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Institutional Challenges in the EEA

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Although the EEA, with its so-called two-pillar structure, has a highly differentiated institutional structure, there are always specific institutional challenges. This analysis gives some examples of such institutional challenges and describes how they have changed the division of competences within the institutional framework of the EEA.

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Summary

The two-pillar structure, with an EFTA pillar and an EU pillar as well as some joint EU EFTA bodies, is still fundamental to the EEA Agreement today. However, since the entry into force of the EEA Agreement, the two-pillar structure has been complemented by specific decision-making rules. This was necessary in order to respond to new institutional developments in the EU. In particular, the incorporation of EU agencies into the EEA Agreement regularly poses a major challenge for the contracting parties of the EEA. As this contribution shows, specific solutions had to be found for each individual agency, the details of which were set out in the corresponding adoption decision of the EEA Joint Committee. The large number of such rules, as well as their lack of consistency with the basic principles of the two-pillar structure, have further increased the complexity of the EEA's institutional framework. Based on specific examples from the EEA Agreement, this contribution addresses the institutional challenges of external differentiation. At their core is the question of the extent to which non-EU states are willing to share decision-making powers in order to achieve their economic or security integration goals.

The two-pillar structure of the EEA

The **Agreement on the European Economic Area (EEA)** establishes a common economic area consisting of the members of the European Free Trade Association (EFTA) - Iceland, Liechtenstein and Norway - and the members of the European Union (EU). The fourth EFTA member, Switzerland, is not part of the EEA Agreement. The EEA Agreement covers the four fundamental freedoms of the EU as well as horizontal and flanking policies and is intended to ensure a level playing field in terms of competition between the EU and the EEA EFTA states. Various EFTA institutions, as well as joint EEA bodies, were set up to administer the EEA Agreement. Together with the EU institutions, these form a so-called **two-pillar structure**.

The two-pillar structure is **essential for an understanding of the EEA** and for an **assessment of its functioning**. The institutional framework of the EEA is meant to ensure the homogeneity of EU and EEA law. However, the institutions of the EU and EFTA pillars are not identical and the EEA does not provide for the same degree of political integration as the EU. In particular, the EEA EFTA states have not conferred substantial legislative powers on the EFTA institutions. Moreover, Iceland and Norway are constitutionally unable to transfer substantial legislative powers to EU institutions.

Challenges in the incorporation of new EU law

Various problems in the day-to-day administration of the EEA Agreement can be seen as the result of the two-pillar structure and thus as institutional challenges. Such "two-pillar issues" arise, for example, when a new EU act that confers operational, executive and quasi-legislative tasks on an EU institution has to be incorporated into the EEA Agreement. EU acts with such institutional requirements must then be adapted to the specific characteristics of the EEA's two-pillar structure for their application in the EFTA states. For this purpose, the tasks and responsibilities of an EU institution are assigned to an EFTA institution. Hence, when an EU legal act confers certain competences on the European Commission, those competences must likewise be conferred to the **EFTA Surveillance Authority (ESA)**, the **Standing Committee** of the EEA EFTA states and the national authorities of the EEA EFTA states for their application in the EEA EFTA states.

The majority of the EU acts incorporated into the EEA Agreement fitted well into the existing institutional structure of the EEA. For all the others, however, specific adaptations had to be agreed. Such two-pillar issues concern, among other things: i) the participation of the EEA EFTA states in the EU bodies and their committees; ii) the power of the EU and its bodies to make legally binding decisions that are addressed to the EEA EFTA states; iii) the extent to which the European Commission has to support the ESA when it makes specific decisions addressed to the EEA EFTA states; (v) whether the EFTA Court or the CJEU is the competent body for jurisdiction; (vi) and the possibility for the EEA Joint Committee to settle political disputes.

These institutional issues were mostly negotiated on a case-by-case basis. As a result, the agreed solution is only relevant for the specific legal act at stake. Due to this case-by-case approach a number of case-specific rules for decision-making and monitoring in the EEA have been added to the EEA's two-pillar structure, while its basic structure has been maintained. The negotiations on such institutional issues were often lengthy and tied up many resources. However, the case-by-case approach was simply unavoidable, as each EU act is unique. This applies both to the institutional requirements included in an EU legal act and to its economic and political relevance.

Despite this case-by-case approach it is possible to a certain degree to systematise the various institutional challenges in the EEA. An attempt to do so will be made in the following sections, in which I will focus on challenges related to the decision-making powers of EU agencies, market authorisation and the imposition of fines and other penalties. Before this, however, I will briefly explain **Protocol 1 to the EEA Agreement on horizontal adaptations**.

Protocol 1 on horizontal adaptations

In general, the scope of a new EU act to be incorporated into the EEA Agreement is identical in the EU and in the EEA. However, in order to maintain the two-pillar structure of the EEA, Protocol 1 to the EEA Agreement specifies how the EU acts incorporated into the EEA Agreement are to be applied in principle. For example, where an EU act contains references to nationals of EU member states, these references shall for the purposes of the EEA Agreement be understood to be references also to nationals of the EEA EFTA states. The same applies to references to territories or languages in an EU act. In addition, the functions of the European Commission "in the context of procedures for verification or approval, information, notification or consultation and similar matters shall for the EFTA States [EEA EFTA states] be carried out according to procedures established among them". In practice, these tasks are carried out by the Standing Committee in the EFTA pillar.

Protocol 1 applies to all acts incorporated into the EEA Agreement unless either sectoral or specific adaptations to an act provide for the contrary. It prevents the need for recurrent adaptations for EEA specific provisions of an EU act when incorporating such EU acts into the EEA Agreement. However, as mentioned above, in some cases such EEA specific adaptations may be necessary in order to preserve the two-pillar structure of the EEA. The legal and political relevance of those adaptations is limited to the specific legal act. Hence, such adaptations are without prejudice to the EEA Agreement and its institutions. To make this clear, the EEA EFTA states have often adopted a joint declaration in parallel with the adoption of EEA specific adaptations.

Legally binding decisions

Over the last 15 years, the number of **EU agencies and other decentralised bodies** has increased significantly. These institutions are separate legal entities from the EU institutions and carry out certain tasks under EU law. Many of these tasks are also EEA relevant, which is why these bodies are usually incorporated into the EEA Agreement. However, there are no institutions in the EFTA pillar that correspond to the EU agencies. Consequently, the legal framework of the EU agencies for the purpose of the EEA Agreement is regulated in the corresponding decision of the EEA Joint Committee.

A challenge for the two-pillar structure occurs when these EU agencies or decentralised bodies have the competence to take binding decisions. According to the logic of the two-pillar structure, this competence must be located within the EFTA pillar with regard to the EEA EFTA states. This also applies in the event that in an EEA EFTA states a legal appeal is made against such decisions.

An example of institutional challenges related to decentralised EU institutions is the participation of the EEA EFTA States in the **European System of Financial Supervisors**, which is composed of the **European Systemic Risk Board** and the three European Supervisory Authorities: the **European Banking Authority (EBA)**, the **European Insurance and Occupational Pensions Authority (EIOPA)**, and the **European Securities and Markets Authority (ESMA)**. These European Supervisory Author-

ities may adopt binding individual decisions addressed to competent national authorities and financial market institutions or participants. The European Supervisory Authorities are empowered to (i) take decisions to temporarily restrict or even prohibit certain financial market activities if they jeopardise the orderly functioning of the EU financial market, (ii) take decisions requiring financial market participants to implement and comply with the relevant EU requirements, (iii) take emergency measures or (iv) settle disagreements between competent authorities.

In October 2014, **the finance ministers of the three EEA EFTA states and the EU states** agreed on the broad lines of the incorporation of the European Supervisory Authorities into the EEA Agreement. In September 2016, after more than five years of intensive negotiations, the contracting parties finally incorporated the European Supervisory Authorities into the EEA Agreement. However, this required several EEA-specific adaptations (more than 50 for each authority; see JCDs **199/2016**; **200/2016**; **201/2016**) and an amendment to the **Surveillance and Court Agreement (SCA)**. These adaptations and amendments provide that all decisions in the framework of the European Supervisory Authorities shall be taken by the ESA on the basis of drafts prepared by the relevant European Supervisory Authority on its own initiative or at the request of the ESA. In other words, although the ESA will act in complete independence according to the adaptation text, it will in fact only 'rubber-stamp' the draft decisions submitted to it by the relevant EU authority (see Fredriksen & Franklin 2015: 679). This "docking" of the EFTA pillar to the EU was necessary to counteract the risk of a differing application and interpretation of the EEA rules in the EFTA and EU pillars. In return, the EEA EFTA states and representatives of the ESA are granted extensive participation rights in the bodies of the three EU financial supervisory authorities – but always without a specific right to vote.

A similar solution was agreed when **Regulation (EU) No 713/2009 establishing an Agency for the Cooperation of the Energy Regulators (ACER)** was incorporated. Here too, the ESA was issuing a decision addressed to the national authorities of the EEA EFTA states based on a draft prepared by ACER (**JCD 93/2017**). Moreover, the adaptation text explicitly states that proceedings can be brought before the EFTA Court against such a decision by the ESA.

Market authorisation

Sensitive products cannot be placed on the market without prior control and therefore require marketing authorisation. To this end, the EU stipulates authorisation requirements and procedures for different types of products.

Since the entry into force of the EEA Agreement, institutional questions have regularly been raised with regard to the regulations that form the basis of market authorisation for a product. This applies in particular to centralised authorisation systems, where the authorisation is granted by the European Commission or an EU agency and not by the EU member states. If such market authorisations do not fall under Protocol 1 of the EEA Agreement and cannot be treated as simple administrative provisions that do not need to be incorporated into the EEA Agreement, the incorporation of the

corresponding EU acts requires EEA specific adaptations in order to establish the competences for authorisation decisions in the EFTA pillar.

Such authorisations may be granted by the EEA EFTA states, the ESA or the European Commission. For example, the EEA-specific adaptation may stipulate that the EEA EFTA states must adopt a decision "simultaneously and within 30 days of the adoption of the decision" by the EU. This applies inter alia to **Regulation (EC) No 726/2004** which sets out Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and for the establishment of a European Medicines Agency, which was incorporated into the EEA Agreement by **JCD 61/2009**. In this way, the EEA EFTA states were able to avoid a formal transfer of their decision-making power to the EU. Since a decision by the national authorities of the EEA EFTA states must be based on that of the competent EU institution and must be taken within a clearly defined period, homogeneity is maintained. The adaptation text also states that the ESA monitors the implementation of the decisions and applies mutatis mutandis in the event of "disagreement between the Contracting Parties on the interpretation of these provisions [...] in the sense of Part VII of the Agreement", which means that the affected parts of the EEA Agreement could be suspended if there is no agreement.

Similar arrangements have been made for the authorisation of medicinal products and chemicals (**Regulation (EC) No 1907/2006**; **JCD 25/2008**) and also for novel foods (**Regulation (EC) No 285/97**; **JCD 147/2015**). However, in the case of **Regulation (EC) No 1592/2002** establishing common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA), the EEA specific adaptation of **JCD 179/2004** gives EASA the competence to take decisions that are directly applicable throughout the EEA. This model ensures the homogeneity of EEA law but bypasses the decision-making powers of the EEA EFTA states and EFTA institutions. Such a deviation from the two-pillar structure of the EEA was only acceptable to the EEA EFTA states because decisions by the EASA are of a very technical nature and require a high level of expertise. The model also applies to **Regulation (EC) No 216/2008 establishing common rules in the field of civil aviation**, which amended Regulation (EC) No 1592/2002 (see **JCD 163/2011**).

Fines and penalties

Issues relating to the two-pillar structure of the EEA also arise where an EU act delegates to the European Commission or to an EU agency the power to impose fines directly on companies. The two-pillar structure implies that the power to impose fines on companies established in the EEA EFTA states must be allocated within the EFTA pillar. For example, the EEA specific adaptation to Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity, as set out in **JCD 146/2005**, states that the European Commission's task of imposing fines on companies shall, for the EEA EFTA states, be carried out by their own regulatory authorities. From the perspective of the EEA EFTA states, this solution may be consistent with the two-pillar structure of the EEA, but in terms of the homogeneity of EEA law, it is questionable whether the regulatory authorities in the EEA EFTA states have the same degree of independence and expertise

as the European Commission. It was also noteworthy that the adaptation text did not require an exchange between the European Commission and the national authorities of the EEA EFTA states on the nature of the fines.

Since **Regulation (EC) No 1228/2003** was repealed by **Regulation (EC) No 714/2009**, the EEA specific adaptation (JCD 93/2017) states that the task of the European Commission to impose fines on those companies concerned in the EFTA States shall be carried out by the ESA and that appeals against decisions by the ESA shall be lodged with the EFTA Court.

A similar arrangement has been agreed for the **European Aviation Safety Agency (EASA)** (**Regulation (EC) No 216/2008**, **JCD 163/2011**). As in the case of **Regulation (EC) No 1901/2006** on medicinal products for paediatric use, the adaptation text provides that fines against market authorisation holders established in an EEA EFTA state are to be imposed by the ESA (see **JCD 192/2017**). However, the adaptation text also states that the European Commission will make its own assessment before the ESA decides on fines and will submit to the ESA a proposal for the measures to be taken. This commitment to close cooperation between the ESA and the European Commission is necessary, since the European Commission is responsible for the adoption of market authorisations and should therefore also be responsible for imposing fines in the event of infringements of its decisions.

Another example can be found in the above-mentioned Regulation (EC) No 726/2004 on the authorisation and supervision of medicinal products for human and veterinary use, which allows the European Commission to impose fines on market authorisation holders. Similar to the first version of the regulation on cross-border trade in electricity (Regulation (EC) No 1228/2003, JCD 146/2005), the EEA EFTA states and the EU have agreed that, as regards the authorisation of medicinal products for human and veterinary use, this task will be performed by their national regulatory authorities in relation to the EEA EFTA states (see **JCD 61/2009**). However, the adaptation text explicitly states that the decisions of these regulatory authorities are based on a proposal by the European Commission.

Finally, the European Commission can act in the field of **competition** in almost all cross-border cases between the EU and the EEA EFTA States. As a result, the European Commission can directly impose fines on companies domiciled in the EEA EFTA states.

Conclusions

The EEA Agreement and its institutions have been strongly influenced by the obligation to dynamically incorporate new EU law into the EEA Agreement. Over 5,000 new EU acts have been incorporated since the entry into force of the EEA Agreement. The majority of these acts easily fit into the existing institutional framework of the EEA and thus could have been incorporated without specific

adaptations. However, some legal acts contained specific institutional requirements. It was therefore necessary for the contracting parties to first clarify where exactly the institutional competences enshrined in the relevant EU act would be located within the two-pillar structure of the EEA.

Since the entry into force of the EEA, a multitude of ad hoc rules for EEA decision-making and surveillance have been added to the EEA's two-pillar structure. Specific rules were necessary as the institutions of the EFTA pillar reflect the main features of the EU institutions but do not fully correspond to them. If, for example, an EU legal act assigns to an EU agency the task of taking binding decisions, this task for the EEA EFTA states can in principle be assigned to their national authorities, the Standing Committee, the ESA or even to a corresponding EU agency. The decisive factor here is the salience of the policy area. For example, the EEA EFTA states are more willing to give the EU a central role in highly technical issue areas such as aviation than in more sensitive issue areas such as financial services.

The institutions of the EFTA and EU pillars are not identical because new institutions have been created on the EU side - such as the EU agencies and other decentralised bodies - after the EEA Agreement entered into force. In addition, the existing institutions have been given new powers as a result of the further deepening of European integration. These integration steps are not reflected in the main part of the EEA Agreement, which is more or less static. Indeed, as long as the legal nature of the EEA Agreement remains that of a simple international agreement and thus deviates from the legal nature of the EU, the institutions of the EFTA and EU pillars cannot have the same tasks and competences. Thus, EEA specific adaptations are repeatedly necessary in order to incorporate new EU acts into the EEA Agreement.

Although the institutional challenges to the EEA outlined in this article are similar and are often linked to the establishment of EEA relevant EU agencies, no uniform approach to solving such institutional issues has yet emerged. Instead, each case is considered separately, which leads to differing regulations and further increases the complexity of the institutional structure in the EEA. However, certain definite patterns can be discerned from the experience of past years. A first pattern is the strengthening of the ESA vis-à-vis the EEA EFTA states, for example by the fact that decision-making powers have not been assigned to the Standing Committee or the national authorities of the EEA EFTA states, but directly to the ESA.

A second observation is a stronger link between the ESA and EU institutions. The dialogue between the European Commission and the ESA has always been intensive. However, the linkage between the EFTA and EU pillars of the EEA has been further enhanced by the integration of the EEA EFTA states and EFTA institutions into the various bodies of the EU agencies.

This development reveals an often forgotten characteristic of the two-pillar structure. Although the basic idea of the two-pillar structure is to ensure largely autonomous decision-making within the two pillars, the institutional framework of the EEA is also intended to bring the EU and the EEA EFTA

states closer together. This does not only apply to the common institutions. On the contrary, all the bodies of the two pillars are constantly engaged in formal and informal exchanges.

However, it should also be noted that individual legal acts have reached the limits of what can still be described as the classic two-pillar model. This applies in particular to the extensive competence of the relevant EU agency in the very technical areas of aviation and, in future, probably also rail transport (see the pending adoption of **Regulation (EU) 2016/796 on the Railway Agency**). In the area of data protection, too, a very close link to the European Data Committee and thus to the EU pillar was recently formed with the incorporation of **Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data** (**JCD 154/2018**). This inevitably has an impact on the characterisation of political cooperation in the EEA as intergovernmental or supranational. As long as the two-pillar structure remains in place, this cooperation will in principle remain intergovernmental. However, the various additional decision-making rules outlined here have also established supranational or quasi-supranational governance modes in the EEA (see separate contribution).

The future of the institutional framework of the EEA is essentially determined by the development of EU law and its compatibility with the principles of the two-pillar structure. If the EEA EFTA states wish to safeguard the functioning of the EEA, they will continue to depend on the political leeway to interpret the two-pillar structure in a flexible way.

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