

The two-pillar structure of the EEA

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The higher the level of integration of a state with the EU, the greater is the importance of the institutions that administer this integration. This contribution describes the two-pillar structure of the EEA by focusing on the institutions of the EFTA pillar.

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Summary

The institutional framework of the EEA Agreement is highly complex. It can be best described as a two-pillar structure. The institutions of the EFTA pillar should as far as possible correspond to the competences of the institutions of the EU pillar. The two pillars are connected by common bodies in which both the EU and the EEA EFTA states are represented. The two-pillar structure reflects a compromise which came out of the laborious negotiations on the EEA Agreement. It was meant to prevent excessive political integration of the EEA EFTA states, but also to safeguard the homogeneity of EU and EEA law. This contribution shows that the institutional rules of the EEA lead on the one hand to a clear separation of competences between the EFTA and the EU pillars, but on the other hand the two-pillar structure also links the EEA EFTA states and the EU by means of a mutual exchange beyond the common institutions. This constant exchange in turn forms the basis for the good functioning of the EEA.

EEA Negotiations

The **European Economic Area (EEA)** is the most comprehensive association agreement ever concluded by the European Union (EU) with a third country to date. The aim of the EEA is to create a dynamic and homogeneous economic area "based on common rules and a level playing field and providing for the adequate means of enforcement including at the judicial level". This is done on the basis of "equality and reciprocity" and a balance of "benefits, rights and obligations" for the contracting parties (EEA Agreement, preamble). The EEA thus requires the three members of the European Free Trade Association (EFTA), Iceland, Liechtenstein and Norway, on the one hand, and the EU, on the other, to agree on common rules which are uniformly implemented, applied and interpreted throughout the EEA.

In order to ensure this high degree of integration, the contracting parties have created a complex institutional framework. This framework can be described as a **two-pillar structure**, with an EU pillar and an EFTA pillar as well as some common institutions. The two-pillar structure presupposes that internal EFTA matters are also dealt with within the EFTA pillar. Thus, competences of the European Commission, of the Court of Justice of the European Union (CJEU), or of other EU institutions governed by EU law are transferred to an EFTA pillar institution for application of this law in the EFTA states.

During the negotiations on the EEA Agreement, the search for an institutional framework proved to be one of the greatest challenges. The EFTA states tried to avoid any political integration that would pool national sovereignty in common institutions. At the same time, they expected to have a say in EU decision-making on EEA relevant policies and rules. In contrast, the EU endeavoured to prevent the EFTA states from "free-riding" and "cherry picking" by selectively participating in the EU's Internal Market. Accordingly, the EEA Agreement should not jeopardise either the integrity of the EU legal order or the autonomy of the EU's decision-making.

The negotiators initially agreed on an institutional framework comprising a common EEA Court and an EEA Surveillance Authority. However, the European Commission requested an opinion from the ECJ on the compatibility of the proposed EEA Agreement with the existing Treaties of the European Communities. On 14 December 1991, the ECJ adopted **Opinion 1/91**, according to which the proposed institutional structure of the EEA, in particular the creation of an independent EEA Court composed of judges from the ECJ and the EFTA states and functionally integrated with the ECJ, was incompatible with EU law. The position of the ECJ was a severe blow to the negotiating parties of the EEA. In less than two months, however, they managed to agree on a new institutional framework, which was accepted by the **ECJ**.

Purpose of the EEA's two-pillar structure

By creating an institutional structure consisting of independent pillars of the EU and EFTA, but also comprising several common institutions, the EU and EFTA agreed on a model that formally preserved the decision-making autonomy of both sides and at the same time created the institutional framework for securing a homogeneous and dynamic economic area. Because this institutional framework did not provide for the transfer of sovereign rights, the EEA Agreement was regarded by the EEA EFTA states as a traditional international agreement.

Analysis of the EEA's institutional framework reveals its high level of complexity, which often makes it impossible to allocate decision-making powers in the two-pillar structure consistent with the basic principles of the EEA. Indeed, due to the dynamic development of EU law and the obligation to incorporate this law into the EEA Agreement, new institutional arrangements were constantly being agreed. For example, the EEA EFTA states were required to transfer new powers to the EFTA institutions and in some cases even to EU institutions. This was the only way to ensure uniform application and interpretation of EEA relevant EU law throughout the EEA.

Joint EEA bodies: EEA Council

The institutional provisions of the EEA are governed by Part VII of the EEA Agreement and by the **Agreement between the EFTA states on the establishment of a Surveillance Authority and a Court of Justice (SCA)**. In the two-pillar structure there are four common institutions: the **EEA Council**, the **EEA Joint Committee**, the **EEA Parliamentary Committee** and the **EEA Consultative Committee**.

In the EEA Council, the EU is represented by the rotating Presidency of the Council of the EU and by representatives of the **European External Action Service (EEAS)** and the European Commission, while the EEA EFTA states are represented by their Ministers for Foreign or European Affairs. Representatives of the **EFTA Secretariat** and the **EFTA Surveillance Authority (ESA)** attend EEA Council meetings as observers. The Presidency of the EEA Council alternates between the EU and the EEA EFTA side. The EEA Council meets twice a year and provides political impetus for the development of the EEA Agreement and the guidelines for the EEA Joint Committee. It also adopts resolutions dealing with the general functioning of cooperation in the EEA. **Decision No 1/95** on the entry into force of the EEA Agreement for Liechtenstein in March 1995 remains the only decision formally adopted by the EEA Council.

The EEA Council is the highest political body in the EEA. In recent years it has increasingly been used as a forum for political discussion. However, the EEA Council has not yet reached the political relevance originally envisaged by the EFTA states. This can be explained, inter alia, by the fact that the actual scope for political impetus to shape the further development of the EEA is limited by the fundamental imbalance of power between the EU and EEA EFTA states. As a result, the EEA EFTA states address challenges to the functioning of the EEA Agreement at a technical rather than a political level, and thus in the EEA Joint Committee rather than in the EEA Council. An exception, however, is the issue of Brexit and the EEA, where the EEA Council played an important role.

Joint EEA bodies: Joint EEA Committee

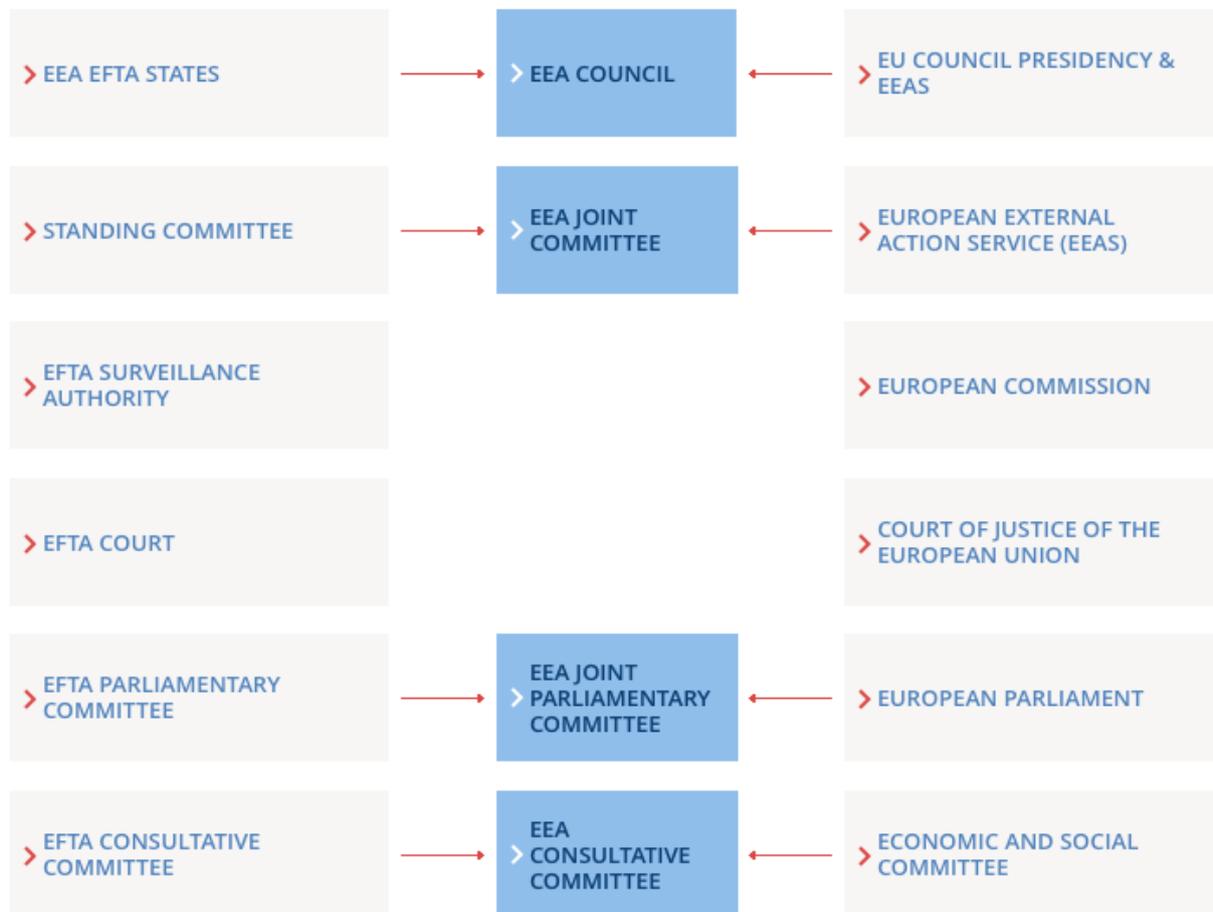
The EEA Joint Committee is composed of representatives of the EEAS, the three EEA EFTA states (usually at ambassadorial level), and the ESA as observers. It meets about 6 to 8 times a year and takes further decisions through correspondence about twice a year. Decisions in the EEA Joint Committee are taken by consensus between the EU on the one hand and the EEA EFTA states on the other. The EEA EFTA states must speak with one voice, which means that they have to agree among themselves before formal negotiations with the EU take place. The obligation to speak with one voice is often seen as one of the greatest challenges for the EEA Agreement, as the EEA EFTA states have to agree on a common position, although their preferences and capabilities in respect of adopting and implementing EU law may differ. This can delay the incorporation of EU law into the EEA Agreement. On the other hand, the "single voice principle" is likely to increase the homogeneity of EU and EEA law, as it forces the EEA EFTA states to cooperate and restricts the demand for country-specific opt-outs among the EEA EFTA states from the outset.

The EEA Joint Committee is responsible for the day-to-day management of the EEA Agreement and for decisions on the incorporation of new or amended EU legislation into the EEA Agreement. The EEA Joint Committee is the main decision-making body in the EEA. However, it is also meant to preserve a homogeneous interpretation of the EEA Agreement through the constant review of developments in the case law of the CJEU and the EFTA Court, and may settle disputes between the ESA and the European Commission or between the contracting parties of the EEA. Against this background, the EEA Joint Committee can also be seen as the ultimate guarantor of the homogeneity of EU and EEA law (see Fredriksen 2018: 828).

Other joint EEA bodies

In contrast to the EEA Council and the EEA Joint Committee, the roles of the EEA Joint Parliamentary Committee and the EEA Consultative Committee are merely advisory. The EEA Joint Parliamentary Committee is composed equally of members of the European Parliament and members of the national parliaments of the EEA EFTA states, while the EEA Consultative Committee is composed of representatives of the social partners of the EU and EEA EFTA states. The two bodies strengthen the dialogue between the EU and EFTA pillars. The aim is to improve the understanding of the special nature of the EEA Agreement and its contracting parties. The two institutions are not directly involved in the EEA decision-making process, but monitor and review EEA relevant developments by drawing up relevant reports and resolutions.

Graph 1: The two-pillar structure of the EEA



This diagram illustrates the management of the EEA Agreement. The left pillar shows the EFTA States and their institutions, while the right pillar shows the EU side. The joint EEA bodies are in the middle.

Source: www.efta.int

Organs of the EFTA pillar of the EEA: Standing Committee

The **Standing Committee of the EFTA states** is based on a separate international agreement between the EEA EFTA states. Therefore, neither the EU nor Switzerland are parties to the Agreement on the Standing Committee of the EFTA states. The main purpose of the Standing Committee is to draw up decisions which will later be taken by the EEA Council or the EEA Joint Committee. The necessity of such a body results from the obligation of the EEA EFTA states to speak with one voice in the EEA Council and in the EEA Joint Committee. However, the Standing Committee also exercises various administrative and executive functions in connection with the EFTA pillar of the EEA. In particular, it is responsible for decisions on the relationship between the three EEA EFTA states.

The Standing Committee consists of the Ambassadors of Iceland, Liechtenstein and Norway as well as observers from Switzerland and the ESA. It normally meets the day before the meeting of the EEA Joint Committee in order to adopt a common position before that meeting. As a rule, an informal preparatory meeting of the Deputy Heads of Mission also takes place approximately one week before the meetings of the Standing Committee.

When a new EU legal act is incorporated into the EEA Agreement, EEA-specific adaptations to an EU legal act can transfer competences to the Standing Committee which the respective EU legal act has transferred to the Council of the EU. Since the EFTA pillar of the EEA does not have an institution that corresponds exactly to the European Commission, the EEA Joint Committee can also transfer competences to the Standing Committee that have been transferred to the European Commission in the EU. This division of tasks is regulated in Protocol 1 to the EEA Agreement or is recorded in a decision of the EEA Joint Committee (JCD) when incorporating a new EU act into the EEA Agreement.

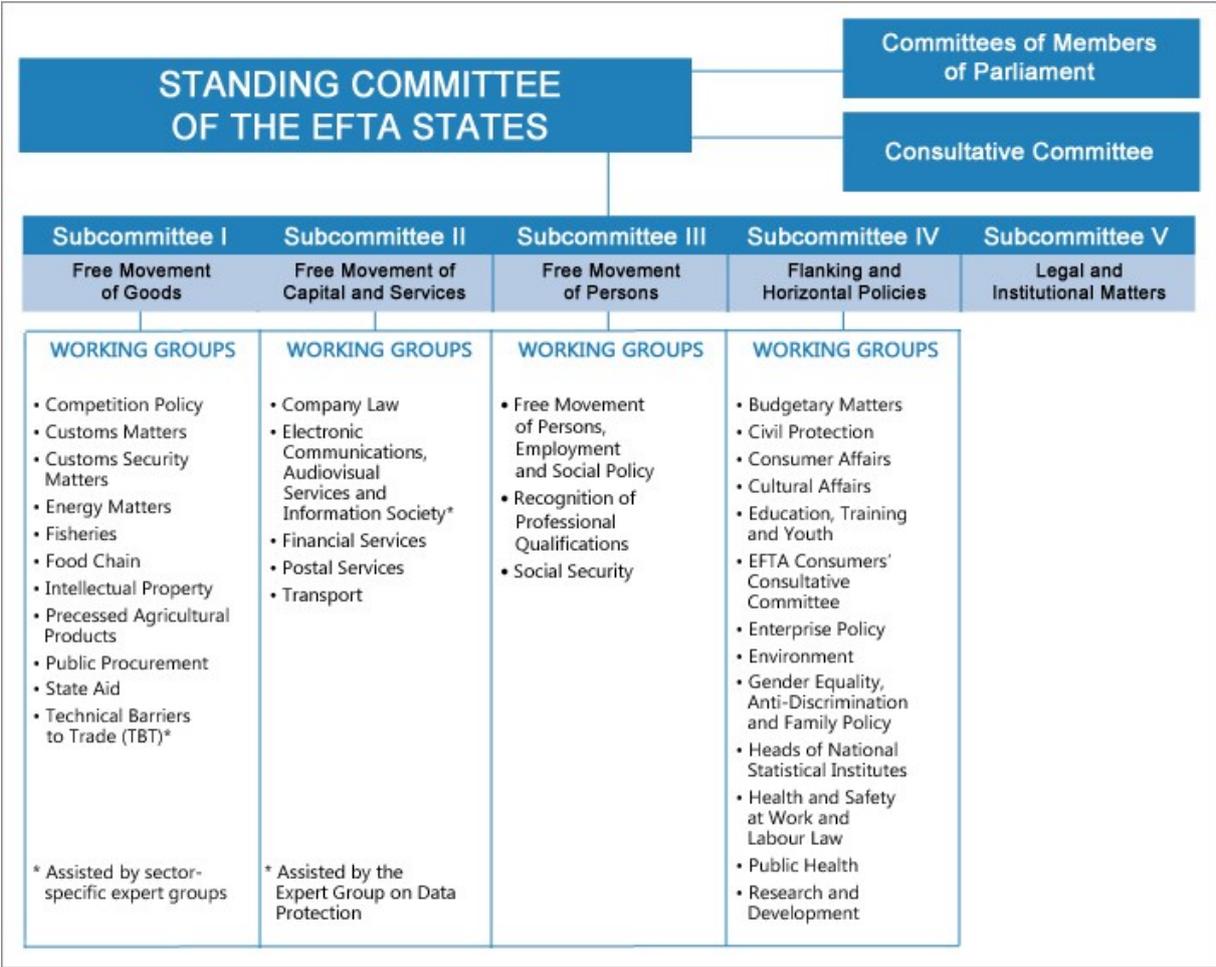
In general, the Standing Committee decides unanimously. In certain situations, however, the Standing Committee can take decisions and make recommendations by majority vote. For example, in the area of financial services, the possibility of majority voting was introduced for the inclusion of the **European Supervisory Authorities (ESAs)** in the EEA Agreement (see Fredriksen and Jonsdottir 2018: 1096). The possibility of majority decision-making shows that there are different modes of governance in the EEA, some of which go beyond the principle of purely intergovernmental cooperation (a separate contribution on governance modes will follow shortly).

Organs of the EFTA pillar of the EEA: Subcommittees

The Standing Committee has five subcommittees dealing with the free movement of goods, capital and services, persons, horizontal and flanking policies as well as legal and institutional issues. Subcommittees I-IV have been meeting jointly since 2009. Their task is to prepare for the incorporation of new EU legislation into the EEA Agreement. Thus, Subcommittees I-IV must also approve a draft decision of the EEA Joint Committee before it can be passed to the EU. After the meeting of Subcommittees I-IV, there is usually a joint meeting with the EU at the relevant committee level. Subcommittee V is composed of legal experts from the foreign ministries of Norway and Iceland and the **EEA Coordination Unit of Liechtenstein**. It is primarily concerned with the analysis and evaluation of legal and institutional issues.

In addition to the subcommittees, there are several working groups composed of experts for the individual regulatory areas of the national administrations of the EEA EFTA states. The Standing Committee has also set up EFTA committees to support ESA in parallel with the EU comitology procedures. The committees are listed in a decision of the Standing Committee and cover each Annex to the EEA Agreement. However, only a small number of these committees are actually of practical relevance. The EFTA Secretariat assists the Standing Committee and the other institutions in preparing the incorporation of new EU legislation into the EEA Agreement. It also supports the contribution of the EEA EFTA states to decision-making in the EU and coordinates cooperation with the relevant EU institutions and bodies.

Graph 2: Subcommittees and Working Groups of the EFTA Pillar



Source: www.efta.int

EFTA Secretariat

The EFTA Secretariat is not part of the EEA's two-pillar structure, but is an EFTA authority that dates back to the foundation of the EFTA. The EFTA Secretariat has offices in Brussels, Geneva and Luxembourg. The Secretary General is based in Geneva. Nevertheless, the EEA accounts for a large part of the work of the EFTA Secretariat. This includes, in particular, assisting the EEA EFTA states in the incorporation of new EU law into the EEA Agreement, and in so-called '**decision shaping**'. In addition, the EFTA Secretariat provides the public with various information on the processes and institutions of the EEA and the development of law in the EEA. In simple terms, the EFTA Secretariat has a coordinating function vis-à-vis the EEA EFTA states and the EU, provides the institutions and actors of the EEA with expertise, and takes care of the public image of the EEA. Although the EFTA Secretariat is not part of the two-pillar structure of the EEA and is not mentioned elsewhere in the EEA Agreement, it occupies an outstanding position for the way the Agreement operates.

EEA Surveillance Mechanism: EFTA Surveillance Authority

The monitoring mechanism of the EFTA pillar consists of the ESA, located in Brussels, and the EFTA Court, located in Luxembourg. As in the case of the Standing Committee, the tasks and powers of the ESA and the EFTA Court are governed by a separate agreement between the EEA EFTA states, the so-called Surveillance and Court Agreement (SCA). In contrast to the Standing Committee, however, the establishment of the ESA and the EFTA Court was provided for in the EEA Agreement itself (see Art. 108 EEA Agreement).

ESA and the EFTA Court are responsible for ensuring that the EEA EFTA states fulfil their obligations under the EEA Agreement. In addition to general monitoring of legal implementation and enforcement in the EEA EFTA states, ESA has extended powers in the areas of competition, state aid and public procurement. These powers correspond to the increased powers of the European Commission in these areas within the EU. The EEA Agreement provides for close cooperation between the ESA and the European Commission.

The policy area of competition is a special case with regard to the distribution of competences between the ESA and the European Commission. Article 56 of the EEA Agreement lays down the principle of a '**one-stop-shop**'. Put simply, this means that the ESA is primarily responsible for cases limited to trade between EEA EFTA states, while the European Commission handles most cases concerning trade between an EEA EFTA state and an EU State. Other specific cases relating to the ESA result from the increasing **number of EEA relevant EU agencies** that carry out surveillance tasks. For parallel EFTA agencies there is no legal basis and no practical justification in the EEA Agreement. Thus, when an EU act establishing an EU agency is incorporated into the EEA Agreement, specific adaptations laid down in the JCD govern the concrete responsibilities of the EU agency, the ESA and the national authorities of the EEA EFTA states. This generally means that, for the purposes of the EEA EFTA states, the ESA is empowered to take decisions similar to those of the EU agencies.

EEA Surveillance Mechanism: EFTA Court

The EFTA Court deals with infringement procedures brought by the ESA against an EEA EFTA state concerning the implementation, application or interpretation of EEA law. At the request of a court of an EEA EFTA state, the EFTA Court also issues opinions on the interpretation of EEA law in the EEA EFTA states, has jurisdiction to settle disputes between two or more EEA EFTA states, and hear complaints about decisions of the ESA. There is an ongoing formal and informal exchange between the ESA and the European Commission as well as between the EFTA Court and the CJEU.

Through the SCA, the EEA EFTA states have established a surveillance mechanism very similar to that of the EU. But there are also some differences. For example, the members of the ESA College are appointed solely by the EEA EFTA governments and do not have to be approved by a parliament, as in the case of the European Commission. There is also no provision in the EEA Agreement which

gives the EFTA Court the right, at the ESA's request, to impose a lump sum or penalty payment for non-compliance with a judgment of the EFTA Court.

Furthermore, judgments and opinions of the EFTA Court are not meant to be binding. In practice, however, they have a "persuasive authority", i.e. in the vast majority of cases they are complied with, just like rulings of the CJEU. Finally, we should also mention the small size of the EFTA Court, with only three members, and the small number of cases compared to the CJEU, which is due not only to the fact that there are only three EEA EFTA states, but also to the fact that their courts less frequently obtain an opinion from the EFTA Court by comparison with the average EU state.

Conclusions

With the two-pillar structure, in laborious negotiations, an institutional framework for the EEA Agreement was created which is compatible with both the preferences and principles of the EEA EFTA states and those of the EU. This has not changed since the entry into force of the EEA Agreement. Accordingly, the two-pillar structure remains in place. The basic idea behind the two-pillar structure is that the institutions of the EFTA pillar mirror the EU institutions relevant to the EEA Agreement. The aim is also to regulate EEA EFTA matters within the EFTA pillar. However, in a common economic area such as the EEA, this cannot be easily defined. As a result, competences regulated in EEA-relevant EU law can be allocated variously to the EEA EFTA states, the EFTA institutions, the joint EU EFTA institutions and the EU institutions.

However, the institutional framework of the EEA must not be reduced to this basic idea. Another essential feature of the two-pillar structure is the cooperation between the two pillars. This cooperation is not limited to the common institutions, but extends to all the institutions of the EFTA and EU pillars. In particular, the ESA and the EFTA Court have in recent years succeeded in establishing a good exchange with the relevant EU institutions. This exchange can be both formal and informal in nature. The EU's willingness to engage in such an intense dialogue can be seen as a recognition of the expertise of the EFTA institutions and their ability to take practical action. In sum, the two-pillar structure should both separate the EU and EEA EFTA states by assigning concrete decision-making competences to each pillar and also connect the two pillars by establishing an intensive exchange on decision-making, implementation and interpretation of the EEA relevant EU rules.

The institutional framework of the EEA is obviously a necessary condition for the proper functioning of the EEA. Efficiency and effectiveness are equally relevant. The institutional framework of the EEA is not only responsible for decision-making within EFTA and between the two pillars (i.e. **decision making in the EEA**), but is also the basis for the participation of the EEA EFTA states in the EU decision-making process (so-called decision shaping). In this way, the institutional framework contributes significantly to the legitimacy of the EEA Agreement in the EEA EFTA states.

However, the two-pillar structure of the EEA should not be idealized. Indeed, its complexity must be viewed critically. The complexity results on the one hand from the very high number of institutions and committees and on the other from the various links between the EFTA and EU institutions, as well as with the national authorities of the EEA EFTA states. Furthermore, the dynamic adoption of EU law has led to the incorporation of new institutional rules into the EEA Agreement which have not always been consistent with the two-pillar structure. This lack of consistency has further increased the complexity of the two-pillar structure. Moreover, the EEA and its institutions in the EEA EFTA states may in general have a high degree of political backing but there are also certain shortcomings - such as the frequently troublesome relationship between the Supreme Court in Norway and the EFTA Court. There is also a lack of political will on the part of the EEA/EFTA States to extend the competences of the EFTA Secretariat for the efficient administration of the EEA Agreement.

To conclude, the institutional structure of the EEA is a necessary but not a sufficient condition for the good functioning of the EEA. Instead, the functioning of the EEA depends heavily on the specific characteristics of the EEA EFTA states. The traditionally high political stability of the EEA EFTA states and their basically high administrative capacity and efficiency should be highlighted. The high economic interdependence between the EEA EFTA states and the EU also facilitates the functioning of the EEA. First and foremost, however, it should be pointed out that from the perspective of the EEA EFTA states there are no credible alternatives to the EEA and its institutions.

The lack of alternative integration models forms the basis for the pragmatism with which the EEA EFTA states have met practical challenges to the EEA's two-pillar structure. As a result, over the past 25 years, case-specific solutions have been found whenever necessary. How these solutions have changed the distribution of competences within the two-pillar structure and to what extent they were actually consistent with the basic principles of the two-pillar structure will be clarified elsewhere. This contribution therefore restricts itself to the conclusion that dynamic integration, as envisaged by the EEA Agreement, always creates new institutional challenges. The possibility of being able to locate the competences required by EEA-relevant EU law within the EEA EFTA states, the EFTA institutions, the joint EU EFTA institutions, or the EU institutions is both the cause of and the solution to these institutional challenges.

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