, however, is required only concerning restrictions on establishments that are not covered by the Bergen agreement.

[6] See *Building EFTA*, published by the EFTA Secretariat, 1968, pp. 123 ff., and *EFTA Bulletin*, vol. VII, no. 8, 1966, p. 11.

[7] Darwin (*I.C.L.Q., supra*, p. 85, note 4), p. 103, and Martin, p. 91: "A mere likelihood of frustration is not enough, and the burden of proof resting on those who seek to have the restriction condemned is extremely high." See also Lambrinidis (*op. cit.*, p. 79, note 1), p. 134.

It was the Norwegian Government that during the initial negotiations in Stockholm took the initiative of introducing a clear exception for establishments requiring access to the national capital market, investment in existing domestic economic enterprises, or the ownership of national resources. This initiative to limit the scope of art. 16 did not have the support of the British Government, and as a compromise a frustration clause was introduced in art. 8. This is the reason why the text of this clause so explicitly places the burden of proof on the complaining party, and in addition is stronger in its wording than are the corresponding clauses in the rules of competition in the Convention. With this background in mind it cannot be correct to use the strong wording of art. 8 as an argument against placing the burden of proof on the complaining party in relation to the rules of competition of the treaty.

6. THE BERGEN AGREEMENT

As indicated earlier, the EFTA Council made it clear at a meeting on November 14, 1968, that the Bergen agreement is legally binding. According to art. 16 (4) the Council may consider at any time after December 31, 1964, whether further or different provisions are necessary to give effect to the principles set out in paragraph 1 of the article, and may decide to make the necessary provisions. This provision does not, of course, authorize the Council to take whatever decision it likes in the field of establishment. The authority is limited by the principles set out in art. 16 (1). They represent the outer limit of the potential obligations of the member states. If the Council wants to make further decisions, the treaty has to be amended according to the procedure in art. 44. The question that will be discussed here is whether the general suspension of the frustration clause in important fields of establishment exceeds the Council's authority.

The Bergen agreement cannot be defended by a reference to art. 32 (4), because this provision does not give the Council a general authority to make decisions to promote the objectives of the Convention. The application of art. 32 (4) presupposes that the Council is authorized by a specific provision in the Convention.[8] Art. 32 (1) does not give the Council a general authority

[8] Lambrinidis, *op. cit.*, p. 31.

to decide within the scope of the objectives in art. 2. On the contrary, art. 2 represents a limitation of the Council's authority. It cannot apply specific provisions to make decisions which are not in conformity with the objectives set out in art. 2. This is also a common view of the competence of the EEC Council, despite the provision in art. 235 of the Rome Treaty.[9] The question of the authority of the Council to make the Bergen decision is not determinative for its validity. The decision is an international agreement between governments, and as such it needs no authorization by the EFTA Council.

At this point it is interesting to look at a similar development within the EEC system. When competence under the Rome Treaty is lacking or uncertain, the members of the EEC Council often make decisions as members of the governments and not as members of the Council. The procedure is very like that of the regular Community decisions, but their legally binding element is the consensus between the governments. Compared with ordinary agreements in international law, the procedure is informal. The connection with the EEC makes it unnecessary to verify the credentials, and instead of ratification the governments simply notify the Secretary General of the Council. The heads of state do not participate. The approval of the national assemblies may be necessary only at a later stage when the decision is to be implemented in national law. In this way the governments can avoid too much publicity and confrontation with party and group interests.

The legal character of such decisions is not clear. If there are no reservations, the decisions are probably binding on the member states. That means that they are not mere gentlemen's agreements, whereby the participating ministers or their governments promise to make an effort to implement the decisions according to their respective national constitutional rules. Indisputably such decisions lack a clear, common legal interpretation in all member states, and their interpretation is not within the competence of the Court of Justice of the Community. This legal uncertainty and possibility of different interpretation is contrary to the spirit of the Rome Treaty. Such decisions weaken national parliamentary control and they put the national parliaments under pressure. Nevertheless they are now integrated in the law of the

[9] See Wohlfarth-Everling-Glaesner-Sprung, *Die Europäische Wirtschaftsgemeinschaft*, 1960, pp. 608 f. See also Opsahl in the Norwegian Parliamentary publication, document no. 10, *Stortingsforhandlinger* 1966–67, pp. 23–6.

European Communities. The "représentants des gouvernements réunis dans le cadre du Conseil" in reality form a new EEC institution. The competence of this body is not derived from the Rome Treaty, but from customary law.[1]

The Bergen agreement is also interesting from a constitutional point of view, inasmuch as the Norwegian Government did not even consult the national assembly before the EFTA meeting in Bergen. It is a fundamental rule in the constitutions of many countries, and the Norwegian Constitution is no exception, that important international treaties or treaties that will make it necessary to amend domestic legislation cannot be made without prior approval of the legislature. If the Bergen agreement was outside the authority of the EFTA Council, it constituted a new international treaty and the prior approval of the legislature was necessary. But even if the agreement was within the scope of the EFTA Convention, the text should, because of its importance, have been presented to the legislature for prior approval. An example will show the importance of the agreement. Let us assume that a British producer of motor cars terminates his agreement with a Norwegian sole distributor, and applies to the Norwegian authorities for permission to establish a commercial enterprise in Norway in order to take care of the distribution himself. According to the Bergen agreement the Norwegian authorities automatically have to give the permission, with the possible result that a Norwegian enterprise that for many years has been sole distributor will lose its trade. Before the Bergen agreement the British enterprise would have the burden of proving that a restriction on the right of establishment would "frustrate the benefits expected ...", i.e. that it would sell more cars by means of this new arrangement than through the Norwegian sole distributor. The example shows how the Bergen agreement has taken away the legal defence of Norwegian economic enterprises without their being given an opportunity to defend their interests before the decision was made. The reason why the prior approval of the legislature was not asked for is probably that the agreement did not necessitate an important change in Norwegian administrative practice in such matters. The main point is, however, that the agreement contains an international obligation that makes it necessary to continue a liberal policy, perhaps under changed

[1] See Houben, *Les conseils de ministres des communautés européennes*, 1964, pp. 78 ff., and Kaiser, "Zur Integration Europas", *Festschrift für Ophüls*, 1965.

economic and political conditions, in a period with an increasing number of foreign establishments.

It is a widespread opinion that the EEC is a somewhat undemocratic and bureaucratic organization. The present example shows that in practice the informal procedure in EFTA can also be undemocratic. After all, democracy at this level is mainly a question of how the individual countries organize their own decision-making when they participate in international organizations.

In this connection it is interesting to note that the German Government has an explicit legal obligation to inform the Bundestag if a decision of the EEC Council will necessitate amendments to national German law or create directly applicable law in Germany. The Government must also keep the Bundestag "continuously informed of the development" in the Council.[2]

7. BENEFICIARIES

According to art. 16 (1) national treatment is to be given to "nationals of other Member States", and for the purpose of this article "nationals" mean (art. 16 (6)):

(*a*) A physical person who has the nationality of that member state and

(*b*) A company and other legal person on the following conditions:

1. It must be constituted in the territory of a member state in conformity with the law of that state.
2. That state must regard it as having its nationality.
3. It must have been formed for gainful purposes.
4. It must have its registered office and central administration within the area of the Association.
5. It must carry on substantial activity there.

According to general principles of international law any state can within certain limits decide which persons it considers to be its own nationals.[3] Of course the EFTA Convention does not imply any change on this point. The question of the nationality of corporations has long been controversial in the field of international customary law. In view of the existing diversity of views

[2] Law of July 27, 1957, *Bundesgesetzblatt* II, 1957, p. 753.

[3] See Schwarzenberger, *International Law*, vol. 1, 3rd ed. 1957, pp. 354 ff.

with respect to the criteria for the determination of the nationality of corporations, it was necessary for the drafters of the Rome Treaty and the EFTA Convention to set out clear and specific treaty provisions.

From the point of view of the member states it is the test of incorporation that is accepted in EFTA. It is not necessary that the principal place of business or the central administration shall be situated in the country under whose law it has been formed. It is sufficient that they shall be located within the EFTA area. From the point of view of the EFTA area it is the test of the *siège réel* that is accepted. Only corporations having their effective headquarters within the area are accepted as EFTA corporations. The proviso added at the end, whereby the state concerned must also regard the corporation in question as having its nationality, presumably takes care of cases where a given state (for instance, Switzerland, which employs the *siège réel*) does not attribute its nationality to legal bodies which are merely incorporated in its territory, because in its municipal law it employs other tests of nationality to determine this attribute.

Art. 16 (6) requires that the corporation shall have its registered office *and* its central administration within the area and that it shall carry on substantial activity there. It is not necessary that all these elements shall be located in one single country. If one of the three elements is located outside the area, the corporation cannot benefit from EFTA treatment. The reference to the registered office is of little importance because it will generally be located in the country where the corporation is established. The proviso whereby the corporation must carry on substantial activity within the area excludes all enterprises which carry on a *substantial part* of their activity outside the EFTA area, even if they are established in an EFTA country and have their administration there.

According to the Rome Treaty, and unlike the EFTA Convention, a corporation may have its *siège réel* outside the EEC area if it is formed under the law of a member state and has its registered office there. The reason for this difference is probably that Holland applies the test of incorporation in such a way that a Dutch corporation can under Dutch law have its *siège réel* outside the country.[4] The Rome Treaty was drafted in order to give such Dutch companies with a *siège réel* outside EEC the

[4] See Leleux (*op. cit.*, p. 79, note 1), p. 26.

right of establishment in the area. The difference between the two treaties is reduced because it is generally accepted that to be accorded the right of establishment under the Rome Treaty a corporation must have "an effective and lasting economic link with the economy of the member states".[5]

It is important that both under the Rome Treaty and the EFTA Convention the nationality of the shareholders or of members of the board is irrelevant for the right of establishment. Many companies, both in EEC and EFTA, are subsidiaries of American enterprises; nevertheless according to the treaties they must be given national treatment. Such corporations satisfy the objectives of the treaties, because they increase employment and strengthen the production in the member countries in the same way as do corporations controlled by nationals of the member states.

Both in EEC and EFTA countries the increasing establishment of American subsidiaries has attracted public attention. This growing American control over European industry has, however, little connection with the fact that under the two treaties the criterion of economic control is immaterial. Both in EEC and EFTA, establishment policy towards third countries is under the exclusive competence of the member states. Control over investments from third countries can only be realized effectively by means of *common rules* of establishment towards such countries. This means in the case of the EEC that the customs union would have to take an important step towards an economic union, and that the Rome Treaty would have to be amended.

8. THE PROHIBITION AGAINST DISCRIMINATION

(a) Liberty of establishment not a prerequisite

Art. 16 does not demand liberty of establishment. Even if a member state nationalizes a kind of economic activity covered by art. 16, this is not a violation of the Convention. It is not discrimination, since both the countries' own nationals and nationals of other member states are barred from establishment. It is commonly accepted both in the EEC and in EFTA that nationalization of whole economic sectors does not constitute discrimina-

[5] See for a more detailed exposé Maestripieri, "Le droit d'établissement et la libre prestation de services dans la CEE", JUR/CEE/737/68, p. 80.

tion. If only *some* enterprises in an economic sector are nationalized, this may be a discrimination if it hits other EFTA nationals particularly hard.

It is quite another question whether nationalized enterprises really *can* be separated from national government interests and act in accordance with general profit motives in a private economy.[6] A prerequisite for free trade in EFTA is that the enterprises shall adapt themselves to the market according to commercial considerations. Public influence is relevant not only to nationalized enterprises but also in relation to enterprises where public influence is partly due to ownership, public loans, concessions, etc.[7] These problems are regulated in special provisions both in the EFTA Convention and in the Rome Treaty.

(b) Administrative practice

The EFTA Convention does not prohibit the passing of discriminatory *laws and regulations*. It is only a discriminatory *administration of law* that is prohibited. This follows from the wording of art. 16 (1): "... that restrictions ... should not be applied, through accord to such nationals of treatment which is less favourable ...". But, of course, the existence of discriminatory national laws and regulations is likely to lead to discriminatory administration unless the authorities are given the power to treat EFTA nationals on an equal footing with their own nationals. This means that the member states can implement the Convention either by abolishing discriminatory laws and regulations or by rendering internal instructions to the administrative authorities ensuring the non-discriminatory treatment of EFTA nationals.

Under art. 52 of the Rome Treaty, discriminatory laws and regulations must be abolished even if they only have a control function without containing any discriminatory substantive conditions.

According to its wording, art. 16 does not provide that foreigners shall, in the relevant respect, be given treatment *identical* to that given to one's own citizens, but rather only that such treatment should be *not less favourable* than that accorded by a mem-

[6] This question was frequently discussed among Czech lawyers during the optimistic liberalization period in Czechoslovakia. They also discussed the possibility of adapting state-owned industry to the rules of competition in the Rome Treaty. See, e.g., the article of Professor Karl Knapp, of Prague, in *L'entreprise publique et la concurrence*, Semaine de Bruges, 1969, pp. 245–66.

[7] See Huth, *Die Sonderstellung der öffentlichen Hand in den europäischen Gemeinschaften*, 1965.

ber state to its own nationals. What is required is thus not *national treatment* of the foreigner, but rather *non-discrimination.*[7a] In practice, however, this distinction does not seem to be important. According to the spirit of the Bergen agreement, foreigners should be given national treatment.

It is understood that restrictions by a member state which, whether formally appearing to give preferential treatment or not, in fact have the effect of giving EFTA nationals treatment less favourable than that accorded to its own nationals are within the wording of art. 16 (1). This is made clear in art. 9 of the Record of Understandings. The fact that, for instance, the exercise of a profession is reserved for people who know the Norwegian language, is not automatically a discrimination according to art. 16 although it will in practice exclude foreigners. In such cases it is important to analyse the motives behind the restriction. In many countries only people who have a certain formal qualification are allowed to exercise a profession. The internationalization of commercial laws and customs has not yet advanced to a stage where qualifications from other countries can be accepted automatically. Unlike the Rome Treaty, the EFTA Convention does not contain rules aiming at mutual recognition of diplomas, certificates and other qualifications. The EFTA Convention does not envisage harmonization or coordination of laws and regulations.

9. CAPITAL MOVEMENTS

In art. 29 of the EFTA Convention capital movements and payments are described by the word "transfers". The member states recognize that these transfers are necessary for the proper functioning of the Association, but they do not undertake new obligations in this field because they regard the obligations undertaken in other international organizations as sufficient at present. A reason for their reluctance was possibly that capital movements are closely interconnected with national discount-rate policy and

[7a] See Robert S. Snyder, *Swedish Restrictions on Foreign Establishment: Economic Xenophobia and International Economic Integration,* 1970, p. 4. See also *Nordiska Rådet,* 1968, pp. 1514, 1586, and *Building EFTA,* EFTA Secretariat, rev. ed. 1968, p. 122.

monetary policy. The member states in EFTA did not want to limit their national sovereignty in this field. In this they differ from the EEC members, who have undertaken special obligations concerning capital movements. It would not, however, be quite correct, at least in relation to the right of establishment, to say that the obligations undertaken in other organizations are sufficient at present. Some countries, among them the Scandinavian states, have made reservations in the OECD concerning the transfer of capital from abroad in connection with the establishment of enterprises. Norway should therefore, according to this reservation, be entitled to restrict the transfer of the necessary capital for an EFTA establishment. Such restrictions would make the Bergen agreement illusory, and obviously this was not the intention of the parties. Despite the reservations to the capital code in the OECD, the member states should not be entitled to make illusory the rules of establishment in EFTA by rejecting transfers.

10. EXCEPTIONS TO THE RULE OF NON-DISCRIMINATION

The EFTA Convention makes some exceptions to the rule of non-discrimination. Art. 18 states that nothing in the treaty shall prevent actions that a member state considers necessary for the protection of its essential security interest. This exception is probably of especial importance for Finland. Art 16 (5) permits control of entry, residence, activity and departure of aliens where such measures are justified by reasons of public order, public health or morality, or national security. Control with reference to this provision may be used as a disguised means of discrimination in order to protect national economic enterprises. The parallel provision in the Rome Treaty, art. 56, therefore in addition aims at a coordination of the above-mentioned legislative and administrative provisions. This will make it possible to compare the national laws, and it will be difficult for certain member states to have provisions that may easily be utilized for purposes of hidden discrimination.[8] Such a coordination is not envisaged in the EFTA Convention.

[8] Wohlfarth (*op. cit.*, p. 89, note 9), p. 184.

According to art. 16 (5) a member state is entitled to prevent a serious imbalance in its social or demographic structure. This means that the member states can take measures to slow down or stimulate establishment in certain areas even if these measures are incompatible with other provisions in the Convention. It was Switzerland that initiated this reservation.[9] It should be noted that the Rome Treaty has no similar reservations, though this problem might be of a much more serious character in EEC countries because the Rome Treaty has provisions ensuring free movement of workers. Finally, according to the EFTA Convention, an appreciable rise in unemployment in a particular sector of industry or region can in certain circumstances give the member state the right "to take such measures, either instead of or in addition to restriction of imports in accordance with sub-paragraph (i) of this paragraph, as the Council may, by majority decision, authorise" (see art. 20). These measures may also mean a preliminary exemption from the obligations undertaken in art. 16.

The above-mentioned measures may be applied even if they would frustrate "the expected benefits", etc.

11. RESERVATIONS IN THE ADDITIONAL PROTOCOL

(a) Investment in existing enterprises

The reservation in art. 8 of the additional protocol to the EFTA Convention means that EFTA nationals have no right under the Convention to buy existing enterprises or shares in such enterprises. This reservation would to a certain degree make the right of establishment according to the Bergen agreement illusory. It is therefore generally accepted that Norway will in practice have to permit acquisition of enterprises or financial participation in enterprises by EFTA nationals without demanding proof of frustration. This is only the case in relation to commercial enterprises listed in the Bergen agreement.

Nevertheless Norway cannot formally give EFTA nationals the right to buy Norwegian commercial enterprises. The Norwegian reservation in the OECD covers such capital movements, and a

[9] Frölich, *Niederlassungsrecht und die Freizügigkeit in den EWG und EFTA*, 1965, p. 67.

formal liberalization in relation to EFTA members will entitle the other OECD members to be accorded the same rights under art. 9 of OECD.[1] Under the OECD's art. 10 exceptions to the rule of non-discrimination may be accorded for the purpose of favouring countries belonging to a special customary system which mutually suspend restrictions on capital movements without extending the liberalization to other OECD countries. This exception only refers to discrimination concerning capital transactions *beyond* the liberalization which is a required part of the OECD's constitution. If a country has made a *reservation,* the OECD rule of non-discrimination is mandatory in that field.

(b) Natural resources

The member states have not undertaken the obligation to permit EFTA nationals to control natural resources. This does not mean that EFTA nationals can be denied the acquisition of the necessary property to establish themselves, but it means that *exploitation* of natural resources may be exempted.

(c) The national capital market

The reservation in art. 8 of the additional protocol covers the right of a member state to control access to its capital market. This reservation seems unnecessary, since the EFTA Convention according to art. 29 does not confer any obligation on the member states in this field. In this connection it should be mentioned that the EFTA Council has discussed British credit restrictions against foreign commercial enterprises. The object of these restrictions was, according to the British Government, to prevent imports from being financed by loans on the British capital market exceeding what are normal commercial credits in international trade. Partly the restrictions would protect the balance of payment through the expected decrease in imports. Certain EFTA countries were of the opinion that art. 16 is applicable to questions of the financing of existing enterprises, at least where non-discriminatory access to normal commercial credits is concerned. Other EFTA countries stated that such questions are covered by the reservation in art. 8. The EFTA Council did not find that the British restrictions violated the Convention.[2]

[1] Code of Liberalization of Capital Movements, June 1965, p. 113.
[2] *Nordiska Rådet,* 1968, p. 1595.

12. PRIVATE RESTRICTIONS

The EFTA Convention only prohibits public restrictions; it does not regulate the relations between private persons. This means that, for instance, privately-owned companies may discriminate against EFTA nationals through provisions forbidding transfer of shares to aliens. Such restrictions exist in several relatively large Norwegian companies, and together with the reservation in art. 8 of the Records of Understanding to the EFTA Convention they may make it difficult for foreigners to buy existing Norwegian enterprises. It will not be contrary to the EFTA Convention, and probably not to the Rome Treaty either, that only a limited number of shares carry voting rights, provided that these shares are at least in principle freely transferable. If the government owns a majority of such shares, it can without investment of capital prevent foreign control over the company. If the government uses its influence on the company to make it discriminate, for instance in regard to conditions of supply or marketing of goods, this is forbidden both in EFTA and in the EEC. By-laws that make the transfer of shares dependent on the approval of the board of directors are not forbidden. It is, however, difficult to amend existing by-laws in this direction for to do so requires, at least in Norwegian law, unanimity among the shareholders. According to art. 7 of the Rome Treaty, refusal to approve a transfer of shares must not discriminate against EEC nationals.

13. THE LEGAL POSITION OF THE INDIVIDUAL IN EFTA AND THE EEC

What is the legal position of a physical person or of a corporation of a member state if the host country does not fulfil its obligation under the EFTA Convention?

It is generally accepted that international treaties can create obligations not only between states, but also between states and individuals. It is, however, also a general opinion that treaties relating to the right of establishment do not create individual rights. If the host country does not comply with the treaty, the only remedy available to an individual is a complaint to the

authorities in his home country, based upon his expectation that they will settle the matter by means of diplomatic intervention. The EFTA Convention must be interpreted in the same way. The Convention does not demand that any of its provisions shall have the quality of directly applicable national law in the member countries. This means that the EFTA Convention does not give the national of an EFTA country a right to have the EFTA provisions enforced by the national courts of the other EFTA countries. The member states are free to decide whether, in their national legal systems, they will give the EFTA provisions the quality of domestic statutory law, or will implement the treaty by means of changes in national legislation or instructions to national administrative authorities. In most EFTA countries, i.e. Britain and the Nordic countries, the national courts as a general rule give national law precedence over international treaties, but the courts will, if possible, avoid conflicts between the two legal systems by interpreting national law in conformity with international obligations.

According to Swiss constitutional law, treaties in international law take precedence over national law. Nevertheless the Swiss administrative authorities do not seem to be of the opinion that art. 16 is directly applicable to enterprises and confers rights or obligations on individuals. Therefore, art. 16 cannot be invoked in civil proceedings.

In the Rome Treaty the standstill clause in art. 53 in the chapter on the right of establishment is self-executing and has to be applied directly by the national courts. On the other hand, the directives abolishing existing discrimination are binding only on the member states, and they leave the domestic agencies a competence as to form and means of implementation. In this respect the EFTA Convention and the Rome Treaty are similar. In the EEC, as in the EFTA countries, the national courts will generally try to interpret the *national law* in conformity with international obligations, and in art. 177 of the Rome Treaty they are given the opportunity to request the Court of Justice to give an interpretation of the Treaty and of the acts of the institutions of the Community.

The Rome Treaty demands that the nationals of member states shall have the right of establishment under the conditions laid down by the *law* of the country of establishment for its own nationals. This means that the same law has to be applied to all nationals of the member states. Either the establishment has to

be entirely free, or the economic activity of all EEC nationals has to be restricted by identical legal provisions. If establishment is entirely free, anybody can start an economic activity without a licence. If the establishment is regulated in the same way for nationals and aliens, those aliens who fulfil the legal conditions must be given a licence. In most national legal systems this is a subjective right not only for nationals but also for aliens, and it can be enforced by complaints at the national courts. If there is a law to the effect that national authorities have discretionary power, the legal position of the alien is more complicated. Assuming that former discriminatory restrictions against aliens have been abolished, the national courts will probably interpret this abolition as a domestic limitation of the administrative discretionary power to discriminate against aliens. If no former discriminatory restrictions existed, it is a question whether without further internal transformation the EEC directives would limit the discretionary power of the national authorities under a specific statute, so that it would be contrary to national law to discriminate against aliens. I do not think that this important question has received a clear solution in practice in the EEC countries. It is also difficult for an alien to prove that in his case all possible conditions are satisfied and that he would have been granted a licence if he had been a national. In this connection it is important that aliens as well as nationals shall have access to official documents. According to sec. 2 of the Norwegian Act of June 19, 1970, everybody (aliens as well as nationals) has the right upon request to be informed of the contents of a public document relating to a specific matter. The committee that prepared the bill had proposed that this right should be granted to nationals only. For an effective implementation it is also important that the administrative authorities should have a duty to give reasons for their decisions, as is the case in Norway.

Because the Rome Treaty provides that the same regulations shall apply to nationals and aliens, the EEC nationals will be able to attack discrimination with those legal remedies which are available to a country's own nationals.

In EFTA it is not necessary that the same laws shall apply to nationals and aliens. The Convention only provides that administrative practice shall not discriminate against EFTA nationals.

According to art. 31 (1) of the EFTA Convention, only member states can refer a matter to the Council. The legal position of the individual in EFTA countries therefore depends greatly upon his

ability to obtain assistance from his home country. Often a member state will not be interested in assisting its nationals in a conflict with authorities in another member state. The so-called Gran case in Norway provides a recent example. The Norwegian authorities did not allow the Norwegian brewery Gran to import beer in bulk from the Danish brewery Fakse, though there was little doubt that the Norwegian refusal was not in conformity with the EFTA obligations. Neither of the breweries could raise the matter before a national court, and they had no right themselves to present their complaint to the EFTA Council. The only possible remedy was a complaint by the Danish Government. However, the Danish and the Norwegian breweries' associations cooperate closely in many matters, and the Danish association did not support Fakse. Consequently, the Danish Government found no reason for filing a complaint. This example shows clearly that the individual has a very weak position in EFTA. According to arts. 169 and 170 of the Rome Treaty, not only the member states but also the Commission can refer a matter to the Court of Justice. This means that the individual can complain to the Commission. Since the Commission is a politically independent institution whose main task is to ensure the application of the Treaty, this gives an individual in the EEC an increased possibility of securing his rights under the Treaty.

Even in cases where a member of EFTA does want to support its nationals in a conflict with another member state, the road is paved with difficulties. According to art. 31 (3) of the EFTA Convention the member states can refer a matter to the Council if no satisfactory settlement is reached by negotiations between them. Before taking action under art. 31 (3) the Council must, at the request of any member state concerned, refer the matter to a neutral examining committee. The Council may then, by majority vote, make to any member states such recommendations as it considers appropriate. If a member state does not comply with the recommendation, and the Council finds, by majority vote, that an obligation under the treaty has not been fulfilled, the Council may, by majority decision, authorize any member state to suspend, in relation to the member state which has not complied with the recommendation, the application of such obligations under the Convention as the Council considers appropriate.

It is the clear intention of art. 31 (1) of the EFTA Convention that the member states should in principle settle their disputes

by negotiation. Art. 170 of the Rome Treaty does not have a similar rule. Such negotiations may easily lead to bilateral interpretations of the Convention which may be contrary to the interests of other member states. They may even have as a result that some member states will implement the Convention in a specific manner which is unknown to other member states. The negotiations will also make the legal position of the individual uncertain. If an EFTA national in one of the member states is treated in a way that is contrary to the Convention's provisions on establishment, bilateral negotiations will almost always be of a political and not of a legal character.

If the member states agree on an interpretation of the treaty, this is decisive. If the member states do not reach an agreement, they have no other course open to them than to refer the matter to the Council. There is no simple and neutral procedure by which the member states can clarify a question of interpretation before a concrete matter of dispute has developed. The situation in the EEC is similar. The Court of Justice has, unlike the International Court of Justice, no general competence to give consultative *responsa.*

Besides the fact that under the Rome Treaty it is easier for an individual to carry the burden of proof, the procedure of sanctions is probably more effective than in EFTA. In the EEC the supranational, neutral Commission ensures the application of the Treaty, and not as in EFTA, the political Council. This difference is in a certain degree reduced because the Council has, for instance concerning the right of establishment, appointed a working group of experts charged to consider whether further or different provisions are necessary to give effect to the right of establishment. The working group has also to consider the treatment of specific cases in this field under art. 31. The members of a working group are not, as in the EEC Commission, nationally independent, but nevertheless they are able to collect information that makes control easier. The expert group has no power to make legally binding decisions, and it has no competence to refer matters to the Council if it finds that a member state is not fulfilling its obligations. The Council itself cannot initiate the complaint procedure *ex officio;* this is the exclusive competence of the member states. In the EEC the nationally independent Commission is competent to deal with such cases, and it can refer them to the Court of Justice. In EFTA it is the ministers in the Council who have to ensure observance of law and justice in the inter-

pretation and application of the treaty. In the EEC it is the independent Commission which gives reasoned opinions and the Court of Justice which makes the legally binding decisions. It is evident that the procedure in the EEC is of a more legal character and that national and political conflicts are more easily kept in the background. A meeting between the ministers in the EFTA Council is a typical political forum, and a majority decision that a member state has not complied with treaty obligations will probably lead to a withdrawal of that member state in accordance with art. 42. The Rome Treaty has no provision for withdrawal. The fact that Norway, even after having strongly criticized the British attitude in the aluminium case, did not refer the matter to the Council indicates that the procedure is of little practical value.

As mentioned before, according to art. 31 (4) the Council may authorize any member state to suspend, in relation to the member state which has not complied with the recommendations, the application of obligations under the Convention. Probably only the complaining state would make use of such an authorization, and in most cases it would have little to gain by a unilateral action. If it restricts exports, this will have a negative effect on its own trade. If it levies higher duties on goods from the other member state, the domestic production will profit very little, as in most cases similar goods will have to be imported duty-free from other member states at similar prices. Usually the state that suspends its obligations will only succeed in hurting private parties in both countries.

The fact that one particular member state is much bigger and more powerful than the others strengthens the political character of EFTA. In negotiations within the EFTA Council it is often easiest for the biggest member state not to carry out its obligations. In the EEC three of the member states are fairly equal in size and the Benelux countries collaborate closely. On the other hand, the Commission and the Court of Justice are not likely to yield to political pressure. When the EEC began it was generally feared that France and Germany would take the most important decisions over the heads of the other member countries. This fear was still more widespread after the signing of the Franco–German collaboration agreement. In practice the two countries have very often taken different standpoints in the EEC on controversial matters.

EFTA is primarily a commercial organization based on the

principle of cooperation. This cooperation does not go further than the participating states at a given moment find politically and economically advantageous. The legal obligations of the treaty have been moved into the background. Consequently the jurists in EFTA countries have done little to interpret the treaty and to develop an EFTA law. Juridical interpretation is generally a prediction of how legal rules will be implemented. When such an implementation is expected to be the result less of applying legal principles than of resorting to a political compromise, a legal prediction will be of little interest. Compared with the EEC, questions relating to the right of establishment have received little attention in legal theory in EFTA countries. In legal writing in the EEC countries the legal problems have been thoroughly analysed. This systematic research cannot, of course, prevent political and economic realities from also playing an important role in the implementation of the Rome Treaty. But legal theory has made it easier for the Commission and the Court of Justice when they try to find solutions for specific cases which fit into the legal structure of the Community as a whole.

The fact that the individual cannot invoke the EFTA Convention in the national courts means that his legal position is basically uncertain. It is all the more uncertain in that he cannot be sure that his home country will, by means of bilateral negotiations or by referring the matter to the EFTA Council, try to ensure the enforcement of the Convention. And we have seen that even if his home country does try to support him the procedure in EFTA will probably be of a political rather than a legal character.