

The European Economic Agreement and the freedom of action for local authorities.

Background of the study

Through the European Economic Agreement Norway forms part of the EU Internal Market. The Agreement implies that national policy and legislation needs to be in conformity with the principles of free movement of goods, persons, services and capital, and the rules implementing those principles, such as competition rules for undertakings and rules for granting state aid. The Agreement limits the scope of local politics through regulating areas that used to be open to political decisions at local level, and it affects counties and municipalities in their capacity as public authorities/regulators, service providers, owners of undertakings and properties, and as promoters of economic growth and business development.

It is not always easy for local authorities to anticipate all the implications of the Agreement and to know their own scope of manoeuvring. As new secondary legislation is incorporated in the Agreement, and new interpretations come through court rulings, local authorities also fear that freedom of action will be further limited.

Local and regional authorities can make maximum benefit from the discretion they have to pursue their own political objectives only if they have good knowledge of the rules and principles of the EEA-agreement. If they want to contribute to the development of new legislation they also need good strategies for influencing the process of decision-shaping.

The Norwegian Association of Local and Regional Authorities (KS) has seen it as important to gain a more systematic overview of the impact the EEA-agreement at local level, and to clarify the potential freedom of action for , especially in the field of Services of General Interest (SGI). Additionally KS has asked for assistance in developing a strategy for more proactive participation when new policies and legislation with a bearing on regional and local actors are being formulated in the EU and implemented at national level.

Mechanisms for adapting EU/EEA-rules to national and local circumstances

The internal market of the EU and the European Economic Area cover a large geographical territory with extensive national and regional variations and disparities in economic and social development, population density etc. In order to make the rules of the Internal Market work in an effective way, it is necessary to take these diverse circumstances into consideration when new rules are created and implemented. The mechanisms for doing so is built into the Agreement as such:

- The European Commission is obliged to seek advice from experts in the EU Member States and in the EFTA-states when new legislation is drafted
- Certain adaptations can be made when new directives are implemented into national law, as long as the national piece of legislation fulfils the objectives of the directive.

The scope for flexibility is normally larger for legislation not imperative for the functioning of the internal market. But even in so-called *core internal market legislation* like state aid regulations and rules on public procurement, a certain flexibility exist for balancing the concern of important public policy objectives against the need to avoid unfair competition in the internal market.

As a general principle the EEA-agreement takes the reconciliation of other political objectives with the four freedoms into account. This makes it possible for national or local authorities to maintain or introduce restrictions of competition as long as they are proven to be necessary and proportionate. The jurisprudence of the European Court of Justice (ECJ) has over the years clarified what can be accepted. The rulings show that practically all kinds of political objectives and concerns can be invoked as long as they refer to objective criteria. On the other hand it has been laid down that economic and budgetary considerations or administrative concerns will not be approved.

There is little scope for national or local authorities to affect the outcome in single cases which require notification and prior approval of the EFTA Surveillance Authority, by political action. The EFTA Surveillance Authority is obliged to take its decision in conformity with existing EEA rules and the case law of the EFTA Court. It is also obliged to take due account of the decisions of the European Commission and the European Court of Justice and of existing guidelines for its own use of discretion. When EFTA undertakes revisions of the guidelines stakeholders such as Norwegian local and regional authorities are invited to give their opinions.

Services of General Interest and freedom of action for local authorities

As member states of EU and EEA are free to define and organise Services of General Interest, and national and local authorities can choose to produce and deliver services themselves or they can delegate tasks to external partners. If they choose to delegate Community law on public contracts and concessions come into play. In such cases the public body is obliged to respect the principles of transparency, equal treatment of all potential providers in the market, and proportionality. As undertakings owned by public authorities are bound by the same rules as private companies they should, as a general rule, not be given contracts on special terms, or granted state aid in a way that is not compatible with the principles and rules of the EC Treaty and the EEA-agreement.

The purpose of these rules on public contracts is to ensure equal treatment of all potential service providers as well as the efficient and cost-effective use of public resources. The rules are quite extensive and do not provide much scope for discretion for national or local authorities. However, an open call for tender is not required for procurement below certain thresholds and for services with little impact on cross-border trade such as health and social services. Member states are free to decide a lower threshold value for public procurement tenders. Norway has decided to put the threshold value considerably lower than what is required by the Agreement, but it is to be noticed that the principles of competition, equal treatment, transparency and traceability apply also in cases below the threshold value.

Service concessions are not covered by the rules on public contracts, but public authorities are also in such cases obliged to act in accordance with the principles of fair competition. Public authorities are free to choose appropriate procedures for service concessions, but open calls for tender will often be the best way to secure equal treatment, transparency etc.

Public authorities that decide to open tenders for provision of services are free to enter the competition for contracts themselves, provided they are able to ensure equal treatment for all potential providers in the market.

Undertakings that are required to deliver unprofitable services, may be compensated without such compensation constituting state aid.

The experience with the EEA in Norwegian municipalities

According to data from the municipalities selected for this study, the EEA-agreement is most strongly felt on an every day basis through the rules on public contracts and procurement. The complexity of the rules requires sufficient expertise, which in itself poses a challenge.

Whereas experts at the administrative level may find the rules helpful, politicians sometimes see them as barriers to their freedom of action. Issues that used to be subject to political considerations are increasingly becoming a matter of legal interpretation. A quite substantial amount of complaints in the field of public procurement has been brought to the attention of the national appeal body for public procurement, KOFA and to the Efta Surveillance Authority. These complaints have, independent of the outcome of specific cases led to increased awareness and a higher level of expertise in the municipalities.

The study reveals that decisions related to opening the market for the delivery of public services are motivated by a general political trend towards increased use of market mechanisms in the public. The respondents are well aware that market opening is not required by the EEA, but they do not always overlook the implications of the EEA-agreement when the market for public service delivery is opened. This is partly due to the complexity of the rules, but also to lack of legal clarity.

Lack of legal clarity is particularly prevalent in areas where municipalities need to make considerable investments and the choice of model of service delivery may have considerable budgetary impact. Waste management is one example where local authorities are requesting clearer guidelines from national authorities on organisational solutions that are compatible with the EEA-agreement.

As the rules of the EEA-agreement are complex, is it a challenge for local authorities to have sufficient knowledge on how they apply. In municipalities EEA-related knowledge and skills are typically most developed at the administrative level and especially among staff responsible for procurement and in legal functions etc. Expertise on the EEA-agreement seems to be less developed at the political level.

Whereas public procurement rules might be sufficiently known, the knowledge on state aid rules seem to be less, even at the administrative level. The state aid rules provide for several options for group exemptions from the general ban on state aid, including exemption from prior approval from ESA. These options are seldom used by the municipalities.

Influence new EEA-legislation

The EEA-agreement does not provide for participation in EU-decision making, but gives the EFTA-states access to the preparatory stage through consultations at expert level, primarily through participation in expert groups under the European Commission, and access as observers to Commission committees at the implementation stage.

Participation in the preparatory stage, when the Commission draws up proposals for legislation to be decided by the European Parliament and the Council, is of vital importance. The Commission consults on an informal basis and expert groups are not restricted to national civil servants. They often include NGOs, the social partners and other actors in addition to member state representatives.

At the preparatory stage, the process is very open and the Commission actively seeks input from the member states, the European Parliament and affected stakeholders. In that respect, local and regional authorities have an important opportunity to have its voice heard either through Norwegian national authorities or through its umbrella organisations at the European level that are active in the EU-decision-shaping phase. Local authorities can also address the Commission and the European Parliament directly.

At the implementing stage the European Commission are assisted by committees in the drawing up of the technical rules necessary to implement legislation adopted by the Parliament and Council, at national level. These committees are composed of member state representatives and unlike expert groups, they have a formal role in the EU decision-making process.

Strengthened participation in EU-decision shaping

The Norwegian Association of Local and Regional Authorities (KS) wants to strengthen the strategy for their contribution to the shaping of EU policy and legislation that affects local and regional authorities. Strengthened EU-related knowledge and skills combined with the necessary political commitment at the local level are fundamental prerequisites to achieve this goal.

A comprehensive strategy for EU/EEA-lobbying should comprise the following elements:

- Strengthening of EU- and EEA-related knowledge and skills among politicians, leaders and professional staff in local and regional public bodies.
- A closer dialogue with the Norwegian government administration and especially with ministries in charge of EEA-legislation directly affecting local level.
- More and better use of available channels to provide input to the decision-making bodies of the European Union, especially the European Commission and the European Parliament.